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LAW UPDATE

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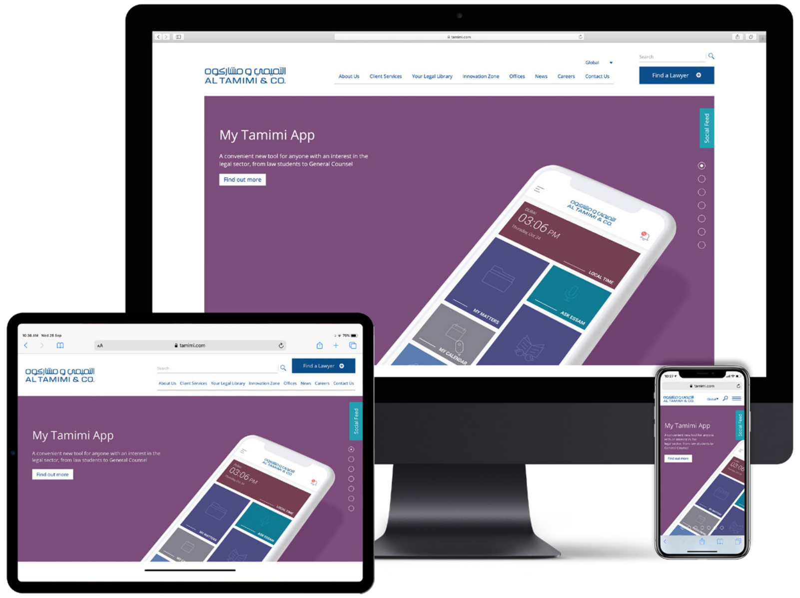

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In this Issue

Welcome to the December – January 2019/2020 issue of Law Update!

Happy new year. I hope the year ahead will bring you and yours much prosperity and good health.

I am delighted to be reaching out to you in the foreword of this month's bumper edition; my first as Managing Partner of Al Tamimi & Company.

A new year. A new era. A new decade; a decade that promises very exciting times ahead for the region which is certain to instil optimism in national and international communities. The 2020s are destined to be a time of transformation for the Middle East. Many MENA countries have already set out their future 'visions', which aim to modernise their respective economies, improve the 'ease of doing business' and attract international and regional investment.

2020 has long been a buzz term in the UAE. With Expo 2020 Dubai on the horizon, the Emirate anticipates and looks forward to a record number of exhibitors and visitors as well as the opportunity to showcase the whole of the UAE on the global stage.

The 2022 FIFA football world cup in Qatar is set to be one of the major highlights of this decade when countries will put aside political and religious differences to focus the world's sporting spotlight on the diplomatic playing field that is the football pitch. This event is sure to boost the tourism, transport and construction industries whilst, at the same time, fostering grassroots sport.

This issue's focus on Banking & Finance and Projects is timely in that it offers valuable insights into how such major, international events come to life as well as the importance of other practice areas in such projects, and all against the backdrop of Shariah law. The development of Banking and Projects in the MENA region is about 'going forward', listening to customers and tailoring one's business offering to meet those needs and expectations.

Our Banking & Finance team examines how the understanding and structuring of Islamic Securities transactions are evolving in the GCC. It is encouraging to observe the increasing sophistication of the relevant laws and systems of the local banking market as it competes in, what has traditionally been considered, the sole purview of international banking institutions (page 55).

One of the areas making major strides in the region (partially because of developments in the Projects sector) is FinTech. The firm's experts look at the importance of a bank's ability to adapt their models, re-think client journeys and re-shape internal working culture to one that is focused and agile; always putting clients at the core of their business plan (page 41).

The Qatar National Vision 2030 is expected to result in the award of over US$85 billion worth of contracts. It is anticipated that this will be achieved through the tried and trusted Public-Private-Partnership ('PPP') model that has, time and time again, been successfully employed in Europe and other parts of the world. Thanks to the emphasis of the PPP initiative, Qatar is on target to have one of the most robust construction markets in this new decade.

Meanwhile, the Kingdom of Saudi Arabia is taking a fresh look at how it can increase its use of renewable energy in order to combat climate change and reduce its reliance on carbon-producing fossil fuels. It is anticipated that the eight environmentally-friendly projects tendered in 2019 will at least be doubled in 2020 (page 93).

In our Jurisdiction Update, the KSA and Bahrain teams focus on a number of developments and, in particular, their governments' attempts to regulate employment relationships. Workplace protection, 'equal pay for equal work' and parental rights are key elements of the proposed updates (page 17); all aimed at achieving a more safe and secure working environment which, in turn, will hopefully bolster confidence for those wishing to do business and work in those jurisdictions.

Looking ahead to this exciting, new decade I believe success in the MENA region will be achieved by those who understand the importance of flexibility, collaboration and innovation.

If you would like to discuss any of the topics covered in this issue, please feel free to get in touch.

Best regards,

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The Enforcement of Foreign Arbitral Awards in the UAE: A Recent Judgment of the ADGM Court of First Instance

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

On 23 September 2019, in the case of A4 v. B4 (ADGMCFI-2019-008), the Abu Dhabi Global Market Court of First Instance (the 'Court') issued its third arbitration-related judgment this year.

The Court considered an unopposed application for the recognition and enforcement of a foreign arbitral award (the 'Award') issued in an arbitration seated in England pursuant to the Rules of Arbitration of the London Court of International Arbitration (the 'LCIA Arbitration Rules').

In granting the application, the Court addressed three central questions: (a) whether it had jurisdiction to recognise and order the enforcement of the Award; (b) whether it was entitled to determine the validity of the arbitration agreements invoked by the Claimant; and (c) whether the enforcement of the Award would breach UAE public policy.

Background

The Claimant, a company registered in Abu Dhabi, provided certain services to the Respondent, a company also incorporated in Abu Dhabi, under five contracts. A dispute arose as to unpaid sums owed in respect of services that the Claimant provided to the Respondent in connection with the "X" Project, Abu Dhabi (the details of the project were redacted by the Court in its judgment to preserve confidentiality).

On 8 March 2018, the Claimant initiated arbitration proceedings seated in England under the LCIA Arbitration Rules against the Respondent. On 3 August 2018, the LCIA appointed a sole arbitrator.

In the LCIA arbitration proceedings, the Claimant argued that it had provided services to the Respondent under five contracts, all of which incorporated "General Terms and Conditions of Sale" (the "Claimant's T&Cs") (and also relied upon "Comprehensive Order Acknowledgement Letters"). Article 26 of the Claimant's T&Cs provided that English law was the governing law. Article 25 stated that, in the event of a dispute that was not resolved through other stipulated procedures, the matter would be

> *"referred to binding arbitration in London under the auspices of, and pursuant to the rules of, the LCIA as then in effect, or such other procedures as the parties may agree to at the time …"*

The Claimant's T&Cs also stated that, subject to Article 25, the contracts would be subject to the non-exclusive jurisdiction of the English courts.

The Respondent initially argued that there was no agreement between the parties that justified the Claimant's initiation of arbitration proceedings under the LCIA, as it had referred in its Purchase Orders to its own "Terms & Conditions" to be applied and which did not provide for LCIA arbitration. The Respondent thus challenged the "jurisdiction of LCIA since there is no Privity [sic] of agreement between the parties, as a result, an Arbitral Tribunal lacks jurisdiction to hear any disputes between [the Claimant] and [the Respondent] or any complaints which [the Claimant] purports to have in relation to [the Respondent]".

The Respondent took no part in the proceedings and did not develop its initial challenge.

The sole arbitrator rejected the Respondent's challenge and made an award in the Claimant's favour on 14 November 2018 in England (the 'Award').

On 25 June 2019, the Claimant applied to the Court for the recognition and enforcement of the Award. The Respondent did not participate in the Court proceedings.

Judgment of the Court

The Court ordered the recognition and enforcement of the Award, being satisfied that none of the grounds for refusing recognition and enforcement of the Award set out in Section 57 of the ADGM Arbitration Regulations ('Regulations') was satisfied.

The Jurisdiction of the Court

First, the Court determined that it had jurisdiction to recognise and order the enforcement of the Award in accordance with the Regulations.

Part 4 of the Regulations applies to the recognition and enforcement of what are referred to therein as "New York Convention Awards" i.e., "an award made, in pursuance of an arbitration agreement, in the territory of a state which is a signatory to the New York Convention (other than the UAE)". Since the United Kingdom is a signatory of the New York Convention, the Court determined that the Award was an award to which Part 4 of the Regulations applied.

Section 56(1) of the Regulations provides that a New York Convention Award must be recognised as binding and must be enforced within the ADGM as if it were a judgment of the Court itself. Section 56(5) of the Regulations provides that:

> *"Awards recognised by the Court may be enforced outside the Abu Dhabi Global Market in accordance with the applicable legislation in force and recognition under these Regulations includes ratification for the purposes of any such applicable legislation".*

The Court therefore determined that it had jurisdiction to recognise and order the enforcement of the Award. Since Section 56 of the Regulations is mandatory, the Court determined that it was required to recognise and enforce the Award unless one of the grounds for refusing recognition or enforcement under Section 57 was satisfied.

The Validity of the Arbitration Agreement

Second, the Court held that it did not have jurisdiction to determine whether the arbitration agreement was valid.

The Court stated that it was faced with a "battle of forms". This is because the Claimant referred to the Claimant's T&Cs and documents called "Comprehensive Order Acknowledgement Letters" in the proposals and quotations it submitted before the five contracts were concluded. Meanwhile, the Respondent referred to "Terms & Conditions to be applied as per attached Annexure 1" (which, as the Court determined, did not provide for LCIA arbitration) in its Purchase Orders.

The Court, however, concluded that it was only entitled to consider the foregoing issue in accordance with Section 57(1) of the Regulations. The Court thus could refuse to recognise or enforce the Award if:

> *"the party making the application [that recognition and enforcement of the Award be refused] furnishes proof that… the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".*

In other words, the Court concluded that it could refuse recognition and enforcement of the Award only if the party, against whom enforcement of the Award is invoked, submitted sufficient evidence to establish the alleged invalidity of the arbitration agreement. While the Regulations did not expressly require the Respondent to make an application that recognition and enforcement of the Award be refused, Section 57(1) reflects the provisions of the New York Convention. Article V.1 of the New York Convention states:

> *"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that: (a) The parties to the agreement … were, under the law applicable to them, under some incapacity, or the … agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made…".*

As noted above, the Respondent however, did not participate in the Court proceedings. The Court held that, although the Respondent raised this objection before the sole arbitrator in the LCIA arbitration proceedings, it did not pursue this contention in the Court proceedings and did not request, prove or seek to prove, that the arbitration agreements upheld by the arbitrator were not valid, or that the Award was made under invalid arbitration agreements. In these circumstances, the Court held that it did not have the jurisdiction to determine whether the arbitration agreement was valid.

No Breach of UAE Public Policy

Third, the Court held that "there is no reason on the facts of this case to refuse the claim on grounds of the public policy of the UAE".

Section 57(1) of the Regulations also provides that the Court may refuse recognition or enforcement of an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of the [UAE]". This reflects Article V(2) of the New York Convention, which states:

> *"Recognition and enforcement of an arbitral award may … be refused if the competent authority in the country where recognition and enforcement is sought finds that ….(b) The recognition or enforcement would be contrary to the public policy of that country".*

Since both parties are Abu Dhabi registered companies, the Court raised the question:

> *"Should this Court be concerned about whether A4 might be seeking recognition and enforcement of the Award not in order to enforce it against assets in the ADGM, but as a device to have an order of this Court (rather than the Award itself) enforced elsewhere in the UAE, and in particular elsewhere in Abu Dhabi, without having other UAE Courts, including those of the Abu Dhabi Judicial Department ("ADJD"), examine for themselves whether the Award should be recognised and enforced within their jurisdictions?"*

"The Court also recognised that it had jurisdiction to rule on an illegality or other public policy issue on its own motion, but it would still require a sound factual basis for doing so.

The Court considered the reference to "public policy of that country" in the New York Convention in light of the UAE regime. Mr Justice Andrew Smith stated that:

> *"I would need little persuasion that it is desirable and in the public interest that the different Courts of the UAE work together harmoniously and that there be an orderly distribution of jurisdiction between the Courts of Abu Dhabi and more generally of the UAE".*

The Court concluded that this question did not fall for determination in the present case. Where a party wishes to rely on considerations of public policy to resist the recognition and enforcement of an award, the burden of proof lies on the party making the application (see e.g., Minmetals Germany GmbH v Ferco Steel Ltd., [1999] 1 All E R 315 per Colman J).

The Court also recognised that it had jurisdiction to rule on an illegality or other public policy issue on its own motion, but it would still require a sound factual basis for doing so. In this case, there was none.

There was no evidence that the Respondent did not have, or would not have, assets within the ADGM at present or in the near future (considering that the Respondent did not participate in the ADGM proceedings). The Court thus determined that there was no reason to suppose that the Claimant sought recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE.

There was also no evidence that there might be duplicate proceedings in the ADGM and other courts in the UAE. The Court found that the Respondent had not brought proceedings to challenge the Award, and there was no evidence that it intended to do so. There was also no evidence that the Claimant had brought proceedings in other courts of the UAE, and there was no evidence that it intended to do so. And even were the Claimant to initiate similar proceedings before other courts of the UAE, the Court felt that it would not, in itself, be objectionable or contrary to the public policy of the UAE to have parallel enforcement proceedings in different jurisdictions of the UAE (see e.g., decision of the Joint Judicial Committee of Dubai in Assas Investments Ltd. v Fius Capital Ltd., Cassation No 6 of 2017).

The Court also added that the Respondent would not suffer any unfairness or any detriment as a result of the Award being recognised and enforced by order of the Court rather than, or in addition to, by order of another court of the UAE. The Court thus concluded that there was no reason to refuse recognition and enforcement of the Award on the grounds of the public policy of the UAE.

Commentary

The judgment is notable for a number of reasons.

First, the Court concluded that, in the absence of a challenge by the Award debtor to the recognition and enforcement of the Award, the Court could not question on its own motion the validity of the underlying arbitration agreement.

Second, in contrast to the foregoing, the Court confirmed that it could rule on public policy or illegality issues of its own volition but would require "a sound factual basis for doing so".

Third, the judgment underlined the desire of the Court to contribute to "harmonious and effective cooperation between the courts of Abu Dhabi" in order to ensure the orderly distribution of jurisdiction between the courts of Abu Dhabi and more generally of the UAE.

Fourth, the Court also established that parallel enforcement proceedings in different UAE courts would not necessarily be objectionable to UAE public policy. In the present case, it concluded that the recognition and enforcement of an arbitral award by the Court, as opposed to another UAE court, would not cause any detriment to the party against whom recognition and enforcement was invoked.

It remains an open question however, as to the impact of a party proving that it would suffer unfairness or any detriment as a result of the Award being recognised and enforced by the Court rather than or in addition to by order of another UAE court or courts.

Finally, the Court left open the question of the potential impact the non-existence of assets in the ADGM, against which enforcement might be made, might have on applications for recognition and enforcement of arbitral awards by the Court.

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

Abu Dhabi Global Market Court of Appeal hands down its First Decision and considers the Joinder of Third Parties

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The Abu Dhabi Global Market Court of Appeal has handed down its first decision in a dispute over an alleged breach of contract. The Court of Appeal has denied permission to appeal to a defendant who had applied to join another party to proceedings. The case has given interesting and useful insights into the attitudes of the judges of the ADGM Courts regarding the management of commercial litigation.

Background to the Dispute

The claimant alleges that the defendant failed to pay sums of money said to be due and owing to the claimant under the terms of a lease of commercial premises at the Rosewood Hotel on Al Maryah Island. The claim comprises six separate heads of claim, with the total amount claimed estimated to be around US$1.362 million in damages for breach of contract, plus contractual interest and costs.

In its defence, the defendant disputes liability to pay any sum, its defences as pleaded amounting, in substance, to putting the claimant to strict proof of its claims, coupled with pleas of lack of consideration and waiver, a denial of the claim for liquidated damages as a genuine pre-estimate of loss, and an assertion of the claimant's failure to mitigate its alleged loss.

The Joinder Application

The defendant had attempted to join a third party defendant to the proceedings on the basis that the third party had conducted the contractual negotiations between the claimant and the defendant on the claimant's behalf. The defendant contended that the third party's representatives had 'solely' been at all the meetings with one of the defendant's key witnesses in the absence of the claimant and that, after signing the lease, the third party had organised and attended meetings and had entered into correspondence with the defendant regarding matters concerning the lease, and latterly matters arising from the current dispute. Consequently, the defendant believed it was 'of paramount importance' that the third party be joined as a party to the dispute.

In its counter argument, the claimant maintained the defendant had applied to join the wrong entity as a third party. It identified that several of the 'correct' third party entity's officers were also directors and the managing director of the claimant. Employees of another, related third party entity had had roles in drafting the lease and carrying out 'follow-up actions' in respect of the alleged breaches of contract. Other directors and employees of the claimant had been occupied with tasks relating to the administration of the lease.

The Decision at First Instance

The judge at first instance, His Honour Justice Stone SBS QC, found that Rule 56 of the ADGM Court Procedure Rules ('ADGMC CPR') was applicable and required the Court's permission to remove, add or substitute a party in a dispute once the claim form had been served, and that any application for such permission may be made by any existing party or by a person who wished to become a party. In considering an application under the Rule, the Court had an unfettered discretion whether to grant permission.

The judge accepted that the defendant had applied to amend the joinder application by adding the 'correct' third party entity. He proceeded to consider whether there was sufficient material before the Court upon which the Court would be able to properly exercise its discretion in the applicant's favour, and thus to order joinder in the form as sought.

The defendant's repeated contention regarding the "paramount importance" of joining the third party "beg[ged] the highly

This case is a good example of a court at first instance and on appeal exercising robust case management powers.

significant question of precisely what is the nature and extent" of the defendant's case against the third party. The Defence "as filed is in entirely general terms, and is of no assistance in this regard" and it was "somewhat surprising" that no draft amended Defence had been exhibited to the joinder application. The evidence, in support of the application, was silent on the issues that any amended Defence would cover against the third party, including any indication of the type and nature of claim that might have been brought. The judge noted, "it remains unclear on the face of this statement why this should be the case; mere factual involvement in the disputed transaction provides no justification for joinder, and in and of itself is of no assistance in resolving the issues currently in dispute". The judge was further critical of the application as it was initially framed and took the view that "the sole indication on the face of the papers as to the reason underpinning this application emerged not in the evidence filed on behalf of the applicant, but late in the day at the conclusion of the reply submission". In its reply evidence, the defendant had intimated some of its potential claim against the third party, including a promise to "bring evidence of the assurances and undertakings" it had allegedly provided to the defendant and on the back of which the defendant claimed it had entered into the lease, which the defendant subsequently alleged had been breached. The defendant therefore proposed to amend its defence in order to "assert its rights in respect of such breach, including without limitation, rescission of the lease, damages for breach of collateral contract, claim by way of indemnity or any other remedy to which it may consider itself entitled."

The judge noted however, that only making these justifications so late in the proceedings (in the Reply), the claimant had been denied the opportunity to respond to them: "It remains a matter of conjecture why these allegations, or any reference thereto, failed to find their way into the witness statements initially filed by [the defendant], and in the circumstances perhaps it is not unreasonable to assume that these assertions were prompted by the criticisms of the application contained within the claimant's prior submission in response". As a consequence, it was deemed the defendant had failed to discharge the burden on it to demonstrate why any order for joinder should be made. It, therefore, remained open to the defendant to pursue a separate claim against the third party.

The Appeal

The defendant sought permission to appeal the first instance decision. The Court of Appeal, consisting of the Chief Justice, Lord David Hope, His Honour Justice Sir Peter Blanchard and His Honour Justice Kenneth Hayne, handed down judgment on 1 September 2019.

The Court of Appeal considered that Rule 56 of the ADGM CPR differed from Rule 19.5 of the English Civil Procedure Rules (and also rule 20.28 of the Rules of the DIFC Courts) in that there was no requirement for the addition of a party to be "necessary". "A court is hardly likely in the exercise of a discretion to join as a party somebody who has no claim relating to the subject matter of the action at all. But, if its powers extend to anyone who has, the question whether a particular entity should be joined is at the discretion of the court."

The basis of the defendant's application for permission to appeal centred around a claim that the dismissal of its application to join the third party "severely prejudiced its right to a fair trial of the issues raised" by the claimant. The defendant argued that the dismissal of the joinder application meant that it was deprived of the ability fully to present its case and defence and "it would be a waste of time, cause an unnecessary increase in costs and militate against the efficient conduct of justice for it to be required to take a separate case" against the third party.

The Court of Appeal rejected the application, restating the orthodox common law position that an appeal court would not "lightly interfere with an exercise of judicial discretion" and would only do so if the judge at first instance had "applied some wrong principle or that for some other reason the exercise of his discretion was plainly wrong". The Court found that the appellant even lacked an "arguable case" that the judge had erred in the exercise of his discretion. No particulars had been given even at the appeal stage of the basis for the defendant's claim against the third party, nor any explanation of how joinder would assist in the resolution of the issues in the dispute between the claimant and defendant.

Application to Strike out all or certain Parts of a Witness Statement in Support of the Defence

Following the Court of Appeal decision, the claimant applied to strike out all or certain parts of a witness statement served in reply to the claim, a remedy available under the power of the Court, at Rule 92 of the ADGM CPR, used to control the evidence. The defendant failed to file any evidence in opposition to the application. The application was made on the basis that the statement was filed late and without any explanation for its delay, that it contained "mostly irrelevant statements bearing no relation whatever to the parties' pleaded cases or the issues in dispute", and represented an attempt to introduce new issues at a late stage of the process. The statement mainly gave evidence on the dealings between the defendant and the third party, and the claimant complained that the statement was an attempt to "circumvent" the rejection of the joinder application by "seeking to introduce in reply arguments relating to its conduct which, if not objected to, potentially impacted upon the contractual relationship under the lease between the parties."

The judge, again His Honour Justice Stone SBS QC, disagreed with the full extent of the application sought, which was to strike out all or most of the statement: "the extensive redactions indicated…over-egg this particular pudding". Instead, with a firm warning that it was not open to the defendant to advance any allegations against the third party, he excluded only the last sentence in one paragraph of the statement.

Analysis

This case is a good example of a court at first instance (and on appeal) exercising robust case management powers. The burden of seeking joinder is on the party making the application, which may face a judge wary of being "sidetracked by the raising of collateral allegations that…may or may not ultimately [be] pursue[d]" against a third party, as the Court of Appeal warned.

The Court of Appeal in fact went further, in response to a complaint by the claimant that, by persisting so far with its application for joinder, the defendant was seeking to disrupt the main proceedings. It issued a warning that any party "held to have indulged in such conduct must expect to be dealt with appropriately in any award of costs. Any disruptive or time-wasting conduct in this court is always to be deprecated".

There are some obvious practical points for parties to litigation in the ADGM considering applications to change parties:

1. if a prospective third party joinder application is considered at the time of drafting a defence, defendants should strongly consider drafting the pleading to make the involvement and relevance of the third party clear. An express reservation in the defence of a right to amend the pleading later in the proceedings after the joinder of the third party is very unlikely to be enough;
2. if it only becomes clear after a defence has been filed and served that a third party should be joined, it is very likely to be appropriate to append a draft amended defence to the application to identify the allegation or allegations that a defendant may wish to pursue against the third party, with an indication of the remedy that the defendant would ultimately wish to obtain against the third party in the event of joinder; and
3. a party must include sufficient detail in its application from the start. The judge at first instance considered the defendant's evidence to have been so weak that it came close to not supporting the application: "in light of the missing information it may have been that this application, at least in the form as initially filed, was demurrable on its face". The evidence in Reply went some, but not all the, way to providing particulars of the allegations and legal claims asserted, as well as amounting to "little more than recitation of a list of remedies potentially" available to the defendant. The proceedings are a cautionary tale regarding applications heard solely on the papers: there was no chance to remedy the defect of insufficient pleadings before the judge issued a decision. It may have been possible to add enough detail in oral arguments before the judge at a hearing, but a party should never rely on a hearing to do what should and could have been included in written submissions.

Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Limited

[2019] ADGMCFI 0008 (27 May and 4 November 2019) and [2019] ADGMCA 0001 (1 September 2019)

Al Tamimi & Company's International Litigation Group regularly advises on proceedings in the ADGM Courts. For further information, please contact Peter Smith (p.smith@tamimi.com), Clare Heaney (c.heaney@tamimi.com) or Rita Jaballah (r.jaballah@tamimi.com).

2019 Review: Employment in Saudi Arabia and Bahrain

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Developments in 2019 suggest that the regulation of work and the employment relationship will continue to be an area of focus as the Kingdoms of Saudi Arabia and Bahrain move into a new decade and compete regionally and internationally for foreign investment and talent.

As with last year's review in the December 2018 / January 2019 Law Update article entitled '2018 Review: Employers in KSA and Bahrain', this article will review the key employment changes that occurred in 2019 in Saudi Arabia and Bahrain.

KSA

Expat Fees

The beginning of the year saw another increase in the so-called 'expat fee' which is payable by employers for their expatriate employees and is collected on the issuance and renewal of work permits. The fee for 2019 was increased to SAR 6,000 for each expat employee where the number of expats did not exceed the number of Saudi employees, and SAR 7,200 where there were more expat employees than Saudi employees. Fees will increase again in January 2020 to SAR 8,400 and SAR 9,600 respectively.

Saudisation

There was no let-up in the government's Saudisation policy and some interesting changes were introduced during the course of 2019; although these will only take effect in 2020. The 'Saudisation' policy, which is currently applied through the Nitaqat program, requires employers in the private sector to employ a minimum number of Saudi nationals. Nitaqat sets quotas for employers based on their size and the economic activity undertaken by them and rates their compliance by placing them in colour coded categories. Employers are placed in the Platinum and Green categories if they are compliant with Nitaqat and are rewarded with various privileges in relation to visas and work permits; whereas employers who fail to meet their quotas are placed in the Yellow and Red categories and are penalised by being denied access to visas, work permits and the Ministry of Labour and Social Development's ('MLSD') services.

In the first of the changes made, Saudisation of the dentistry profession became a requirement with the passing of Ministerial Resolution No. (61842) dated 27.3.1441H (corresponding to 25.11.2019G). Resolution No. (61842) as follows:

- Phase 1 will commence on 1.8.1441H (corresponding to 26.3.2020G) and will require 25 per cent of the affected roles to be Saudised; and
- Phase 2 will commence on 1.8.1442H (corresponding to 15.3.2021G) and will require 30 per cent of the affected roles to be Saudised.

The affected roles are: Dentist Consultant, General Dentist Consultant, General Dentist Physician, Dentist, Oral and Maxillofacial Surgery Consultant, Oral and Maxillofacial Surgeon, Orthodontist as well as all professions that are included in the field of dentistry. Resolution No. (61842) does not apply to establishments where there are less than three dentists. The penalties for non-compliance are a suspension of the services of the MLSD, which include issuing visas, transferring sponsorship and applying for a change of profession for expatriates. This is in addition to the penalty fine for not complying with Saudisation.

The next significant change has been the issuance of Ministerial Resolution No. (63717) dated 29/03/1441H (corresponding to 27.11.2019G) which will abolish the Yellow Category in Nitaqat. Resolution No. (63717), which comes into effect on 01/06/1441H (c.26.1.2020G), represents a significant change to Nitaqat by removing the Yellow category with the aim of further pressuring employers to meet their Saudisation quotas and generally increasing employment opportunities for Saudi nationals. As a consequence of the change, all employers currently in the Yellow category will automatically transfer to the Red category. This will mean that they will become subject to the following penalties as a result of being a Red category employer and will be prohibited from:

- applying for visas or work permits;
- renewing the work permits of employees;
- making any changes to the role or profession stipulated in the work permit issued to an expatriate employee;
- recruiting an expatriate by a transfer of sponsorship from another employer in Saudi Arabia; and
- opening file 700 with the labour office for a new branch of the entity.

Yellow category employers are already restricted from applying for new visas and permits and renewing existing ones. They are also prevented from changing job roles specified in work permits and having expats transfer to them from another employer in Saudi Arabia. The impact of being a Red Category employer will be that they will not be able to renew the work permits of all of their expatriate employees (currently they are only prevented from renewing the work permits of employees who have been in Saudi Arabia for two or more years), and will not be able to employ any expatriates in a new branch with the labour office to register as an employer.

Authentication of Employment Contracts

In April 2016, the MLSD introduced the standard form employment contract which contained mandatory terms and conditions that all employers are required to adopt. To ensure that employers continue to adhere to the minimum requirements of the Labour Law issued by Royal Decree No. M/51 dated 23 Sha'ban 1426 (the 'Labour Law') by issuing a written employment contract that incorporates the minimum statutory entitlements for employees, Ministerial Resolution No. (156309) dated 18.8.1440H (corresponding to 23.4.2019G) was passed earlier in 2019 requiring employers to 'authenticate' employment contracts by uploading them to the web portal of the General Organisation for Social Insurance ('GOSI'). Employers were required to authenticate contracts for all new hires immediately following the issuance of Resolution No. (156309). Contracts for existing employers are required to be authenticated in the following phases:

Employer (by number of employees)	Commencement Date		Percentage of Employee Contracts to be Uploaded in Phases					
	Hijri	Gregorian	Q3 2019	Q4 2019	Q1 2020	Q2 2020	Q3 2020	Q4 2020
Giant (3000+)	1/12/1440	2/8/2019	20%	50%	100%			
Huge (500 -2999)	1/3/1441	29/10/2019		20%	50%	100%		
Medium (50-499)	1/6/1441	26/1/2020			20%	50%	100%	
Small (1-49)	1/9/1441	22/4/2020				20%	50%	100%

The penalty for non-compliance is that employees who have not had their contracts authenticated by the required period will be permitted to leave and work for another employer.

Changes to the Labour Law

A number of minor changes were made to the Labour Law by Royal Decree No. (684) dated 27.11.1440H (corresponding to 30.7.2019G). The definition of worker in Article 2 was changed slightly to make it explicit that it includes both men and women. Article 3 was amended to make it unlawful to discriminate against citizens in the advertisement, recruitment and performance of their work on grounds of sex, disability, age or any other form of discrimination. The retirement age in the Labour Law was aligned with the Social Insurance Law issued by Royal Decree No. M/22 dated 15.11.1969. Articles 155 and 156 of the Labour Law, which makes it unlawful for a female employee to be issued with a notice of termination or to be dismissed during maternity leave or a period of illness resulting from pregnancy or delivery, were amended with the latter being repealed and consolidated into Article 155. The new Article 155 prohibits employers from issuing a notice of termination or dismissing an employee who is pregnant or on maternity leave or for the duration of her illness resulting from pregnancy, provided that in the case of the latter the employee's illness is certified and her absence (whether cumulative or in aggregate terms) does not exceed 180 days per annum.

Protection against Behavioural Abuse in the Workplace

Following the enactment of the Anti-Harassment Law by Decision 488 dated 14.9.1439H (the 'Anti-Harassment Law') in 2018, Resolution No. (20912) dated 2 Safar 1441 (corresponding to 1.10.2019G) was passed which sets out procedures and requirements that employers must comply with in order to safeguard the privacy, dignity and personal freedom of the individual and protect against behavioural abuse.

Resolution No. (20912) came into effect on 20 October 2019 and is wide in scope in that it defines 'behavioural abuse' as all acts of abuse by one party against another, including all forms of exploitation, threats, harassment, extortion, inducement, quarrel, insult, offence, or deliberate seclusion with the opposite sex, as well as any form of discrimination. Behavioural abuse can occur physically, verbally or by electronic means and can take place outside of working hours or the workplace. Further, it covers acts which may intend, lead or potentially lead to physical, psychological, sexual or economic harm to the other party.

Resolution No. (20912) prescribes a number of measures that must be taken by employers to protect employees from behavioural abuse. These include:

- providing means for filing a complaint through the employer's website or by email or telephone;
- raising the awareness of employees with regard to facing and reporting behavioural abuse;
- forming a committee to investigate allegations of behavioural abuse and to recommend appropriate disciplinary penalties where applicable;
- ensuring confidentiality for the parties involved and the complaint process; and
- escalating complaints to the relevant authorities where the abuse constitutes a criminal offence.

Penalties will apply to employers who fail to comply with the Resolution. For example, employers who do not establish a committee to investigate complaints may incur a fine of SAR 15,000. Also, employers who fail to investigate an allegation of abuse within five working days of receiving the complaint or fail to recommend disciplinary penalties for anyone found culpable may be fined SAR 25,000 for each case.

Privileged Iqama Law

In May 2019 the government finally made good on its promise to make available a work permit that dispenses with the need for a sponsor by issuing Royal Decree No. M/106 dated 10.9.1440H to enact the 'Privileged Iqama Law'. The Privileged Iqama is available to non-Saudi nationals either on a permanent basis or for a one-year renewable term. It allows the holder to work in any private establishment and change employers without restriction; except for roles that are reserved exclusively for Saudi nationals. The holder is also allowed to carry out commercial activities permitted by the Foreign Investment Law issued by Royal Decree No. M/1 (the 'Foreign Investment Law'), to own and use real estate in all towns and cities (except the holy cities of Mecca and Madinah) for residential, commercial and industrial purposes, and to use real estate in Mecca and Madinah for a period not exceeding 99 years.

There are also personal benefits for the holder and his/her family. The holder's family is permitted to stay with him/her in the Kingdom, and the holder can obtain visit visas for relatives and recruit domestic workers. Additionally, the holder can own private transport. Further, the holder can exit and enter the Kingdom freely without the need for a visa and use the passport desks designated for Saudi citizens in the airports.

The conditions for obtaining the Privileged Iqama are not dissimilar to that for the ordinary Iqama in that the applicant must have a valid passport, provide a police clearance certificate, pass a medical check and must not be less than 21 years old. Additionally, the applicant is required to pay a fee and have health insurance cover.

Rules on the Employment of Women

Women in employment continued to be an area of focus for the government in 2019 with the issue of Ministerial Resolution No. (39860) of 1440H which set out a number of rules. Key amongst these are:

- the defining of night shift work in terms of the hours over which it will apply (6 pm to 6 am) and the type of work that can be undertaken (e.g. health or charitable work, the media, radio and television, call centres, etc.);
- making it unlawful to treat women differently to men in terms of paying for work of equal value;
- requiring women to wear decent clothing that covers the body;
- making employers directly responsible for creating a suitable working environment for women;
- requiring employers to designate areas in the workplace for women that are private and independent without closed doors and with their own areas for praying and bathroom facilities;
- prohibiting privacy between men and women; and
- prohibiting women from working in establishments designated for men only and vice versa.

Bahrain

Bahrainisation of the health sector

In March 2019, the government passed Law No. (1) of 2019 dated 5.3.2019 which amended Article 14 of Law No. (21) of 2015 Concerning Private Health Institutions to make the employment of physicians, paraprofessionals and nurses in private health institutions a priority for Bahraini nationals, with the exception of roles that require a special expertise that is rare and unavailable. The prioritisation of roles for Bahraini nationals became obligatory on the expiration of contracts with expatriate workers.

Labour Market Regulatory Authority

Resolution No. 2 of 2019 was passed to amend some provisions of Resolution No. 76 of 2008 so that employers seeking a work permit for a foreign worker should not have abused their employees or failed to fulfil their rights, including failing to pay wages. Also, employers were required to register and update their employees' data with the Labour Market Regulatory Authority on a regular basis. Finally, (and even though it is yet to be implemented) employers were required to pay wages in accordance with the wage protection system (see further below).

The fee imposed on foreign employers for issuing or renewing a permit to practice a professional activity was increased to 500 Bahraini Dinars by Resolution No. 3 of 2019 amending Resolution No. 31 of 2014 regarding fees imposed by the Labour Market Regulatory Authority.

Wage Protection System

The implementation of the wage protection system had been the subject of much discussion in recent years and it was not surprising that Resolution No. 68 of 2019 on the Wage Protection System was passed in 2019. Resolution No. 68 obliges employers to pay wages in accordance with the wage protection system through any payment methods of providers authorised by the Central Bank of Bahrain. These authorised providers are required to disclose to the Labour Market Regulatory Authority immediately after the deposit of wages certain information that includes the employee's name, wage amount, date of payment, and the employee and employer's account numbers. Resolution No. 68 of 2019 is to be implemented in stages by a separate Resolution which is still awaited.

Pregnant Employees

Finally, Resolution No. 84 of 2019 was issued by the Minister of Labour and Social Development prohibiting the employment of pregnant women in a number of hazardous conditions, including exposure to extreme heat, continuous physical exertion, harmful vibrations, exposure to radiation, bacterial infection and certain hazardous materials. It also obliges employers to take necessary measures to protect the health of pregnant women and the foetus where there may be a danger to them as a result of the work performed by the employee.

As we move into a new decade, 2020 is likely to bring more interesting developments in the employment law landscape. Any changes will be reported in future editions of Law Update and on our website (www.tamimi.com).

Al Tamimi & Company's Employment & Incentives team regularly advises on employment issues in the KSA and Bahrain. For further information please contact Zahir Qayum (z.qayum@tamimi.com).

KSA Leads on Singapore Convention

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KSA has embraced international mediation through accession to the Singapore Convention. This article looks at some of the detail in the Convention and the benefits of mediation generally.

Arguably, the single most important innovation in the legal sector over the last five decades has been the steady advance of alternative forms of dispute resolution – including mediation and arbitration. At a time when clients are acutely time- and cost-conscious, the prospect of protracted litigation or even arbitration can seem burdensome. Mediation enables a quicker and less gladiatorial option – whilst still keeping the parties' powder dry in the event that a settlement agreement is not agreed. International mediation has recently been put on a similar footing to international arbitration (which has benefitted from the New York Convention since 1958) – the likelihood is that more disputes will be funnelled through this channel with the new international treaty on the enforcement of mediation settlement agreements coming into force.

The New Convention

The Kingdom of Saudi Arabia ('KSA') is one the founding signatories of the Singapore Convention on Mediation (the 'Convention') (long form title: the United Nations Convention of International Settlement Agreements Resulting from Mediation). KSA was represented at the signing ceremony held in Singapore on 7 August 2019 by Ministry of Commerce and Investment Undersecretary for Policies and Regulations, Mr. Bader Al-Haddab. The Saudi Center for Commercial Arbitration ('SCCA') participated as part of a high-level official delegation, consistent with the aspiration for KSA to further enhance its own alternative dispute resolution profile. KSA's Council of Ministers had already approved the mandate to sign the United Nations Convention on Mediation during the Cabinet meeting on 23 July 2019. The Convention will come into force six months after three countries have ratified, accepted, approved or acceded to the Convention (Article 14) – almost a certainty since 45 other countries as well as KSA signed at the first opportunity.

The Convention is intended to further bolster the efficiency and effectiveness of global trade by further facilitating cross-border dispute resolution. It recognises that the use of mediation results in substantial benefits, such as reducing the instances where a dispute leads to termination of a commercial relationship and, crucially, produces significant savings in the administration of justice by States.

As defined under the Convention (Article 2(3)), a mediation comprises:

> *"...a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the "mediator") lacking authority to impose a solution upon the parties to the dispute."*

This is a particularly broad definition and would not require a mediation to be conducted by either a mediation institution or an accredited mediator for the Convention to apply. However, it should be noted that a serious breach by the mediator of standards applicable to them or the mediation and/or a failure to maintain impartiality/independence may result in the competent authority of the signatory State declining to grant relief (Articles 5(e) and (f)). The Convention therefore sensibly anticipates (but does not mandate) that mediators will be qualified/ accredited and bound by a code of ethics (and there are a variety of accrediting bodies, such as the Centre for Effective Dispute Resolution ('CEDR'), which fulfil this role).

The Convention (Article 1) applies to written settlement agreements arising from mediation relating to a commercial dispute, which, at the time of its conclusion is international in that:

1. at least two parties to the settlement agreement have their place of business in different States; or
2. the State in which the parties to the settlement agreement have their places of business is different from either: (i) the State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) the State in which the subject matter of the settlement agreement is most closely connected.

The Convention does not apply to settlement agreements which have been approved by a court in the course of proceedings before a court and which are enforceable as a judgment; or which are recorded and enforceable as an arbitral award, separate regimes applying in these cases. KSA has an Enforcement Law which sets strict hurdles for the enforcement of foreign judgments (including a reciprocity test) but is also a signatory to the New York Convention on the recognition and enforcement of arbitral awards.

The competent authorities of a Convention signatory State are expected to:

1. enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention; and/or
2. allow a party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention.

It should be noted that parties can expressly opt-out of the Convention (Article 5(d)) and that signatory States can also reserve enforcement only to settlement agreements which expressly opt-in. The competent authority can also refuse to grant relief on public policy grounds (Art 5(2)(a)), which may pose particular challenges in the KSA context where particular terms (such as interest on late payments) are inconsistent with Shari'ah law principles.

..unreasonable resistance to the process can be taken into account when assessing costs..

So what is a Mediation?

A mediation is, in essence, a structured dialogue between parties facilitated by a mediator. There are ground rules – the process is confidential and without prejudice. This means that matters disclosed should remain confidential and cannot be advanced in subsequent hearings. The mediator mediates; their role is not to judge or arbitrate. Rather, through a blend of listening, reframing, coaching and encouragement, the mediator strives to create an environment where the parties can achieve a settlement. The mediator must maintain strict neutrality at all times. The focus is on interests rather than contractual rights. Flexibility is a clear advantage – typically the mediation moves through a process of information gathering/ disclosure (tightly managed by the mediator who should seek explicit permission to convey anything sensitive between the parties), through to bargaining and then, possibly, settlement. The skill set involved requires a high level of emotional intelligence and experience of difficult negotiations; if mediation is being considered then its apparent that a deadlock of some kind has already occurred. Sensitively helping the parties to unpick that deadlock will likely involve unpacking some controversial issues.

Mediation has a rich heritage in the region. Islamic Law recognises the concept of an independent mediator through the practice of Al Wasata. Al Wasata is the practice of one or more persons intervening in a dispute, either at the request of one or both parties or, interestingly, on their own initiative. Building on this cultural legacy and taking on board international best practice, in KSA the SCCA has promulgated its own set of Mediation Rules and is in the process of establishing a panel of mediators (although membership of the SCCA panel is not mandatory).

Judicial views on mediation in the UK are encouraging (which, given that many regional players have contracts governed by English law, is especially relevant). It is clear that an unreasonable resistance to the process can be taken into account when assessing costs; leaving a substantial uncertainty hanging over proceedings as the reasonableness (or not) of a party's actions can only be determined at the end of a case. It is likely that mediation will gain further traction in future as a necessary step and indeed a preferred method of dispute resolution or embedded in a multi-tiered process. The striking success rate of mediation is already well known According to CEDR's 2018 Mediation Audit, 12,000 commercial mediations (excluding small claims mediations) were performed, being an increase of 20 per cent on 2016 and double the number in 2010. The estimated value of commercial claims mediated was GB£11.5 billion (approximately US$15 billion). The overall success rate of mediation remains high with an aggregate settlement rate of 89 – 74 per cent achieving settlement on the day of mediation and 15 per cent shortly after mediation.

Businesses in KSA and regionally will need to seriously consider mediation when navigating their options on any dispute; the Convention will enable settlement agreements settled outside or related to KSA to be invoked and enforced in KSA. Likewise, mediation settlement agreements agreed in the Kingdom can be invoked and enforced in other signatory states.

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 and beyond. For further information, please contact Francis Patalong (f.patalong@tamimi.com).

Copyright Protection in Iraqi-Kurdistan


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As an autonomous region of Iraq, Iraqi-Kurdistan (Kurdistan Region of Iraq) in 2012, passed its own law to govern copyright and adjacent rights (Region Law No. (17) of 2012) (the Copyright Law). The Copyright Law governs copyright in the jurisdiction and protects the authors of original literary, artistic and scientific works, whatever their method of expression, importance and purpose, with limited exceptions. Stakeholders and interested parties seeking to protect and enforce copyright and adjacent rights would therefore need to rely on the Copyright Law. However, little is known about this Copyright Law due to the limited amount of information that is publicly available. This article provides a snapshot of the Kurdistan Region's Copyright Law and current practices.

Protection of Author's Moral and Financial Rights

The Copyright Law gives the author and the author's heirs/successors financial rights over their work. To this end, the author may either permit or prohibit the following:

1. the sale, display, rental or display of the work;
2. the copying, printing, recording or photographing of the work by all available means;
3. importing copies of the work published abroad;
4. the performance of the work, if applicable; and
5. the transfer of the work to the public, regardless of the form or the method.

“The Copyright Law governs copyright in the jurisdiction and protects the authors of original literary, artistic and scientific works, whatever their method of expression, importance and purpose, with limited exceptions.

The author is also entitled to moral rights over his/her work, such as the right to attribute the work to him/herself and, in certain cases. to object to the distortion or misrepresentation of his/her work. Protection includes the title of the work even if such is not indicative of such.

The works of foreign authors that are published, acted or presented for the first time in Iraq, are protected by the Copyright Law. However, the works of foreign authors that are published for the first time in a foreign country are not protected, unless the country provides Iraqi nationals with reciprocal protection for their works published or displayed for the first time in Iraq.

The scope of protection provided by the Copyright Law extends to works in both traditional and digital forms, namely the following categories:

1. literary (written works, works verbally presented such as lectures, speeches, sermons);
2. public recitation of the Holy Quran and religious hymns;
3. dramatic (plays, dances, choreography, musical works whether digital or not, etc.);
4. musical (whether digital or not and whether accompanied with words or not);
5. film (films, broadcasts, and audio-video works);
6. artistic (drawing, photograph, sculpting, engraving, and applied and decorative works);
7. architectural (illustrative images, maps, designs, drawings and geographical and topographical models)
8. computer software (regardless of the language used)
9. data bases; and
10. sub-works.

Specific categories are unprotected by the law, including but not limited to: abstract ideas; principles, discoveries and scientific data; theories; mathematical equations; flags; the daily news published or broadcasted; and official legal documents.

Although the Copyright Law protects an author’s rights in his/her work regardless of the medium used to communicate it to the public, it does not specifically address copyright infringement over the internet (internet piracy, torrent sites, etc.). The general provisions of the Copyright Law can be applied to cases of copyright infringement over the internet however, precedent in this regard is largely lacking. As an initial step, the legislature in the Kurdistan Region ought to introduce internet specific regulations, such as the prohibition of the transmission of copyrighted work (without the authorization of the author) over the internet (or pursuant to any exceptions/limitation provided by the Copyright Law).

Duration of Copyright

In the Kurdistan Region, copyright is an automatic right that arises whenever an author creates work in an objective form that is comprehensible. Copyright does not have to be registered. However, the Ministry of Culture - Copyright Office permits registrations.

The duration of copyright protection endures for the period of the author’s lifetime and fifty years following the author’s passing. The duration of protection with regards to collective works, works published anonymously or under a pseudonym, applied arts works, works published after the passing of the author are addressed by specific provisions of the law.

Upon the lapse of its protection period and, in the absence of the author’s heirs/successors, a published work will enter the public domain and be available for use without the author’s permission. Conversely, an unpublished work will not enter the public domain, and any use thereof is prohibited in the absence of approval from the author (or his/her heirs) of such work.

Copyright Infringement

The civil court may, under an application from the holder of the right or any of his/her heirs/successors, whether before or during a lawsuit, take any of the following preventive measures regarding any potential or ‘alleged’ infringement of the rights:

- issue a preliminary or permanent injunction;
- confiscate the infringing copies and any materials and/or devices used in the commission of the infringement;
- confiscate the proceeds of the infringement;
- and/or order the destruction of the illegal copies at the request of the author.

The Ministry of Culture - Copyright Office is the body tasked by the court to carry out any of these measures if required.

An author, whose copyright in his/her work is infringed upon, shall be entitled to appropriate compensation. In deciding compensation, the court considers the cultural standing of the author, the literary, scientific or artistic value of the work and the extent the infringer benefited by exploiting the work.

Acts of infringement are of course punishable under Article 36 and Article 37 of the Copyright Law. Under the Copyright Law, copyright infringements include:

1. the sale, distribution, or rental of the work without the prior written approval of the right holder of the work;
2. counterfeit, sale, offer for sale, distribution, or rental of the work knowing that it is counterfeited;
3. publication of the work using any means of publication (with certain exceptions), without the prior written approval of author; and
4. infringement of any other incorporeal or financial right of the author.

Copyright infringers in Iraqi-Kurdistan may face imprisonment terms of no less than one month and no more than one year and fines of no less than five hundred Iraq dinars ('IQD') (US$50) and no more than one million and five hundred thousand (US$1,300) IQD, or both.

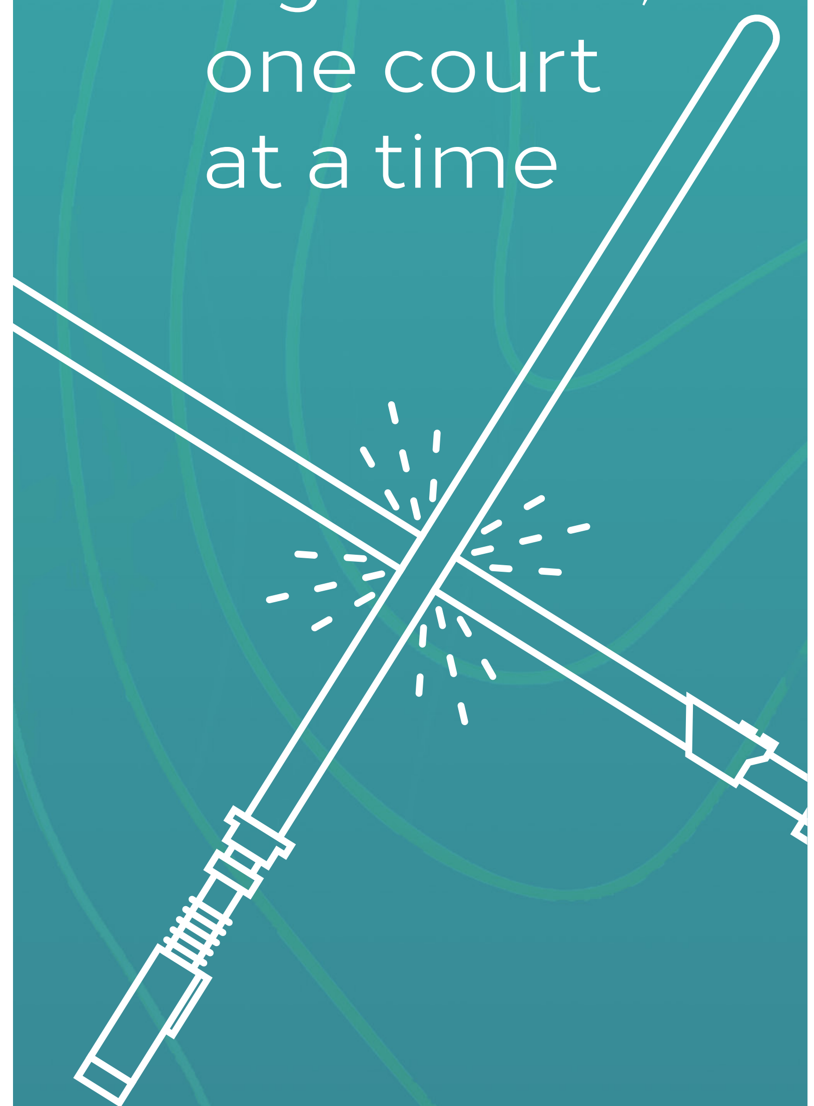
In addition, any person who distributes, imports for the purpose of distribution, broadcasts to the public, without the prior approval of the author, fixed performances or audio recordings, faces imprisonment terms of no less than three months and no more than one year, and a penalty of no less than one hundred thousand IQD (US$90) and no more than five hundred thousand dinars (US$420) or both.

Conclusion

The introduction of the Copyright Law provides a legislative framework for a cultural shift to take place with respect to the protection of original work and the empowerment of innovation in the region. However, the lack of judicial and administrative precedent, amongst other obstacles, means it is only the first step on the long road to achieving positive and just protection for original authors and artists.

Al Tamimi & Company's Intellectual Property team regularly advises on Intellectual Property matters in Iraq. For further information, please contact Haydar Jawad (h.jawad@tamimi.com) or Aro Omar (a.omar@tamimi.com).

"Into the Garbage, Fly Boy" A review of the Star Wars legal world, one court at a time



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A long time ago in a court house far, far away the world created by George Lucas has become much more than simply a film franchise.. As the all time classic Star Wars "Episode IX: The Rise of Skywalker", hits our screens it seems appropriate to review this iconic representation of film making and storytelling from the late 20th century which leaves us with not only a creative legacy but also a number of fascinating legal precedents.

The commercial model has been discussed many times. Lucas famously retained merchandising rights within the original deal with the studio. Because of this, Lucas retained what has now become a vast merchandising empire - comprising figurines, backpacks, hats, T-shirts, talking Wookie masks as well as rights over character licensing. This decision not only generated additional revenue but gave Lucas incredible control over the way in which the franchise was perceived by the public.

Lucas was not shy about seeking to protect rights through the courts across the globe. Some of these cases have become landmark cases in the legal framework that underpins the film and merchandising industry. In and of themselves, they often have stories that are interesting and still relevant – although unfortunately without droids and lasers.

When Galaxies Collide

The 1970s was a time when entertainment across the board was looking to the stars. Dr. Who and Blakes 7 were topping the chart in UK television, and Happy Days in the US even introduced an alien called Mork (with apologies to anyone under 50 who had to do an online search to understand all of that).

Star Wars came at a time when the world's obsession with space and space travel was already at a high level. So, it was no surprise that, when other space adventure films started to hit the market, Lucas tried to claim that this other space dynasty had 'stolen; their story line and their idea for the film. In 1978, the epic court battle between the producers of 'Battlestar Galactica' and producers of 'Star Wars' began in earnest.

For the casual outsider, the producers were fighting for the right to own a storyline that had proven to be lucrative, but underpinning that was also an argument about originality and the complexity of copyright protection. Many questions were raised:

At what point is the storyline so developed that it can be protected?

At what point can one claim that the storyline is so original that it deserves protection from all other potential competitors?

At what point can you claim that your storyline was stolen by somebody else?

These questions still plague producers globally. The case was, even at that time, a case that producers hoped would provide some clarity as to the legal position in relation to the original storyline. The case unfolded in the California courts and stretched ominously over several years.

Lucas (represented by Fox in this case) identified various aspects of their storyline and claimed that Battlestar Galactica has appropriated each of those elements in a manner that infringed its copyright. Fox undertook a classic scene-by-scene storyline breakdown and, it seemed clear on analysis, that they had some justification for their concerns. For example, each deals with a large scale war between two forces across the galaxy. In both, there is a good leader that is an older man of great wisdom and leadership. There is a hero who is linked to the ruling family, his roguish friend, and a heroine who falls in love. Battlestar Gallactica even included a room filled with weird creatures playing music, similar to the famed cantina scene of Star Wars. In all they isolated 34 points of similarity in the storylines.

The Battlestar Galactica producers claimed that the elements of the storyline that had been allegedly stolen were, in fact, scenes that were universally applied within stories dating back over hundreds of years. On that basis, Fox could not claim any originality in the tale. At the essence of the argument: Star Wars had no rights of ownership over generic components of a storyline; those components were available for all producers to freely use.

The judge in the case at first instance was scathing about not just only about the case but the participants themselves, ruling that there was no substantial similarity. Fox appealed, and the Court of Appeal decided that there was a case to be heard and sent it back for trial. At this point, over four years later, the parties settled the matter out of court.

From this case, producers can learn to be wary of claiming copyright in matters that are generic in nature or which constitute standard scenes of drama and storyline. However, it is also important to note that the court was not decided – so beware of intentional copying of too much of any storyline!

Stormtroopers in a Tea Cup

Never were the laws relating to intellectual property more pushed and pulled than they were when Andrew Ainsworth decided to start selling Stormtrooper helmets to passionate Star Wars fans.

On the face of it, this should have been a straight case of rights infringement; making merchandise without a licence is not permitted and the iconic Stormtrooper helmets were certainly original and identifiable. When Ainsworth started selling Stormtrooper helmets some 20 years after the release of the original film, and made a very tidy profit from doing so, it was not unexpected that he found himself on the wrong end of the law.

“It is a sage lesson for all producers; IP rights are complex and contracts must be drafted accordingly. Securing a supplier is not a simple act of providing a purchase order; where intellectual property is involved, a contract that properly addresses the legal position is required.

However, the case was complicated by one fact: Mr. Ainsworth was the person that created the original moulds from which all Stormtrooper helmets were created for the original Star Wars trilogy. He charged Lucas a fee for all the helmets that he created from that mould. To make the matter more complex, the design of the Stormtrooper helmets themselves had, in fact, come from the Lucas team.

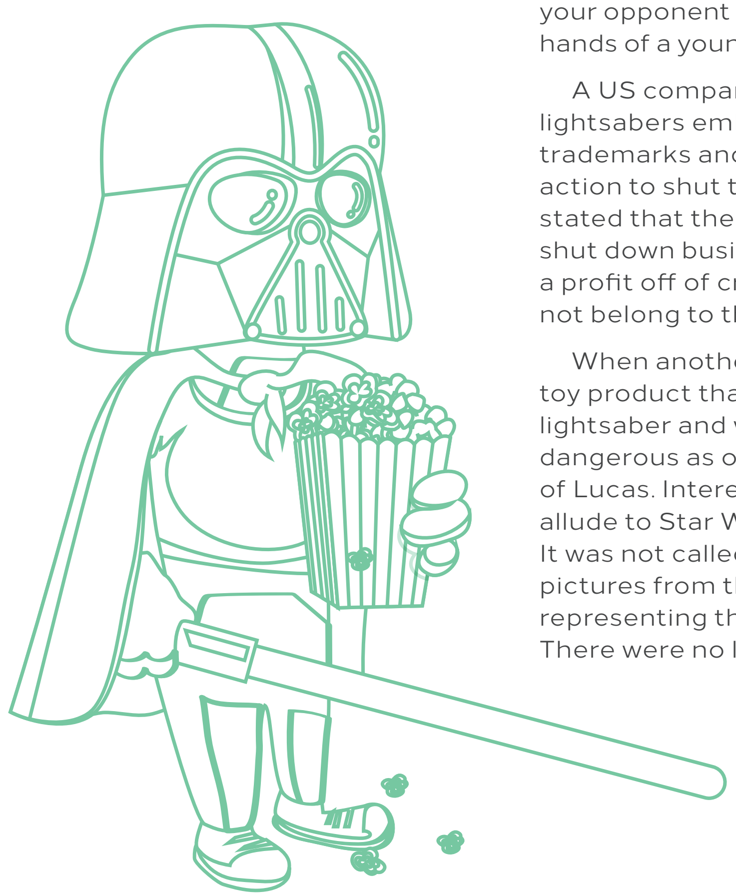
On the face of it, this case should have been resolved reasonably quickly. We naturally assume that Lucas, who was a diligent producer, had clearly set out the rights' position in relation to the Stormtrooper helmets within the contract with Ainsworth. But the courts found that this was not the case. In addition, Ainsworth was a resident of the UK and Lucas decided to take action in

courts in the USA. Lucas claimed damages of approximately US$20 million. However, the UK courts had no ability to enforce the judgment and so Lucas was forced to re-start his claim in the UK courts.

This is where things became incredibly complicated because Lucas was claiming ownership of rights under copyright laws of the UK but Ainsworth countered that the protection could only arise because of the operation of the design laws of the UK. The difference between these two is significant. Fundamentally, protection for copyright lasts for 80 years whilst protection for designs only last for 10 to 15 years.

If Ainsworth was successful in this assertion, Lucas no longer had the right to stop anybody (and particularly the man who owned the casts that created the masks) from selling Stormtrooper masks.

It would be safe to say that Lucas felt reasonably confident about his chances of success in this case. He had already won in the US. But as lawyers will always tell you, you must take into account the differences between jurisdictions when it comes to enforcing your rights.



Unfortunately for Lucas, the courts in the UK agreed with Ainsworth that this was not a copyright issue and that the design right, which the court agreed had existed, had expired. According to the courts, Ainsworth was able to sell Stormtrooper masks anywhere he wished and, given his link with the original production, had the right to claim that he was using the original mould whilst promoting those masks.

Lucas did not win this one; one can only imagine that his paperwork for future designs and copyright was carefully redrafted. It is a sage lesson for all producers; IP rights are complex and contracts must be drafted accordingly. Securing a supplier is not a simple act of providing a purchase order; where intellectual property is involved, a contract that properly addresses the legal position is required.

Saving the Lightsaber

When it comes to film creation and the magic of bringing that vision to life, very few things have captured the imagination in as much as the lightsaber. That wonderful combination of light and sound coupled with the ability to slash your opponent to pieces! Every stick in the hands of a young Jedi fan became a lightsaber.

A US company began selling unauthorised lightsabers emblazoned with the Star Wars trademarks and, as expected, Lucas took action to shut them down. At the time, Lucas stated that their goal was "to go after and shut down businesses that are trying to make a profit off of creations and properties that do not belong to them".

When another company brought out a toy product that looked very similar to a lightsaber and was, shockingly, almost as dangerous as one it naturally caught the eye of Lucas. Interestingly, this version did not allude to Star Wars on any of the packaging. It was not called a lightsaber; there were no pictures from the movie or anything visually representing the movie on the packaging. There were no logos or branding that looked deceptively like a Star Wars logo. However, the shape of the weapon was reminiscent of the famous lightsaber from the movie series and in fact Lucas found a similarity in the handle and lodged its claim for copyright infringement. The company had to add wording to make it clear that the product was not linked to the franchise.

Beer with Me

A further issue came to light when a New York brewery that had, for almost a decade, been making a small variety of beer known as buck which is called Strikes Buck. The brewery, which is located in the Empire State building, is called Empire Brewery and so the product became known as 'The Empire Strikes Buck'.

So the marketing for the product continued without any issue until Lucas decided that the beer may cause confusion for consumers. Consumers may believe that the beer was a product associated with Lucas and the Star Wars franchise which, in the face of multiple branding exercises across numerous unusual product segments, was not entirely unreasonable. Once the Empire Brewing Company tried to register its trademark for 'Empire Strikes Buck', Lucas formally opposed the registration. Empire Brewing withdrew that application and has since successfully filed for ownership of the name 'Strikes Buck' on its own. So the force can still be with us, at least in some small bars in the state of New York.

The lesson here? You cannot win them all!

Conclusion

Lucas not only created a fictional representation of the universe that has captured the hearts, minds and souls of so many people around the world, he was also the originator of the business model that altered the way Hollywood and film studios globally made films, created stories, delivered icons, and exploited characters and other elements in order to maximise profit and exposure for his creative output. Protecting that revenue stream was, understandably, always a priority.

For young filmmakers and experienced filmmakers alike, it is educational to watch the legal manoeuvrings of those companies that have the time and resources to protect their rights in their creative outputs. Whilst the various legal cases concerning the Star Wars universe are entertaining in many respects, they are also a great way to remind producers that film production is in fact a business. Making sure that contracts are properly drafted to protect intellectual property rights is as important to a small filmmaker as it is to a large one.

May the force be with you!

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

Financial Services in MENA: The Ever Evolving Legal Landscape

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Welcome to the Banking & Finance focus edition of Law Update.

The banking sector led the GCC with a moderate upsurge in loan assets (slight increase in non-performing assets) in 2019 supported by innovative trends in the financial services and the ever-evolving legal regulatory framework. In view of the pace of the credit growth and changes in the outlook of the financial service sector, it is appropriate to begin 2020 with this edition of the Law Update dedicated to the Banking & Finance practice area.

We start by looking at the changing legal and regulatory framework. It has been another busy year for regulators that have continued their pursuit of harmonisation and modernisation across the region as is evident by the evolving legal and regulatory landscape in the financial sector across the Middle East & North Africa. Common themes during 2019, which have been identified, include: the increased focus on the regulation of FinTech activities; heightened corporate governance and money laundering procedures; and the introduction of the personal insolvency laws in the UAE. An overview of the flurry of new legislation enacted throughout 2019 and some notable legislation that is in the pipeline for 2020 are highlighted in this edition.

With the increased focus on the regulation of FinTech activities and the growing importance that financial technology is playing in the financial sector, this edition provides a deeper analysis of the FinTech Sector in the UAE covering the key legal issues this sector faces in the Middle East & North Africa. In light of the much anticipated replacement of the London Interbank Offered Rate (LIBOR) as an index for pricing loans, debt and derivatives, our feature provides a helpful comparison between LIBOR and its proposed replacement, the proposed risk free rates and its potential impact on existing or future lending.

The rise in popularity of Islamic securitisation is discussed in detail in this edition. The featured article examines legal structures of Islamic securitisation and the key commercial considerations for banks and financial institutions and, in particular, balance sheet treatment by such banks and financial institutions. In this edition we also provide a comprehensive summary of the issues to consider when setting up a derivatives trading relationship with hedging counterparties. In the funds space we have studied the growing recognition of the Dubai International Financial Centre and the Abu Dhabi Global Market as alternatives to BVI and Cayman Islands for the formation of private equity and venture capital funds for Middle East, Africa and South Asia.

Further, readers will also be provided with a round-up of some of the key developments and trends in the TMT and IP sphere, respectively. In an era of social media marketing, we look at the potential legal pitfalls faced by banks and financial institutions that are using social media to build brand awareness and strengthen client relationships.

Lastly, through our regional network this edition also covers the regional banking updates for the GCC and the greater Middle East & North Africa markets.

We hope you enjoy this edition and please feel free to share any ideas for future articles or feedback generally to **info@tamimi.com**.

Reversal of Fortune: The Growing Popularity of the DIFC and the ADGM over the Cayman Islands as a Jurisdiction of Choice for MEASA-based Private Equity and Venture Capital Funds

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The Cayman Islands have historically been a popular choice for the formation of private equity and venture capital funds for Middle East, Africa and South Asia ('MEASA') based investments. Recently, however, we are witnessing a growing trend for domiciling these types of funds in the Dubai International Financial Centre ('DIFC') and the Abu Dhabi Global Market ('ADGM'). Let's examine the factors that appear to have led to this reverse of fortune.

Background of Private Equity Platforms

In the North American market, private equity and venture capital funds are typical established using a Delaware platform with Cayman domiciled alternative investment vehicles formed on a deal-by-deal basis to address particular tax and regulatory concerns. Typical structures include limited partnerships, limited liability companies and trusts however, the exempted limited partnership structure is the most commonly used structure where subscribers invest in an equity interest in the partnership and the general partner or fund manager will participate in the performance of the fund as a 'carry' participant either through subscription for units in the fund or through a separate carry entity. 'Carry' or 'carried interest' is a share of the profits of an investment paid to the general partner or fund manager as compensation regardless of whether they make a contribution to the fund. Carried interest compensation is typically agreed at about a quarter of the fund's annual profit. It is intended to motivate the general partner or fund manager to increase the fund's performance. Carried interest is typically only paid if the fund's returns meet a certain threshold. Since carried interest is considered a return on investment in taxable jurisdictions, it is taxed at a capital gains rate and not an income rate.

Regionally-based fund managers have also typically used a Cayman Islands platform for establishing their private equity and venture capital funds coupled with the incorporation of local SPV's for investing in MEASA-based investments.

Reasons for the Popularity of the DIFC and the ADGM as Fund Jurisdictions

We have witnessed a growing movement in the MEASA region away from domiciling private equity funds in the Cayman Islands to domiciling them in the DIFC and the ADGM. Fund managers are quick to point out the following reasons for this trend:

- the DIFC and the ADGM offer a unique choice of options and platforms to meet the desires of business ventures in the region. They have been very creative at enhancing the private equity platforms that were traditionally offered by offshore jurisdictions like the Cayman Islands. They offer a diversity of choices for the ideal fund structures and licensing options resulting in an unique regional platform to launch, distribute, manage, domicile and promote all types of private equity funds;

- there is a momentum driving private equity activity in the region due, in part, to institutions, high-net-worth individuals and family offices looking to diversify their portfolios by creating a broader local investor-base for regionally themed funds;
- governments in the region are also considering public-private partnerships creating another opportunity for domestic private equity structure;.
- fund managers are responding to the desire of venture capitalists, many originating in the United States, the United Kingdom, Europe and Asia, who are looking for liquidity with regional partners supported by highly skilled locally-based service providers and legal counsel who understand the local market and regulatory environment to assist with their unique fund raising objectives;
- the DIFC and the ADGM understand and have instituted a regulatory framework for Shari'a compliance and Islamic finance generally.

The Growing Popularity and International Recognition of the DIFC and ADGM

Proactive and Responsive Regulators

The DIFC and the ADGM offer similar platforms to those offered in the Cayman Islands, however, both the DIFC and the ADGM offer their clients a regionally-based common law platform with very proactive and responsive regulators. The DIFC is a leading global financial center ranking 8th in the Global Financial Centres Index ('GFCI'). It has been in existence for 17 years now. Many international and regional banks, asset managers and investment advisors are established in the DIFC making it an attractive jurisdiction for financial firms seeking to establish themselves in the region. Alternatively, the ADGM is the newest offshore financial ecentre. It is an attractive jurisdiction for financial start-ups because of its pro-active regulator seeking to position itself as a dynamic and pro-business financial free zone.

Venture Capital Initiatives

The DIFC and the ADGM have made significant strides in the venture capital arena. The ADGM has recently introduced a calibrated venture capital fund manager framework in the region. It has streamlined the applicable regulatory requirements for unlisted, exempt or qualified investor closed-ended private equity venture capital platforms that offer equity positions in domestic companies by way of private placement to 'Professional Clients'. The subscription is limited to US$100 million unless otherwise agreed with the regulator. The features of this regime include the waiver of most of the prudential regulatory requirements. Further, there are no minimum regulatory capital requirements. Building on an objective of decreasing costs for establishing a VC fund in the ADGM, the regulator does not require the VC fund manager to appoint an internal auditor, independent custodian, independent valuer or independent fund administrator. These are very attractive features for start-ups. This new framework is bespoke to the ADGM and has many features aimed at attracting VC managers to set up in this jurisdiction.

The DIFC has also recognised and responded positively to the growing regional venture capital market. The DIFC's US$100 million FinTech fund was announced during the inaugural Global Financial Forum ('GFF'), organised by DIFC at the end of 2017. The FinTech-focused fund is set to accelerate the development of financial technology by investing in start-ups from incubation through to growth stage and help FinTech firms looking to access the MEASA markets. The FinTech fund objective is to leverage the DIFC's FinTech platform consisting of attractive experimental licenses, market leading pricing and collaborative spaces.

Marketing Initiatives (Passporting)

Marketing and promotion of foreign funds in the United Arab Emirates ('UAE') imposes additional requirements that domestic funds established in the DIFC or the ADGM do not face. The Securities and Commodities Authority ('SCA') Chairman Resolution No. 9 R.M. of 2016 (Concerning the Regulation on UAE) Mutual Funds) ('Fund Regulations') and the Chairman of the SCA Board of Directors Resolution No. 3 of 2017 Concerning the Organization of Promotion and Introduction, set out the requirements for the promotion of foreign funds in the UAE. A fund manager who wishes to promote a foreign fund in the UAE has a duty to register the fund with the SCA, annually renew its registration and, subject itself to certain prescribed exceptions (i.e., reverse solicitation and promotion to qualified investors other than natural persons), appoint a local promotor. Registration of a foreign fund requires the funds to be registered or regulated within their foreign jurisdiction or otherwise be able to demonstrate that the fund is not exempted from any regulation or supervision rules or the regulations for preparing and issuing periodic reports at is domicile of incorporation. The SCA will look at each application on a case-by-case basis to determine if the particular applicant meets this standard. While a certificate of good standing from the foreign jurisdiction is occasionally sufficient to meet this threshold (i.e., notably, in our experience, for Cayman Islands' segregated portfolio companies), often the SCA will require that the foreign fund demonstrate that it is registered or regulated in its home jurisdiction. Since closed-ended private equity funds are not typically regulated in the Cayman Islands, often fund managers will voluntarily register such funds with the Cayman Islands Monetary Authority and incur the additional costs to satisfy the SCA's registration requirements.

The attraction in establishing a private equity fund in the DIFC or the ADGM is the ability to promote such funds throughout the UAE following the recently signed Passporting Agreement by the SCA, the DIFC and the ADGM. The Passporting Agreement facilitates the mutual promotion and oversight of investment funds established in the different jurisdictions within the UAE with the objective of having greater diversification of investment opportunities and products. The passporting regime enables investors to access growth opportunities with greater ease and efficiency. It will invariably bolster the UAE's economic diversification strategy and attract more foreign direct investment and new investors and institutions to participate and support the growth of the local economy and the development of the region.

The passporting rules will enable a local fund manager authorised by the DIFC, the ADGM or the SCA to market their funds throughout the UAE without the need for further authorisation or approval, provided they meet the relevant requirements and notify the respective regulators. Fund managers are required to identify the jurisdictions in which they plan to promote their funds and provide a copy of the offering documents. If the fund manager will be engaging placement agents, he/she will need to disclose this information to the relevant regulator. The respective regulators are obligated to maintain a register of passported funds. They have the power to remove a fund from its register if the regulator determines that the fund manager is not complying with the rules, the fund is wound up, or if one of the other regulators or the fund manager requests that the fund be removed.

The passporting rules afford domestic funds in the UAE a significant advantage over foreign funds that wish to promote their funds in the UAE in that they provide a further significant motivation for fund managers to choose to establish their private equity platforms in the UAE.

Conclusion

The DIFC and the ADGM have gained international recognition as world-class regulators offering private equity platforms that are competing in a very meaningful way with the traditional Cayman Islands funds regime. They are doing so by being pro-active, cost-effective and extremely creative at meeting and increasingly exceeding the demands of sponsors and private equity and VC fund managers. Each regulator has created flexible fund platforms that are enhanced by the ease of marketing and promotion throughout the UAE through a passporting regime that is resulting in fund managers embracing the DIFC and the ADGM as jurisdictions of choice over the Cayman Islands for MEASA-based investors and investments.

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FinTech Space in the United Arab Emirates

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The UAE, including the Abu Dhabi Global Market ('ADGM') and the Dubai International Financial Centre ('DIFC') continues to be actively involved in the development of the financial technology ecosystem within the MENA region particularly around areas of cryptoassets, the regulatory laboratories and testing licenses, financial technology licensing, digital banking and crowdfunding.

Given the vastness of the subject, this article focuses on areas of cryptoasset and the regulatory laboratories and the testing licenses.

Cryptoassets and Initial Coin Offerings ('ICOs')

Central Bank and SCA

There are currently no regulations on cryptoassets or ICOs onshore in the UAE. There have been several press releases and statements issued by the UAE Central Bank confirming that it does not approve any private cryptocurrencies or schemes and has not issued any licenses in the UAE. However, no formal notification or set of guidelines have been issued by the Central Bank in this regard.

Initially the UAE Securities and Commodities Authority ('SCA') issued a public warning statement, in February 2018, on ICOs reiterating that the SCA does not regulate, mandate, or recognise any ICOs. The statement also highlighted the risks associated with investments in ICOs. This was followed by an announcement, later that year, indicating the SCA's intention to regulate ICOs and recognise digital tokens as securities.

Taking a step further, the SCA, in October 2019, issued draft regulations relating to cryptoassets. SCA invited feedback from various market players regarding these regulations. The draft regulations primarily dealt with token issuance requirements, trading and safekeeping practices with an emphasis on protecting investor interests, financial crime prevention measures, cryptoasset safe-keeping standards, information security controls, technology governance norms and conduct of business requirements for all market intermediaries.

In the midst of these developments, the Dubai Multi Commodities Centre ('DMCC'), one of the free zones in the UAE issued licenses for conducting 'proprietary trading in cryptocommodities'. Activities of the entities holding such licenses are limited to trading in cryptoassets for and on their own behalf.

Dubai Financial Services Authority ('DFSA')

Similar to the onshore position, there are no laws or regulations around cryptoassets in the DIFC. In 2017, DFSA issued a statement highlighting that issuance and offering of cryptoassets and the systems and technology that support them are complex and therefore have a high risk associated to them. In the said statement, it was confirmed that it does not regulate product offerings in connection with cryptoassets and also that it would not licence firms undertaking such activities. There has been no change in this position since then.

Financial Services Regulatory Authority ('FSRA')

Taking a lead on the regulation of cryptoassets in the ADGM, in June 2018 the FSRA issued guidance on conducting cryptoasset activities and has accordingly amended the relevant financial regulations applicable to ADGM. This guidance is supplementary to and should be read in conjunction with FSRA's earlier guidance on regulation of ICOs, token offerings and virtual currencies issued in October 2017.

These guidelines were supported by an additional guidance "Regulation of Digital Security Offerings and Cryptoassets under the Financial Services and Markets Regulations" and "Cryptoasset Activities" both of which were issued by the FSRA earlier in 2019.

The former is applicable to those considering the use of ICOs to raise funds including those considering transacting in, and the general use of, virtual tokens and cryptoassets. Whereas, the latter sets out the FSRA's approach to the regulation of cryptoasset activities in ADGM, including activities conducted by cryptoasset exchanges, cryptoasset custodians and cryptoasset intermediaries.

The guidance on cryptoasset activities applies to: (a) applicants intending to carry on the regulated activity of operating a cryptoasset business ('OCAB') in or from the ADGM; (b) licensed entities in respect of carrying on the regulated activity of OCAB in or from the ADGM; (c) recognised investment exchanges with a stipulation on its recognition order permitting it to carry on the regulated activity of OCAB within the ADGM; and (d) applicants and licensed entities in respect of the use of stablecoins in or from the ADGM.

Guidance on the use of stable coins seems to be a recent addition to the OCAB framework. Stablecoins are blockchain based tokens that are valued by reference to an underlying fiat currency or basket of assets. These typically are less volatile than typical cryptoassets, which makes them a more lucrative option as a medium of transfer of value within the cryptoasset domain. In addition to being a safe store of value, the ability to liquidate a stablecoin to fiat currencies seem to be higher than cryptoassets, therefore leading to a growing demand for such digital tokens.

Testing Laboratories

Sandbox

Under the SCA's announcement in September 2018, indicating its intention to regulate ICOs and recognise digital tokens as securities, it also approved draft regulations setting the regulatory controls for the FinTech sector in the form of a pilot regulatory environment (i.e. the sandbox) in order to enhance and support the financial integrity of financial technology companies.

The draft regulations explained Sandbox as a process-based framework that shall allow entities to test innovative products, services, solutions and business models in a relaxed regulatory environment, but within a defined space and duration. Under this framework, SCA intends to work together with the participants to evaluate the innovative products, services, solutions or business models with a view to identifying legal and regulatory requirements which can potentially be relaxed or waived throughout the duration when the participants are within the Sandbox regulatory regime.

SCA continues to discuss the said framework as well as the draft regulations with the relevant market players and is currently inviting comments on Sandbox controls from these players.

FinTech Hive Accelerator

Similar to the SCA's proposed Sandbox regime, FinTech hive is an accelerator programme of the DIFC aimed at encouraging technology entities that have a product or service offering that benefits the financial services sector or the digital space. The programme allows FinTechs, InsurTechs, RegTechs and Islamic FinTechs, an opportunity to develop, test and adapt their technologies in the DIFC, in collaboration with top executives from the DIFC and regional established financial institutions.

To the extent applicants intend to provide innovative solutions in the financial services sector, the DFSA offers an innovation testing licence to such applicants. This restricted financial services licence allows qualifying applicants (i.e. participants) to develop and test innovative concepts from within the DIFC, without being subjected to all the regulatory requirements that normally apply to regulated firms. In order to determine the level of restriction and support the DFSA works with the participants to understand the business proposal and establish the appropriate controls for the safety of clients (if any) involved, on a case-by-case basis.

The UAE, including the Abu Dhabi Global Market ('ADGM') and the Dubai International Financial Centre ('DIFC') continues to be actively involved in the development of the financial technology ecosystem within the MENA region.

The validity of such a licence typically ranges from a period of six to twelve months, during which the participants are expected to complete the testing and development of the solution. At the end of the prescribed period, if the participant meets the outcomes detailed in the regulatory test plan, it can opt for migration to full authorisation. If it does not meet the outcomes, the participant will be required to cease activities within the accelerator programme.

RegLab

The ADGM RegLab is a regulatory framework introduced by the FSRA to provide a controlled environment to FinTech participants to develop and test innovative solutions.

The FSRA offers licenses for developing financial technology services within the RegLab. Such a licence permits the participants to develop and test innovative FinTech services, business models and delivery mechanisms. Similar to the DFSA model, in order to facilitate such development and testing, the FSRA assesses the risks posed in each FinTech participant's business model and accordingly tailors a set of appropriate regulatory controls on a specific, case-by-case basis. These regulatory controls are less onerous than those applicable to regulated entities in general in the ADGM. The tailoring of regulatory controls are usually subject to restrictions regarding the scope and scale of the test activities in order to mitigate the associated risks and impact.

The licence is typically valid for a period of two years, during which period the participants are expected to successfully develop and test their FinTech solution, to a point it can be commercially launched. Similar to the DFSA approach, at the end of the testing period, the participant is provided an option to migrate to a full licence, if the trial is successfully completed and the innovation is ready to be commercially launched. However, if this is not the case, the participant is required to cease its activities in the ADGM and exit the RegLab.

Conclusion

Whilst the Central Bank, the SCA, FSRA and DFSA have their own set of laws, rules, regulations as well as guidelines for regulating FinTech activities within their respective jurisdictions, efforts are being made to align the regulatory landscape and boost the overall development of the FinTech ecosystem.

These jurisdictions do not provide for any passporting arrangements. Accordingly, the FinTech participants will have to limit their activities within the jurisdiction in which they are incorporated and would therefore require additional licensing for conducting activities in other jurisdictions.

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Legal Transformation affecting the MENA Banking Sector

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The legal and regulatory landscape in the financial sector across the Middle East has continued to see a period of change and reform over the past year. In line with international best practice, regulators have continued their pursuit towards liberalisation and modernisation of laws to enhance business opportunities for investors. Similar themes have also been noted across the Middle East, for example, the introduction of Law No. 20 of 2019 on combating money laundering and terrorism in Qatar, the amendments to the Banking Law in Jordan in relation to corporate governance and the introduction of new laws in KSA to regulate the creation of security over movable property. It is also apparent that increased focus on the regulation of FinTech activities has been at the forefront of new regulations across the region. This is a significant recognition of the ever-growing importance that financial technology is playing in the financial sector.

This article looks back on some of the key financial services' legal and regulatory developments in the Gulf and wider Middle East and also touches upon what's to come.

United Arab Emirates

For the first time in the UAE, UAE Federal Law No. 8 of 2018 on Finance Lease (which came into effect on 1 January 2019) was introduced in order to provide a distinct regulatory framework for conducting finance lease business in the UAE. Key aspects of the law include: registration of a lease to make it binding on third parties and preserve priority; the requirement to obtain a licence from the Central Bank to undertake finance lease activities; and provisions relating to ownership of the asset upon expiry of its term. Compliance with the law is underpinned by strict penalties for those who are in breach.

On 28 January 2019 the Central Bank of the UAE issued Cabinet Resolution No. 10 of 2019 Concerning the Implementing Regulation of Federal Law No. of 2018 (the 'Resolution'). The Resolution introduced a risk- based approach to be adopted by both financial institutions and designated non-financial businesses to assess a client's money laundering risk. This includes carrying out prescribed customer due diligence to manage potential money laundering risks, submitting suspicious transaction reports to the Financial Information Unit, conducting additional risk assessment measures in respect of politically exposed persons who are UAE nationals and finally, ensuring the maintenance of records of all of the information which would be required as part of the customer due diligence process, while making this information available to the relevant authorities when so requested.

More recently, Federal Law No. (20) of 2016 on Mortgage of Movables as Guarantee for Debts has been amended pursuant to Federal Law no. 24 of 2019 (as amended, the 'Movables

Law). Two of the key amendments include: the right of an assignee under an assignment to register the assignment at the EMCR; and the Movables Law applying to mortgages by possession only. The former is a significant departure from the existing law as previously there was no requirement to register an assignment at the EMCR.

The new personal insolvency law is in force now and will seek to support individuals facing existing or anticipated financial difficulties. While, in the short term, there will be some uncertainty as to how these laws will unfold, generally they are a welcome addition to the insolvency laws introduced for companies in 2016.

Looking ahead, it is clear that regulators will remain active in the UAE during the course of 2020. The Central Bank of the UAE has proposed draft regulations for loan-based crowdfunding platforms operating in the UAE. As an attempt to develop the FinTech sector, the regulations provide a framework for licensing, regulating and monitoring loan-based crowdfunding platforms to enhance consumer protections and mitigate financial risk. Further, enhanced consumer protection measures, the regulation of crypto-assets and the regulation of outsourcing are also in the pipeline for 2020.

Saudi Arabia

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The Saudi Arabian Ministry of Commerce and Investment ('MOCI') announced, in March 2019, the issuance of the Regulations of the Unified Registry for Commercial Pledges (the 'Regulations'). The Regulations are an important step in the implementation of the Commercial Pledge Law issued in April 2018 (the 'CPL'). The CPL regulates the creation of security over movable property including current and future movable property as well as future rights (including receivables).

Clarity has now been provided under the Regulations as to the functions, operation and management of the registry for commercial pledges (the 'Registry'). All services of the Registry under the Regulations will be provided electronically. The Regulations provide for the procedure for registering pledge contracts with the Registry and cancellation and renewal of such registration.

Where a specific special registry (the 'Special Registry') regulates the ownership of a particular movable property but does not record security interests over such property, the pledgee must ensure that the requirements for registration of pledge contracts are complied with and the Registry will notify the relevant Special Registry. In other cases, where the Special Registry registers a security interest (e.g. at the Depository Centre established by the Tadawul for listed shares), then such security interest is required to be registered at the Special Registry.

In line with the Regulations, MOCI has launched the electronic registration system to operate the Registry which allows the registration of pledge contracts (made in accordance with the CPL) for various types of movable assets.

MOCI has published the User Guide for the Regulations (the 'User Guide'), clarifying how the Registry will be managed. The User Guide lists the processes (among others_ of: (i) registration of pledge contracts; (ii) conducting a search of the Registry; and (iii) uploading constitutional documents of the parties (to the extent relevant and applicable). The user of the Registry (KSA national/ Muqeem, GCC national or SAGIA foreign investor) must first create an account through the portal: https://efile.mci.gov.sa. Following the creation of the account in the Registry, the services of the Registry can be accessed through the portal: https://rhn.mci.gov.sa.

Kuwait

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Recognising the ever-growing importance financial technology is playing in the financial sector, the Central Bank of Kuwait ('CBK') has, over the past year, spent much of its time aiming to encourage and adapt to the growth of differing technology in the financial space while still trying to ensure the protection of the Kuwait financial and banking sector by adopting appropriate policies and regulations. To that end, the CBK issued the Regulatory Sandbox Framework (the 'Framework') with the stated objective of temporarily exempting participants from certain regulatory or licensing requirements in order to adopt and promote innovation in the Kuwait financial sector. The Framework is aimed at companies and individuals that provide financial products or services that are based on, or relate to, electronic payment of funds by using new or innovatively applied technology.

An applicant approved to participate by the CBK in the Framework has one year to complete a four-stage process. The first stage of the process is the application stage. During the application stage the participant must show the CBK that the product or service meets the eligibility criteria.

Specifically, an applicant must show: (i) that the service or product is to be launched in the local market; (ii) that the service or product does not contravene the laws and regulations of Kuwait; (iii) that the service or product has a benefit to both the customer and the market; and (iv) the service or product must be in an advanced enough development position to test.

The next stage is what the CBK is called the evaluation stage. During this stage, the applicant will be thoroughly evaluated from all technical, security and regulatory aspects relating to the service or product. The third stage is the experimental stage where, in collaboration with the CBK, the applicant initiates a technical, safety and operational testing of the proposed service or product in a controlled environment. Among other things, testing will include measuring the level of compliance of the product or service with existing CBK regulations, verifying that security measures are embedded within the proposed product or service and that customer confidentiality and privacy standards are upheld. The final stage is the accreditation stage. It is at the accreditation stage when the CBK will grant its initial approval or reject it for the proposed product or service.

Bahrain

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The Central Bank of Bahrain ('CBB') issued regulations on open banking in November 2018 that apply to 'account information service providers' and 'payment initiation service providers'. The regulations are the first of its kind in introducing open banking regulations in the MENA region and enables consumers' personal information to be shared between organisations in a standardised and secured manner. Through the use of application programming interfaces, third-party financial service providers can access the information efficiently and cost effectively thus enabling the development of innovative

FinTech solutions. The Open Banking Module is included in Volume 5 of the CBB Rulebook that governs ancillary service providers. In February 2019, the CBB also issued regulations to govern and license 'regulated crypto-asset services'. Regulated crypto-asset services include trading, dealing, advisory and portfolio management services in 'accepted crypto-assets' either as a principal, agent, custodian or as a crypto-asset exchange within or from Bahrain. Overseas domiciled, incorporated persons and entities dealing in crypto-assets can obtain a licence and operate within Bahrain as an 'overseas crypto-asset service license'. The Crypto Asset Module is included in Volume 6 of the CBB Rulebook that governs Capital Markets. Further, in March 2019, the CBB issued directives on 'Digital Financial Advice', which is the provision of financial advice using technology (also commonly known as robo-advice or automated advice). Digital financial advice is subject to a comprehensive governance and control framework given that the technology is based on algorithms and assumptions that translate consumer inputs into financial advice.

On 21 March 2019, the CBB issued Resolution No. 23 of 2019 regarding the Issuance of Regulations in respect of Short Selling and Giving Securities on Loan (the 'Resolution'). The Resolution was issued pursuant to Article 92 of Decree No. 64 of 2006 with respect to promulgating the CBB and Financial Institutions Law. It provides that "the Central Bank shall specify the types of securities, which may be traded by loan and short sale, the terms and procedures of such transactions and the rights and obligations of all concerned parties." The objective of this Resolution is to improve the efficiency of the capital markets in Bahrain by promoting new investment and trading strategies through diversification of investment instruments with a view to leading to better price discovery, enhanced liquidity, and attracting new sophisticated investors.

More recently in August 2019, the CBB issued regulations on insurance aggregators enabling customers to find and choose insurance quotes from several insurance companies under a single electronic platform or mobile device application. Insurance aggregators are the intermediaries with an insurance broker's licence that operate online platforms (whether hosted on an internet website or available as a smart device application) to provide price comparisons and facilitate the purchase of insurance policies from several insurance licensees.

Finally, on 18 January 2019 and 1 August 2019, the Competition Law (Law No. 31 of 2018) and the Personal Data Protection Law (Law No. 30 of 2018) ('PDPL') came into force respectively. The PDPL, among other things, provides individuals with rights in relation to how their personal data is collected, processed and stored. It imposes new obligations on how businesses manage this information, including but not limited to, ensuring that personal data is processed fairly, that data owners are notified of when their personal data is collected and processed and that data owners can exercise their rights directly with businesses.

Looking ahead, the draft Secured Transactions Law which has undergone industry consultation and review for the last few years is expected to come into force in 2020. The new law will significantly change the way security is created in Bahrain and will allow security to be created over future assets.

Jordan

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In May 2019, the Central Bank of Jordan ('CBJ') enacted the Amended Law No. (7) of 2019 ('Amended Banking Law'), which amends the Banking Law No. (28) of 2000. On the corporate governance front, the Amended Banking Law seeks to better align a bank's governance structure with its highly leveraged business model, thereby reinforcing the legitimacy of previously introduced legislative measures. For example, the Amended Banking Laws impose restrictions on board members' remuneration and independence, as well as such members' qualifications and experience. More importantly, the CBJ now requires every bank to establish an auditing committee for such committee's specialised oversight over the bank's audit processes and policies. Further, CBJ's prior written consent is now required for the transfer of bank shares that may result in a significant change in ownership, or where there is an increase in the ownership of a significant shareholder.

With regard to facilitating greater stability within the banking industry, the CBJ introduced Instructions on Exposure Limitations and Credit Controls No. (2/2019) ('IELCC') for controlling risk levels borne by banks in credit grants. In line with the Basel standards, the IELCC sets the limit for a bank exposure to one single counterparty (defined as 10 per cent of Tier 1 capital) at 25 per cent of Tier 1 and requires lower thresholds for related persons. In effect, because the IELCC's framework addresses both, on- and off-balance sheet exposures, it progressively reduces the banking industry's exposure to concentrated risks.

Meanwhile, in light of increased usage of payment systems, the CBJ is in the process of finalising the issuance of new regulations and instructions for enhancing customer protection. Forthcoming regulations and instructions are anticipated that will require the accreditation and licensing of all international payment providers currently operating in Jordan. Such regulations and instructions aim to enhance CBJ's oversight of this industry.

Finally, further to the Securing Rights by Moveable Assets Law No. (20) of 2018 and the Registry of Rights Over Moveable Assets Regulation No. (125) of 2018, the Ministry of Industry, Trade, and Supply has facilitated the registration and search process for security and assignment of interests over moveable assets by providing for their publication on a central registry. As such, security interest holders are advised to publish their interests by February 2020 in order to safeguard the priority of their security interests.

Iraq

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The Central Bank of Iraq ('CBI') has been active over the past year in developing Iraq's banking infrastructure. These developments follow and supplement the successful removal of Iraq from the FATF's list of 'jurisdictions of strategic deficiencies', a milestone that has catalysed the evolution of Iraq's legal and regulatory architecture.

In line with the standards set forth under Basel III, CBI's particular focus has shifted towards bank stability. Essential changes include CBI's introduction of minimum liquidity thresholds, which require banks to adjust their liquidity on the basis of a delineated maturity scale model. Specifically, a bank must match high quality assets to certain liabilities on the basis of specified criteria to ensure it has the capacity to meet tentative payment obligations while it continues as a going concern. Moreover, the CBI has published a detailed stress testing manual that encompasses specifications for sensitivity and scenario analyses, among others. In addition to adjusting its operations on the basis of its specific test results and findings, a bank must submit its results and findings to the CBI in a timely manner. Standards articulated under this manual are merely floor thresholds for purposes of compliance. Furthermore, the CBI has published a comprehensive manual on risk management and internal control systems for conventional banks. This manual articulates operational and governance frameworks, among other guidelines, for a bank's strategic plan to mitigate risks. It also encompasses supplementary guidance on stress testing.

Meanwhile, for fostering competition in the banking industry and consumer protection, two ancillary goals to bank stability, the CBI has introduced new instructions for bank mergers and acquisitions. Chiefly, these instructions require the CBI's review and pre-approval of any potential bank merger or acquisition. This pre-approval condition permits the CBI to evaluate and, subsequently, manage, the systemic effects of bank mergers and acquisitions. Consequently, parties to a relevant transaction must submit an application to the CBI for its approval at least 60 days prior to the intended date of execution. The aforementioned application requires extensive disclosures to the CBI, including the filing of the transaction's proposed agreement, profitability and feasibility study, and implementation plan, among others.

Egypt

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The regulatory regime governing the banking sector in Egypt has witnessed significant changes largely propelled by the implementation of Egypt's general economic reform agenda with the aim of creating a more stable and safe banking industry in Egypt. It is expected that the New Banking Law, to be issued during the first quarter of 2020, will introduce a number of changes to the banking sector including, among other things: (1) strengthening the governance and independence of the Central Bank of Egypt ('CBE'); (2) adopting internationally recognised banking standards; (3) raising the minimum capital requirements for banks operating in Egypt; and (4) regulating co-operation among the CBE, the Egyptian government and authorities tasked with monitoring the financial sector. Despite such significant developments, the recent move by Egyptian regulators towards creating robust and effective regulatory regimes, governing non-banking financial instruments has been the most notable shift in the Egyptian banking sector.

The aim of this shift is to create an inclusive non-banking financial system through the economic empowerment of marginalised groups by facilitating their access to financing. The non-banking financial market in Egypt is overseen by the Egyptian Financial Regulatory Authority ('FRA'). A four-year strategy (2018/2022) for the development of the non-banking financial sector in Egypt has been adopted and is currently being implemented, whereby the strategy is based largely on carrying out comprehensive structural and legislative reforms. The most noteworthy regulatory updates in the non-banking financial market in Egypt include: (1) the issuance of law No. 176 of 2018 on financial leasing and factoring; (2) the issuance of a number of decisions by the FRA regulating microfinancing activities in Egypt; and (3) the introduction of amendments to the Egyptian capital markets law specifically regulating the issuance of Sukuk certificates.

Expected regulatory updates in the Egyptian non-banking financial market include the issuance of a law governing consumer financing, a law governing the financing of small and medium enterprises as well as a law governing crowdfunding activities in Egypt. The FRA's strategy also includes the proposition of appropriate legislative amendments required to adopt electronic means as an approved means of notification and as means of dealing with the entities which fall under the supervisory umbrella of the FRA.

Qatar (including Qatar Financial Centre)

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The introduction of Law No. 20 of 2019 ('New AML Law') seeks to replace Law No. 4 of 2010 on combating money laundering and terrorism and to incorporate the latest international standards adopted by major international organisations including the Financial Action Task Force. The New AML Law focuses on increased due diligence measures and risk assessment procedures to be adopted by both financial institutions and designated non-financial businesses or professions and includes measures relating to sharing or exchanging of information and international co-operation between Qatari public authorities and their foreign counterparts. The New AML Law sees a significant increase in the penalties for violations of the provisions of the New AML Law, including financial sanctions and imprisonment for any person convicted under the New AML Law.

Following the recommendation of the International Chamber of Commerce (in co-ordination with International Chamber of Commerce, Qatar) for achieving best international practices, the Qatar Central Bank has recently introduced a unified form for letters of demand guarantee and has directed all locally licensed financial institutions to adopt the unified form. The aim is to standardise the form of the demand guarantees for all banks operating in Qatar as well as to reduce the risks associated with the interpretation and enforcement of demand guarantees, including the elimination of open-ended guarantees and the requirement to insert a termination date.

The Qatar Central Bank has also issued Decision No. (7) of 2019 on the instructions for licensing, organising and supervising the business of insurance support service providers, pursuant to the provisions of Law No. 13 of 2012 (the 'QCB Law') (the 'QCB Insurance Support Service Provider Regulations'). The QCB Insurance Support Service Provider Regulations sets out a mechanism for licensing procedures and certain competencies and expertise that must be met by each insurance support service provider. The insurance support service providers include the representatives of the insurance company, insurance brokers, reinsurance brokers, insurance consultants, actuarial experts, inspection experts, damage assessment experts, insurance management company and banks authorised to practise bank insurance business.

Further the new Financial Services Rulebook issued in May 2019 (the 'FSR') by the Qatar Financial Markets Authority sees the replacement of the previous Financial Services Rulebook. The FSR sets out certain additional requirements in relation to the licensing and conduct of financial services activities including capital requirements for different types of brokers and financial services.

Finally, the Qatar Financial Centre ('QFC') has announced that the new Customer and Investor Protection Rules 2019 have been effective from 1 January 2020, and will replace the Conduct of Business Rules 2007. In addition, a new Customer Dispute Resolution Scheme Rules 2019 will be introduced by QFC effective from 1 January 2020 which will provide for the establishment of an independent body for dealing with complaints by customers of authorised firms.

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Banking on Intellectual Property; the Future of Banking

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It could be argued that the traditional way of doing business has resisted technology for years. This is now changing. The physical storage of data on business premises, physical attendance for signing of of transactional documentation as well as document verification were often considered to be barriers, by central banks, which, could be said, to the evolution of technology in financial services. Today, mobile apps, cloud storage and facial recognition are the new norm. Technically speaking, money exchange houses could do away with all branches, yet regulations still impede their ability to become fully efficient and optimally streamlined. Financial institutions are increasingly looking to strike a balance between anti-money laundering/Know Your Customer regulations and the offering of smart services with minimal operational costs. In the past, customers may have preferred one bank over another due to its branch network or strength of assets. Today however, the choice is influenced by user friendly apps and quicker access. The exploitation of intellectual property rights by financial institutions has expanded from the mere branding of slogans, names and colours to the development of software and investment in FinTech. For this reason, financial institutions will also need to secure their intellectual property rights in order to protect their investment and brand.

These changes have encouraged many banks to re-brand and move away from their traditional long names to adopt smarter and more catchy trademarks while continuing to serve the brand promise and purpose. Whether it be CITI, FAB or ENBD, smart branding represents the first step in an institution's drive towards innovation. Re-branding is not easy to achieve given the international reach of banks in a very crowded trademark space for financial services. Class 36, being the core class for financial services, is shared, among others, with insurance companies, banks, exchange houses, investment firms and real estate developers. Word marks such as NATIONAL, FIRST, TRUST and abbreviations usually face trademark opposition challenges when attempting to be registered. Furthermore, mergers and acquisitions in the financial sector require banks to ensure their trademarks are capable of protection in new territories which may be included as a result of the merger or acquisition. Launching a brand or re-branding, therefore necessitates a wider geographical scope of trademark due diligence than the current territory of operations. Innovation in banking transactions has led to banks investing in financial technology. A report established that "US banks are future-proofing by actively investing in Fintech start-ups. In 2019 YTD, US banks have participated in 24 equity deals to FinTech companies. This follows a record 2018, where US banks backed 45 equity deals to FinTech startups – a 180% increase from 2017."[1] These investments ranged from payment and settlement solutions, software for customer-facing and backend operations, lending, blockchain and regtech.

These ventures have opened up the financial sector to intellectual property beyond trademarks in order to address copyrights and patents. As such, intellectual property audits in the course of mergers, acquisitions or even investing in start-ups, require the assessment of different types of intellectual property assets. The purpose of these ventures allows banks the potential for high returns from the future profits of these start-up investments, as well as the ability to establish strategic partnerships. Investment in intellectual property asset-based start-ups also enables banks to open up their platforms to third party access in what is known as 'Banking as a service'. Banking as a service is defined as "the process of digitally connecting FinTech companies to banks via APIs. This connection allows companies to build consumer banking products on top of banks' regulated infrastructure gives companies access to banking toolkits, so they can integrate regulated banking products into existing consumer apps." As such, consumer apps could benefit from direct linking of their bank accounts.[2]

The brick and mortar model of banking growth has done away with the evolution of technology and utilisation of intellectual property backed start-ups. While in-house counsel is traditionally required to have banking and corporate experience, the need for specialist intellectual property experts has become an important part of any bank's systems and processes going forward.

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[1] https://thefinanser.com/2019/08/where-top-us-banks-are-betting-on-fintech.html/
[2] https://www.cbinsights.com/research/what-is-banking-as-a-service/

Understanding Islamic Securitisation

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Islamic finance structures are based on the precepts of the Shariah. Broadly speaking the Shariah is the body of Islamic jurisprudence that regulates various aspects of life including politics, economics, and succession. In the context of finance, the Shariah prescribes certain prohibitions, which constitute the main principles of Islamic finance. These prohibitions relate to charging of interest (Riba), uncertainty (Gharrar) in contracts, contracts relating to gambling (Qimar) and contracts pertaining to unethical investments. In addition, Islamic finance transactions are required to have a linkage to an underlying tangible asset (e.g. commodities, vehicles, real estate etc). In other words, an Islamic finance transaction will typically involve the sale of an asset, the lease of an asset or a joint venture or partnership in an operation or new business venture.

Islamic Securitisation

Islamic securitisation is a legal structure that uses the main principles of Islamic finance to achieve the economic purpose of transformation of non-tradable assets into tradable securities. Islamic securitisation relies on structural arrangements of asset transfer from the originator of the asset to a special purpose vehicle that will issue securities. The assets typically comprise of income generating financing arrangements entered into between financial institutions and their customers. These income generating financing arrangements can comprise of a portfolio of home financing contracts structured using Ijara financing, a vehicle finance portfolio structured using Murabaha or Ijara financing or participations in larger syndicated financing transactions concluded using Shariah compliant structures.

Balance Sheet Treatment

One key commercial consideration for a financial institution seeking to undertake securitisation is to remove the relevant asset being securitised from its balance sheet and to book the proceeds received as income. This treatment is possible if the receivables are sold on a 'true sale' basis. Auditors usually require a legal opinion to confirm that a 'true sale' of the receivables has been effected.

The transfer is carried out on a true sale basis using either the legal concept of novation or assignment of rights. The procedures for carrying out a novation or assignment must be consistent with the rules of the jurisdiction where the assets (i.e. the ultimate obligors) are located. Therefore, if the obligors are located in the UAE, the procedures for carrying out a novation or assignment must be consistent with UAE law. The other features required to achieve the requisite balance sheet treatments are: (1) the assets transferred should be segregated into a bankruptcy remote vehicle such that the bankruptcy or the originator of the assets does not have an impact on the transferred assets; and (2) the originator should have no obligation to repurchase the transferred assets, in other words the transfer should occur on a 'without recourse' basis.

From a Shariah perspective it is difficult to segregate the receivables derived from the physical asset that generates the receivables. For example, as part of a home finance portfolio consisting of real estate Ijara transactions, the financial institution (originator) would hold the title to the real estate it has financed. In this example, the real estate would be transferred to the special purpose company (being the issuer of the Sukuk) and the Ijara agreement would also be novated in favour of the special purpose vehicle.

Understanding Sukuks

The most popular asset-backed securitisation structure within Islamic finance is Sukuk. In the Shariah Standard No. (17) on Investment Sukuk issued by the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), Sukuk is defined as "Certificates of equal value representing undivided shares in the ownership of tangible assets, usufructs and services or (in the ownership of) the assets of particular projects or special investment activities."

Sukuks are backed by Shariah-compliant assets that may take the form of Islamic financing methods such as Murabaha, Ijarah, Istisna, Salam etc.

Essentially, Sukuk structures involve a transfer of rights over receivables from certain Shariah-compliant assets from the originator (who seeks to securitise its assets) to a special purpose vehicle (acting as the Issuer). The investors provide the capital for the purchase of, or investment in, the Shariah-compliant assets against the issue of Sukuk Certificates by the Issuer SPV. The Sukuk Certificates represent pro rata share of the investors in the underlying Shariah-compliant assets. As a result, the investors are entitled to receive periodic payments derived from the Shariah-compliant assets.

Sukuk transactions may be structured in various forms. We will discuss the Sukuks based on Mudaraba and Wakala structures.

Securitisation: Mudaraba Structure

Sukuk with Mudaraba structure (Mudaraba Sukuk) would be feasible when there is a portfolio of different types of Shariah-compliant assets for example, real estate assets, non-real estate assets. The Mudaraba structure is similar to a joint venture where the investors appoint a manager to purchase assets from a financial institution. The manager is responsible for managing the assets.

The general concept of a Mudaraba is used as a base to structure the Mudaraba Sukuk transaction. The Issuer SPV will issue Sukuk to the investors against the payment of a subscription price. The subscription price received from the investors forms the Mudaraba capital which is provided by the Issuer SPV (as Rab-al-Maal/Trustee on behalf of the investor) to another SPV (acting as the Mudarib or manager) under a restricted Mudaraba Agreement. The Mudarib will use the Mudaraba capital to invest in a portfolio of Shariah-compliant assets, being the Mudaraba Assets, in accordance with the Mudaraba investment plan. This investment would involve the transfer of Mudaraba Assets, on a true sale basis, from the originator (as the seller of Shariah-compliant assets) to the Mudarib (acting as agent or trustee on behalf of the Rab-al-Maal and the Investors) under a Mudaraba Sale and Purchase Agreement.

The cash flow stream from the portfolio of Shariah-compliant assets is paid directly to the Mudarib who then makes a distribution to the Issuer SPV (as Rab-al-Maal/Trustee on behalf of the investor). The profits derived from the Mudaraba Assets will be shared between the Mudarib and the Rab-al-Maal in a pre-agreed profit sharing ratio under the restricted Mudaraba Agreement. The portion of Rab-al-Maal's profit will pass through to the investors on a pro rata basis. Essentially, the Sukuk represents undivided ownership of the Investors in the Mudaraba Assets.

Securitisation: Wakala Structure

The Wakala Sukuk structure is similar to the Mudaraba Sukuk structure, but with certain fundamental differences. Similar to the Mudaraba Sukuk structure, the Wakala Sukuk structure would be feasible for a portfolio of different types of Shariah-compliant assets.

> **"The major issuers of Sukuk are based in the six Gulf Cooperation Council ('GCC') states. A trend of sophistication in the understanding and structuring of Islamic securitisation transactions is clearly visible.**

Under the Wakala Sukuk structure, the Issuer SPV will issue the Sukuk to the investors against payment of the subscription price. The Issuer SPV (as Trustee) will enter into a Master Wakala Purchase Agreement with the originator (as seller of the Shariah-compliant assets) to purchase, on a true sale basis, the Shariah-compliant assets (forming the Wakala Assets). The subscription price from the issuance of Sukuk will be used to purchase the Wakala Assets.

The Issuer SPV (as Trustee) would appoint the originator as a Management Agent (or Wakeel) to manage the Wakala Assets for the benefit of the Trustee in accordance with the Management (Wakala) Agreement. Under the Management (Wakala) Agreement, the Managing Agent (Wakeel) would manage the Wakala Assets in accordance with the investment plan by providing certain services including timely receipt and payment of the Wakala revenues. The Wakala revenues are applied towards payment of the periodic distribution amount to the Investors as the Sukuk represents an undivided ownership interest in the underlying Wakala Assets and a right against the Issuer SPV for period payments of the profits.

The main difference between the Mudaraba Sukuk structure and the Wakala Sukuk structure is in respect of the profit sharing mechanism. Unlike a Mudaraba, in which profit is divided between the Mudarib and Rab-al-Maal based on pre-agreed ratios (which are then passed on to the Investors), in the Wakala Sukuk structure, the principal and the wakeel agree upon a profit return to the investors. Any profit in excess of the agreed profit for the account of the principal will be retained by the wakeel as a performance incentive.

Conclusion

Islamic securitisation transactions are growing in popularity in the Islamic countries. S&P reported that in 2018 the size of the Sukuk market was US$114.8 billion and is expected to range between US$105 billion to US$115 billion. The major issuers of Sukuk are based in the six Gulf Cooperation Council ('GCC') states. A trend of sophistication in the understanding and structuring of Islamic securitisation transactions is clearly visible. Increasing numbers of regional and international banks, investment banks, asset managers are keen to participate in securitisation transactions. The relevant regulatory bodies are also keen to allow securitisation transactions subject to local legal and regulatory compliances and of course, Shariah approvals and are seen to work closely with the parties involved to pave way for the development of Islamic capital markets.

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Interest(ing) Developments: The Replacement of LIBOR

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US$300 trillion. That is an almost incomprehensibly large sum of money, but what does it represent? The annual value of Saudi Arabian oil exports? No, that was loose change in comparison to 2018's (less than) US$0.2 trillion. The total reserves of US dollars held by central banks around the world in 2019? No, that was only US$6.79 trillion. Perhaps then the entire gross domestic product of the globe in 2018? No, even that was a relatively trifling US$85 trillion in 2018.

US$300 trillion represents the aggregate value of financial contracts, from credit cards and car loans to incredibly complex derivative transactions that use LIBOR as the benchmark to determine the applicable interest rate. At the end of 2021 it is going to effectively disappear, so what will replace it?

Background

LIBOR, or the London Inter-bank Offered Rate, has for the past half century been the benchmark by which interest rates financial products denominated in a variety of currencies have been set. It can be used not just for Sterling, but also US dollars, Yen, Swiss Francs and Euro for seven different tenors. LIBOR reflects the published rate at which banks and other financial institutions will lend to each other in a given currency and is calculated by aggregating rates provided by participating institutions. The underlying process for this calculation has changed over time, caused in part by well-documented attempts by certain institutions to artificially manipulate the LIBOR rate for their own profit. This manipulation led to financial regulators around the world imposing fines of over US$9 billion and revising the basis of calculation of LIBOR, designed to make the process more objective and to minimise the risk of interference. The current regime has an administrator for LIBOR, ICE Benchmark Administration Limited, which is responsible for testing and issuing the rates provided by 20 contributor banks, A so-called Waterfall Methodology is applied to set some fixed, transaction-derived data points to try to make the calculation as transparent as possible.

However, in July 2017 the head of the Financial Conduct Authority, the UK regulator, said that from 2021 onwards it would no longer compel banks to submit rate information to determine LIBOR. As a result of this, there is growing focus on what will replace LIBOR and, in particular, on the near risk-free rates ('RFRs') that have been selected for each of the currencies for which a LIBOR rate is currently issued. The RFRs are not simply replacements for LIBOR, as there are key differences in the basis of calculation, which will have significant implications for documentation.

Proposed Risk Free Rates ('RFR')

The key differences between RFRs and LIBOR are:

- **Backward looking:** unlike LIBOR which is a forward looking rate for seven different tenors or durations for each currency, the applicable RFR is a backward looking overnight rate and is based on actual transaction data.
- **Credit risk:** LIBOR prices in term bank credit risk, whereas RFRs, as the name suggests, do not.
- **Longer dated funds:** unlike LIBOR, RFRs do not include a premium for longer term funding.

The effect of these differences is that the applicable RFR is not the same as the equivalent LIBOR, typically tracking lower, though with a spread differential that varies through the economic cycle.

Considerations for New and Existing Transactions

The current situation, where it is known that LIBOR will cease to be the key pricing benchmark but a consensus as to how to address that, from a documentation perspective, has not been arrived at, is causing challenges across many types of transactions where LIBOR is utilised. This is equally applicable to existing deals as well as deals being documented or contemplated now.

Even though the RFRs for each currency have been identified and are already being published, how to amend existing documentation is causing a headache given the transitional period we are in. Market-standard documentation (such as those published by the Loan Market Association ('LMA') do contain fall-back provisions to deal with the non-availability of LIBOR, but these are considered to be short-term fixes and not acceptable lenders or borrowers for the longer term. In addition, current deals (especially loan financings) were typically priced by lenders on the basis of LIBOR plus a margin. Because RFRs are different, and usually lower than LIBOR, a reimbursement mechanism may need to be introduced or pricing adjusted to reflect the divergence in rates.

LIBOR is being replaced as the benchmark for calculation of interest rates. We are currently in a transitional period where market participants are aware of the impending change, but are not agreed on how to address it and reflect the change in existing and new documentation.

Currently there is no agreed approach to either how to amend existing documents, nor document new deals. Key market players such as the LMA are consulting with regulators, lenders and other trade associations such as the Association of Corporate Treasurers on the issue but for now there is no agreed method of dealing with the replacement of LIBOR. The LMA has published exposure drafts of a compounded SONIA based sterling term and revolving facilities agreement and a compounded SOFR based dollar term and revolving facilities agreement, but these are not recommended templates as of yet. Crucially, the LMA does not have a protocol system for amendments unlike, for example, ISDA, so a market consensus will need to be reached on how to deal with the new interest rate benchmark, and contract counterparties engaged in the process.

To facilitate the process of amending current deals which utilise LIBOR as the benchmark, the LMA has also published an exposure draft of a reference rate selection agreement for use in relation to legacy transactions and the transition to alternative reference rates. This is a proposed form for an amendment agreement which would sit alongside an existing facility agreement, enabling the parties to select an alternative means of calculating the applicable interest rate. The principle behind the exposure draft is to simplify the process of replacing LIBOR. Whilst not yet formally recommended by the LMA, anecdotally we are seeing this adopted by parties in order to amend existing facilities. One would expect a market consensus on the preferred approach will evolve.

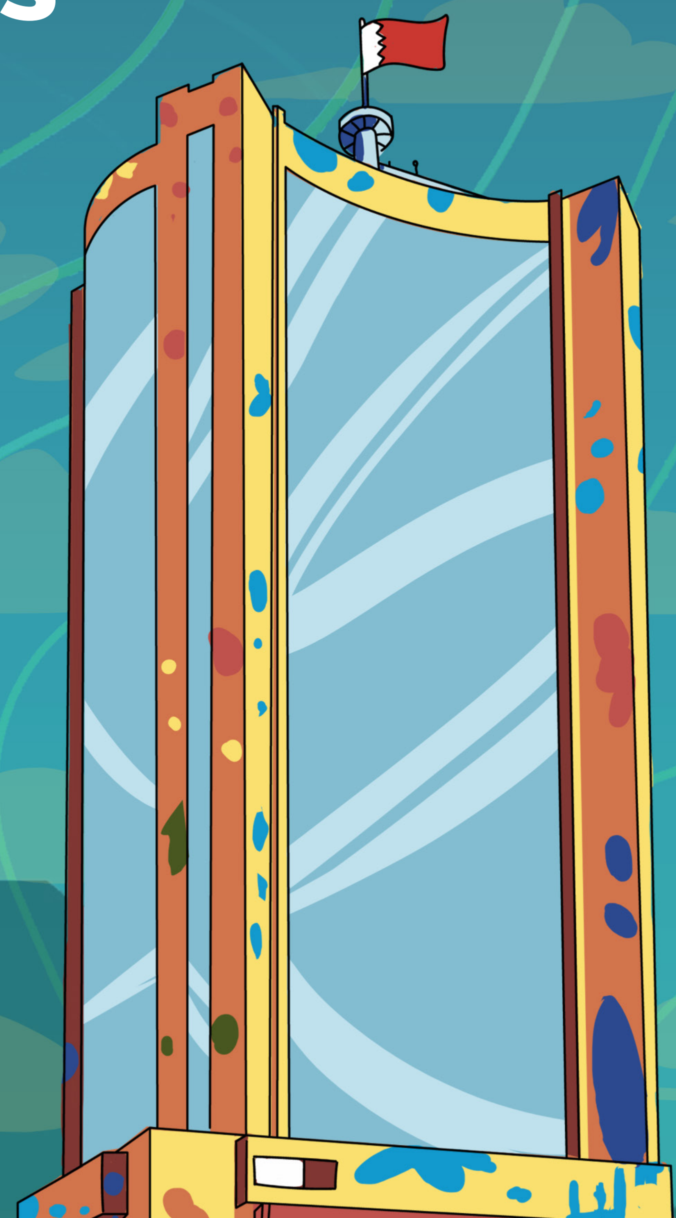
There is also discussion about the overall method to be adopted to deal with the replacement of LIBOR: (i) the amendment approach, where the parties to an agreement agree the replacement methodology at the time that the new interest rate is adopted; or (ii) the hardwire approach, which will provide for a pre-defined alternative benchmark upon a defined LIBOR replacement trigger. Either way, the parties to the contracts will need to be actively engaged.

Conclusion

LIBOR is going to be replaced and, in the context of financial transactions, relatively soon. At the moment, there is no consensus in any of the financial markets as to how to address this replacement. It is crucial for lenders to have the flexibility to re-visit pricing so as to ensure its overall IRR is not impacted by a shift from LIBOR to RFRs. Equally, borrowers will want to ensure that they are not prejudiced by the change and need to ensure that documentation (whether that is via amendments to existing facilities or for transactions being entered into going forward) gives it the certainty in relation to pricing and availability of debt it needs. Preparations for the switchover will intensify over the coming months, so all participants in the market need to keep up-to-date and ensure that documentation and systems are ready for the change. Al Tamimi & Co will issue further client alerts to reflect the latest developments and to enable our clients to be prepared.

For further information, please contact Matthew Heaton (m.heaton@tamimi.com) or Sakshi Puri (s.puri@tamimi.com).

Borrowers in Bahrain may be able to Object to Automated Loan Processing Decisions



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The Kingdom of Bahrain's Law No. 30 of 2018 promulgating the Personal Data Protection Law ('PDPL'), which came into effect on 1, August 2019, gives data subjects resident in the Kingdom the right to object to decisions made based only on automatic processing (Article 22 of the PDPL).

The banking and finance sector is likely to be impacted by this new statutory right.

A Practical Scenario: Automated Loan and Scoring Decisions

An automated process for scoring loans can calculate and score qualitative and quantitative risk factors and weigh each according to the type of loan in order to automatically generate a loan decision.

Automating loan decisions are said to be highly beneficial to the banking and finance sector as a whole for the following reasons:

- it enables banks to provide loan applicants with quick answers and enhances the loan process substantially. In more practical scenarios; financial institutions use technology to score simpler loans allowing analysts to focus on more complex credits. Alternatively, different categories, high quality weak and intermediate loan requests could also be created using scoring outcomes for the financial staff to further analyse intermediate applications; and
- it increases consistency and compliance with the bank's loan policy and culture, meaning that staff spread across several segments are less likely to misinterpret lending policies.

The Right to Object

While described as a 'right to object' to decisions based on automated processing, the right granted under Article 22 to individuals (potential borrowers in this scenario) is actually a right to request processing in a manner that is not solely automated.

Article22 (1) states, in part (in its English translation):

"If a decision is based solely on automated processing of personal data intended to assess the data subject regarding his performance at work, financial standing, credit-worthiness, reliability or conduct, then the data subject shall have the right to request processing in a manner that is not solely automated."

Re-consideration of the automated decision by an human is obligatory in these circumstances and must be done free of charge for the data subject.

The Board of the Personal Data Protection Authority ('Authority') is yet to issue a regulation specifying procedures relating to the submission and processing of the request

“The right to object only applies to decisions that are based solely on automated processing of personal data.

under Article 22. Although, the Minister of Justice, Islamic Affairs and Awqaf has recently been tasked under Decree No. (78) of 2019 with the duties and powers prescribed under the PDPL for the Authority to date, no regulations have been issued regarding Article 22. What remains unclear is, whether in the absence of these processes, data subjects can exercise their rights under Article 22.

Further, the right to object under Article 22 expressly does not apply “in favour of the Data Subject, where the decision is taken in the course of entering into or performance of a contract with the data subject, provided that suitable measures to safeguard his legitimate interests have been taken, such as hearing the data subject’s view.”

It is worth noting that any person who incurs damage arising from processing of their personal data by a data controller (whether by automated means or otherwise) has the right under Article 57 of the PDPL to compel the data controller to pay compensation with a view to repairing the damage.

What does this mean for Banks in Bahrain?

The right to object only applies to decisions that are based solely on automated processing of personal data. Where a loan decision is not fully automated, the right does not apply.

As noted above, the Authority has not issued any guidance on the application of Article 22(2) of the PDPL. However, this PDPL provision appears to be based on Article (22)(2)(a) and 22(3) of the European Union’s General Data Protection Regulation (EU) 2016/679 (‘GDPR’).

These equivalent GDPR provisions likely provide some guidance for interpretation of the PDPL. Under the GDPR, a data subject does not have a right to object to a decision based solely on automated means if:

- the decision based on automated means is necessary (i.e. no alternative method exists to achieve the same goal) to enter or to perform a contract between the data subject and data controller; and
- suitable measures are implemented to safeguard the data subject’s rights and freedom and interests.

Guidelines for the GDPR produced by the advisory body known as the Article 29 Working Party (or WP29), gives examples of ‘suitable measures’ that enable the data subject to obtain human intervention, express their point of view and contest the decision.

Consequently, if for example, an online bank in Bahrain is offering loans and a decision on whether or not a loan should be offered based on an algorithm is taken, it appears under the PDPL the bank should:

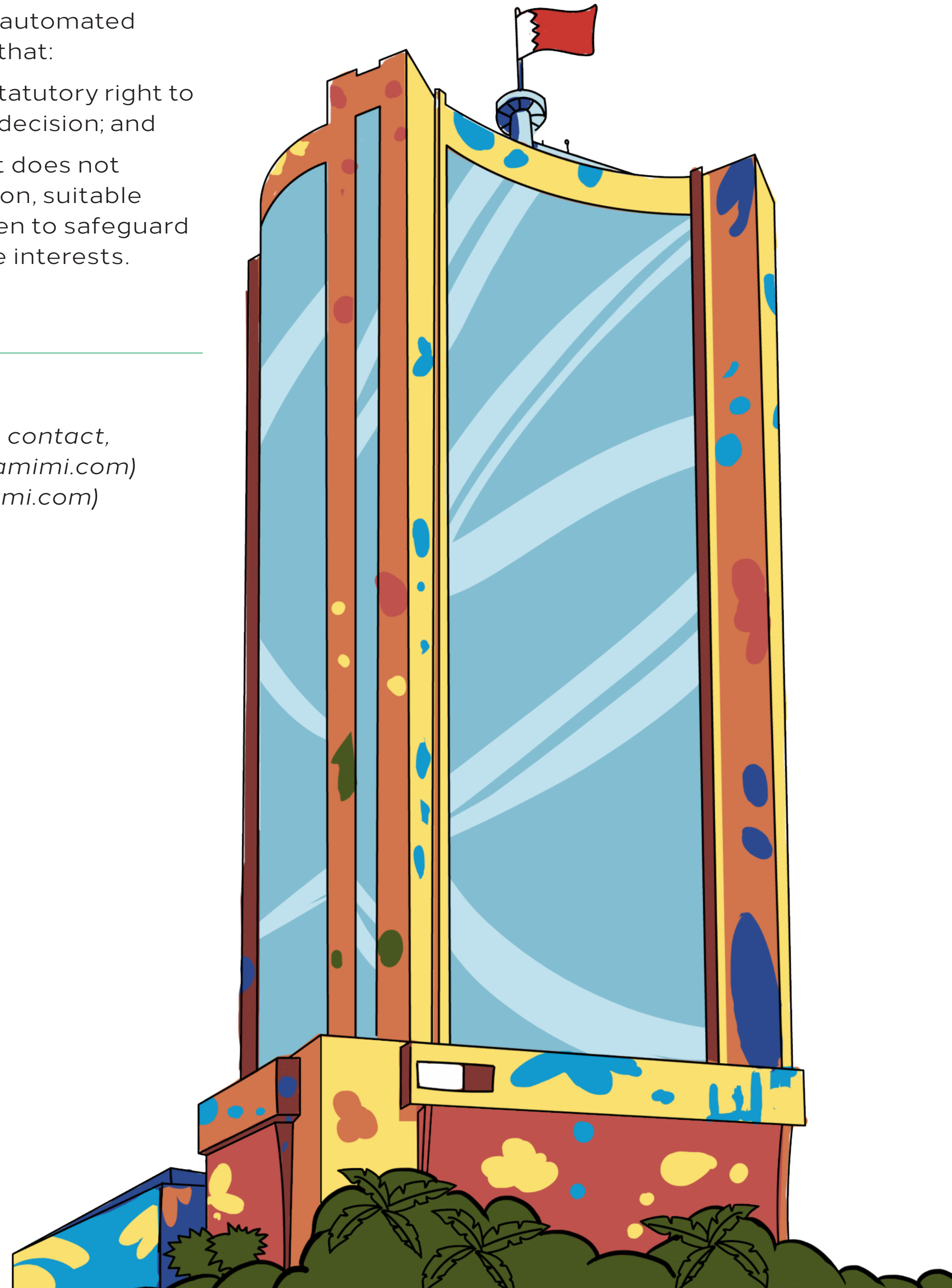
- review decisions when requested to do so by an applicant;
- provide the details of a contact person at the bank; and
- notify the applicant regarding its right to challenge the automated decision and to express its point of view.

Conclusion

Banks and other financers in the Kingdom of Bahrain do not necessarily use automated loan decisions for every type of loan offering considering that numerous factors make up their business strategies and lending decisions. However, if they do make a decision based solely on an algorithm or other automated process they need to be aware that:

- the applicant now has a statutory right to object to the automated decision; and
- even where the applicant does not have that right of objection, suitable measures have to be taken to safeguard the applicant’s legitimate interests.

For further information please contact, Andrew Fawcett (a.fawcett@tamimi.com) or Krishna Jhala (k.jhala@tamimi.com)



Tapping into Social Media, without Fear, in Financial Services

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Social Media provides all industries with an easily accessible tool to build brand awareness, establish and strengthen their client relationships and, naturally target potential new clients. When well managed, it can provide a low-cost tool that can be used across the company to consolidate brand messages and create a pool of data that can direct strategy.

In this article, we highlight four areas where a financial services company must ensure that all teams are aware of the potential legal risks at play when using social media. We recommend that strategies be implemented to address these issues, not just within a standalone policy but also integrated within individual policies in each relevant area. Social media is no longer the sole concern of the marketing team but, can and, will be used by other parts of the business on a regular basis.

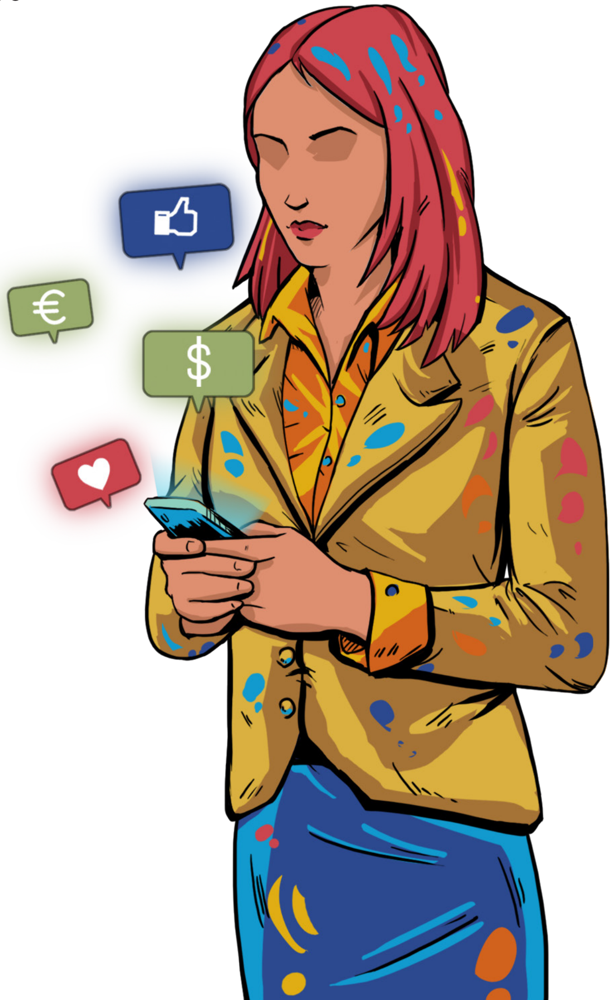
1. *Customer Privacy*

At the centre of compliance for all financial services companies is the need to protect the customer's data. This includes the manner in which that data is collected. Remembering that social media will not provide an adequate method for collecting the consent of customers to retain their data, it is important to ensure that data can be collected about your customers from these platforms, their interests, family members, activities etc., which a company might want to utilise to target for particular products including travel loans and credit cards. We note that issues arising from misuse of consumer data that has been obtained from social media sites has often triggered negative PR for various industries, and the potential for this element of negativity cannot be underestimated in the sensitive area of financial services. This activity should be considered carefully and contained (at the very least) within a privacy policy with employees also understanding the boundaries that a company might wish to place around the collection and use of this data.

2. *Promoting Particular Services*

The advertising of all bank products remains subject to the usual rules of engagement; disclosures that would be required in a newspaper advertisement for a loan product must still be contained within social media posts for the same product. The tendency of social media to be less formal in style can allow employees to feel that social media posts do not need to contain all the required disclosure wording. This could not be further from the truth. Advertising on social media is a call to action to a consumer and must be just as compliant with the law as it would be in any other form of media. This means addressing the concerns under the consumer protection laws, the content and media standards as well as any financial services compliance regulations.

We recommend that all companies undertake a critical assessment of these stress points so that issues can be eliminated or addressed early on and in an efficient manner. That way, the enormous, positive benefits that social media can offer a company in the financial services sector can be explored and exploited to their true potential.



3. Reputational Risk

Financial sector companies suffer from the same fear as other industries in approaching social media; whilst feedback is always good for a business, public facing feedback can be tricky to manage a well-crafted complaint post can quickly become viral. Having a clear policy on the management of social media posts that includes the way in which replies are handled (and when, if ever, posts are removed) is vital. The value of firm-wide training cannot be underestimated.

4. Regulatory Compliance

From a regulatory perspective, it is also important that claims that might have legal ramifications (e.g., errors in accounts, misleading conduct, data breaches) are identified quickly and transferred seamlessly to the appropriate channels. For this, we recommend utilising trained and experienced compliance professionals or installing appropriate monitoring software. It is important to be aware that a third party social media agency will not have the skills to identify these risks, and may need assistance to spot them.

When things go wrong in social media, it is generally due to a failure of process, systems or training. We recommend that all companies undertake a critical assessment of these stress points so that issues can be eliminated or addressed early on and in an efficient manner. That way, the enormous, positive benefits that social media can offer a company in the financial services sector can be explored and exploited to their true potential.

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Banking and Finance: Case Update

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Electronic communications

Background

In a recent case involving three banks, a corporate entity as well as an individual in the UAE, the Dubai Cassation Court issued a judgment on October 2019 referring the case file back to the Appeal Court and to re-appoint the same expert.

The Court of Cassation stated in the judgment that the appointed expert at the Appeal Court did not review the email communications, telephone calls and text messages between the litigants (noting that such tasks were not expressly mentioned in the expert's mandate as issued by the Appeal Court).

The concerned litigants requested the expert to review such materials during their meetings however, the expert ignored the litigants' request, on the basis that it was not a financial matter related to the case in hand and it was not mentioned by the Court in his mandate.

Conclusion

The UAE Courts recognise digital communications (email, telephone calls, text messages, etc.) between litigants when establishing the facts of the case and the Court appointed expert is obliged to review all types of communications between the litigants even if the Court has not explicitly mandated this role in the expert appointment letter issued by the Court.

Mortgage of Movable Assets to Secure a Debt

There are very limited Court precedents relating to the Movables Law however, we are aware of one successful case which was filed before the Dubai Courts by a bank with a view to attaching and selling a mortgaged movable asset based on the Movables Law. The movable asset was in the form of a registered assignment of receivables.

Although the case related to specific facts and, arguably, has limited value in terms of precedent, it is a positive sign that the Courts recognise the priority of security registered on the Emirates movable collateral register.

Sale of Mortgaged Property in Dubai

Change of Dubai Courts approach

Previously, a mortgagee had the discretion to file two different types of legal proceedings against the mortgagor (i.e. substantive claim (including a precautionary attachment) as well as foreclosure proceedings). Such claims could be made simultaneously in parallel proceedings. These are the most practical proceedings a creditor would follow, using a substantive claim when the mortgaged property's value is less than the current debt.

At present, when a mortgagee applies to the Court to attach and sell a mortgaged property through public auction (based on a mortgagor defaulting), the Dubai Courts will request the mortgagee to submit an official document extracted from the Dubai Court system which confirms that there is no substantive claim registered/ongoing before the Dubai Courts in relation to the particular mortgaged property on which the mortgagee is foreclosing.

Conclusion

Creditors can no longer file a substantive claim and a foreclosure case at the same time. Creditors now must choose the proceedings that are most likely to result in recovery. Filing a substantive claim and a foreclosure case may lead to the suspension or the dismissal of the foreclosure case.

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The Emergence of FinTech in MENA

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What is FinTech?

FinTech (short for 'Financial Technology') is an umbrella term that refers to the application of technological innovation to the financial services industry. It is quite a broad term, and as such, FinTech firms often have very little in common with one another. Although most people associate FinTech with crypto-currency, the reality is that it is much more than that. In fact, FinTech encompasses a diverse range of platforms, applications and service offerings for both individuals and corporates, including:

- Lending, Peer to Peer (e.g. Beehive and Liwwa) and Crowdfunding Platforms that allow individuals and businesses to lend to and borrow funds from a variety of sources through an online platform (like Eureeca);
- RegTech: regulatory compliance software (including for facilitating 'Know Your Client' procedures, Anti-Money Laundering and fraud screening and detection, and real time monitoring of compliance with regulatory requirements). Prominent examples include Hummingbird and Azakaw;
- Payment Processing (e.g. Pay Tabs, Stripe, Fiserv and Paypal) and Subscription Billing Software (think Netflix and Uber);
- Budgeting Tools and Apps to manage personal finances (such as Mint - a free budgeting app that syncs users' bank accounts, credit cards and other accounts to help track incoming and outgoing money);
- Mobile Wallets (e.g. Careem Wallet) and Mobile Payment Apps (e.g. Apple Pay, Google Pay, and Alipay) which allow users to pay on websites, in apps, and in stores using the cards saved to their account (by simply tapping the back of a smartphone to the payment terminal screen);
- International Money Transfer and Tracking Software (e.g. CurrencyFair);
- WealthTech: Wealth Management and Investment Platforms and Tools, including Robo-Advisors (e.g. Sarwa, and Vanguard personal advisor services);
- Open Banking APIs used as a secure communication method between banks and authorised third party providers (e.g. TrueLayer);
- InsurTech: data analytics and software for re-insurers and companies selling insurance digitally (e.g. Bayzat, Democrance and BIMA – the latter, a Swedish company that promotes financial inclusion by offering insurance and mobile health services for low-income families, the vast majority of whom are accessing insurance for the first time and who live on less than US$10 per day);
- Stock-trading Apps (like Robinhood) which are relatively inexpensive and require low minimum investment amounts;
- Capital Markets analysis and infrastructure tools (e.g. Credit Benchmark) for financial institutions;

- Mortgage financing and digitisation platforms (such as Zoopla which reduces the mortgage application process from months to days, and the Dubai Land Department's proposed platform for conducting end-to-end real estate transactions online); and
- Blockchain technologies for financial services (e.g. HSBC MENA's Voltron which digitises the Letter of Credit process).

Unicorn, Sandbox, Chatbots.. What the!?

The technology industry (and FinTech is no exception) loves jargon. Here are some commonly used terms in this space (in order of appearance in this article):

- ***Application Program Interface or APIs***: allow one computer program to be used by another. Essentially, they are used as a secure method of communication between online banking systems and those of third parties.
- ***Neobanks / Challenger banks***: fully digital banks with no branches (such as Monzo and Revolut) that operate through online banking or mobile Apps. Primarily, there are three types of neobanks: those that offer financial services under the licenses of traditional banks; those that have alternative licensing for offering bank accounts that have some limitations; and those that are a subsidiary of a traditional bank which aims to offer new products etc. but operates under its parent bank's licence.
- ***Unicorn:*** a privately held Start-up company with a value of over US$1 billion.
- ***Sandbox:*** a time bound regulatory process that provides FinTech firms and traditional banks the ability to develop and test their new product and service offerings in a controlled environment without having to comply with the regulatory requirements that would otherwise apply to it. The aim is to encourage innovation whilst providing regulators with an opportunity to understand potential implications of the solution to consumer protection and financial system stability, so that they can adapt the current regulatory framework to accommodate such innovative and disruptive solutions.
- ***Machine Learning:*** refers to computer systems that have been empowered by humans with the ability to 'learn' by themselves by using the provided data and to make accurate predictions and decisions. Machine Learning is a subset of Artificial Intelligence.
- ***Artificial Intelligence or AI:*** is an umbrella term that describes machines that incorporate some level of human intelligence / cognitive ability.
- ***Chatbots:*** software (such as Siri) that conducts a conversation with customers via audio or text, providing automated customer support.
- ***Robo-Advisors:*** are automated virtual financial assistants which use mathematical rules or algorithms to provide digital financial advice, make asset recommendations, and manage and optimise portfolios without any human intervention.

What's the Big Deal?

FinTech has, and continues to disrupt the financial services industry by providing better, cheaper, and more personalised offerings to individuals and businesses (including banks) often by utilising the internet, mobile applications, cloud services, software and other technology. Add to this the proliferation of user-friendly interfaces and frictionless customer experience (for example, being able to buy stocks or transfer money at the click of a button) – and it is no wonder that customers are increasingly transacting digitally and moving away from cash and visiting branches.

In Australia for example, the Australian Prudential Regulatory Authority's data shows nearly 300 branches closed around the country in the year to June 2019, up from the 201 branches closed in the previous financial year. Banks in the Middle East have been equally affected by this seismic shift in peoples' preferences when it comes to financial services, and they have responded by investing heavily in digital transformation. EmiratesNBD has been leading the charge, with an AED 1 billion digital transformation initiative aimed at improving its technology infrastructure so as to continuously improve its digital banking offerings and customer experience.

The impact of FinTech is evident with banks looking to appoint Chief Digital Officers who report directly to the Board. And their role is not just about automation; it is about transforming the whole bank (and not just automation) – this means streamlining existing operations, rethinking client journeys, creating new opportunities by building digital products and services, and most importantly reshaping the internal culture to one that is agile and focused on putting the customer at the centre of every single process.

FinTechs were initially considered a major threat to traditional brick-and-mortar banks and other financial services firms, with the expectation that banks would look to acquire lots of FinTech firms. In reality, this has not eventuated largely because of issues around incompatibility with the legacy technology infrastructure of banks, differences between the Start-up culture of FinTech s (driven by small autonomous teams tasked with delivering customer value) and the more conservative environment prevalent at banks, and competition law restrictions. Instead, the much touted rivalry has given way to a more collaborative approach with banks looking to work with different FinTech firms (including neobanks) and other technology vendors to accelerate the innovation process and co-create solutions that are customised to the needs of banks and which serve to fill a gap in servicing their existing and prospective customers.

The FinTech sector has experienced phenomenal growth in the last five years or so, with t FinTech deals having soared to approximately 1,700 deals (and a combined value of US$39 billion) in 2018. The number of FinTech unicorns globally grew from 25 (with a total value of approximately US$75 billion) in 2018 to 39 unicorns in 2019 (worth close to US$150 billion).

Although the MENA region accounts for a small proportion of venture capital investments in FinTech globally, the FinTech sector in the region is said to be growing at a compounded annual growth rate of 30 per cent. Also, on the consumer side, the region is an attractive market for FinTech firms, boasting a population of roughly 450 million people (half of which is below the age of 25 – presenting a strong base of early technology adopters). The challenge for foreign FinTech firms expanding in to the region will be maintaining their global brand whilst modifying their offerings to be relevant to the local market.

What are the Trends and Predictions?

1. Everyone, particularly the big tech companies (Apple, Google and Facebook) want to be a bank in a bid to increase revenue (essentially by offering financial services to their existing customer bases), however there are some competition law hurdles they will need to overcome, particularly if they wish to do it without partnering with a licensed financial services provider.
2. Banking-as-a-service ('BaaS'): this is an extension of the 'as-a-Service' model that is prevalent in the technology industry and presents banks that have embraced digital to monetise their regulated infrastructure by granting access to FinTech firms that will pay fees to access a bank's BaaS platform via APIs. This in turn, enables FinTech firms to use the APIs to build new financial services solutions.
3. Bundling of offerings and the dominance of 'super Apps' as consumers will find it difficult to (ironically) stay on top of multiple Apps, each with a different offering. Grab, WeChat and Go-jek in Asia have taken advantage of their strong customer bases and existing platforms to expand into new segments and provide consumers with a less fragmented experience that allows you to take a car ride, book hotels, order food delivery, get documents and parcels delivered, transfer funds, and make in-store and online purchases. Careem locally is moving to leverage its existing ride-hailing infrastructure to become the Super App of the region.

What are some of the Relevant Legal Issues?

Regulatory Frameworks

By default, all entities will be subject to the existing legal framework in each jurisdiction. However, a number of jurisdictions in the region have established regulatory sandboxes, including the Dubai Financial Services Authority ('DFSA'), the Abu Dhabi Global Markets ('ADGM'), Bahrain and Saudi Arabia. Although mainland UAE does not have a sandbox, the UAE Central Bank recently announced that it will be setting up a dedicated FinTech office to develop countrywide regulations in order to enable and facilitate FinTech activities in the country.

While each sandbox has its own rules, generally, to be admitted into a sandbox, an applicant needs to demonstrate that its solution is genuinely innovative (i.e. that its offering is significantly different from those that already exist, that it offers a new use for existing technologies or represents a significant scale-up in existing technologies), offers consumer benefit, is ready for testing and that it has a plan to exit the sandbox and deploy its solution in the market.

Please see the related article entitled *'FinTech Space in the United Arab Emirates'* from our banking team on the regulatory framework (including sandboxes and testing licenses) for crypto-assets in the UAE.

Right to object to 'Automated Data Processing'

Often, FinTech solutions adopt AI (including machine learning) technologies, mathematical rules or algorithms to automate certain tasks and make decisions. Such cases include Chatbots, Robo-Advisors, fraud detection and claims management software and predictive analysis in financial services.

Under some regional data protection laws (for example the Bahrain Data Protection Law), an individual may object to decisions that are made solely on automated processing of personal data intended to assess him / her (for example in the context of a loan application). Please see Andrew Fawcett's and Krishna Jhala's article titled *'Borrowers in Bahrain may be able to Object to Automated Loan Processing Decisions'*.

Ethical use of AI

Guidelines have been developed around the world to provide a framework for the ethical use of AI. Regulators globally have in general sought to avoid enacting laws so as to avoid stifling innovation. Given the infancy of AI technologies, it is believed that a soft regulatory approach will help the industry flourish whilst enabling regulators to better understand the associated risks. The focus is more on working with business to develop an agile approach to regulation that is industry specific.

In large part, the various guidelines are focused on ensuring that AI is explainable, non-discriminatory, unbiased, fair, transparent and accountable. In the context of the automated loan processing example above, AI developers would need to be able to explain the algorithms they use so that 'black box' systems do not make arbitrary decisions that have a significant impact on a person's life. Also, they would need to be able to demonstrate that the data sets being fed into their AI systems are unbiased. Consider if the data set is taken from a loan officer who routinely rejected loan applications because of their race, religion, gender or some other factor that is not relevant to assessing their ability to repay a loan. If that data set were to be given to the AI system as a basis for assessing future loan applications, then that human bias and discrimination would be ingrained into AI systems, and similar applicants would have their loan applications rejected because of irrelevant factors, thereby resulting in algorithmic bias and perpetual discrimination.

Early this year, Smart Dubai launched its own guidelines on the ethical use of AI together with a toolkit that allows developers to assess their AI systems' level of compliance with Smart Dubai's guidelines. Although the guidelines are not legally binding, breach of certain principles could nevertheless amount to a breach of relevant national laws such as the UAE's Federal Law Combating Discrimination and Hatred.

Data Protection

Compliance with a raft of data protection regimes is a key concern for FinTech offerings as the underlying systems and applications contain vast amounts of data, including personal data. In the region, there are myriad of data protection laws that apply in various free zones (such as the DIFC and ADGM), as well as in Bahrain, Qatar and other jurisdictions with new laws expected to be enacted in the UAE and Saudi Arabia.

From a data protection perspective, Banks, FinTech firms and other technology vendors will need to ensure they have, in place, appropriate documentation (for example privacy policies and data protection / transfer agreements for sharing data with one another as well as other data controllers and processors, both domestically and across borders) in addition to technical and operational measures so as to comply with regional data protection laws. A data breach incident can result in civil (and even criminal penalties), and in cases where the personal data relates to persons in more than one jurisdiction, it may result in fines being imposed by multiple regulators. We will discuss this issue in greater detail in a publication to be published in the next couple of months.

Cloud and Cybersecurity

The risk of data breach increases as banks and FinTech firms collaborate and novel business models such as BaaS become more common. Well known FinTech platforms could be an easy target for cyberattacks, and in addition to the measures noted above, FinTech firms and banks ought to ensure they have adequate cybersecurity and cyber insurance in place to meet regulatory requirements. Please see Zil Ur Rehman's articles in relation to proposed cybersecurity standards for Information Communication Technology ('ICT') service providers in Saudi Arabia that are likely to be relevant to telecommunications service providers who are looking to offer mobile or 'internet of things' wallets in conjunction with banks.

Open Banking

Open Banking started out as a regulatory initiative in the EU as part of a concerted effort to increase competition and innovation in the banking sector, which is now gaining momentum globally. In certain countries, such as Bahrain, banks are required to share customers' financial information with authorised third parties, resulting in numerous benefits, namely: (1) third parties can access consenting bank customers' financial information in order provide alternative or new offerings to such customers; (2) banks are able to deliver a better experience to its customers by enriching their offerings; and (3) customers can access their data in real time and share their information with other parties (for example, to get a better deal elsewhere or simply to get an amalgamated view of all their finances across various banks and FinTech firms within the one portal or App). It is yet to be seen, if and when, other countries in the region will follow suit. It is envisaged that Open Banking will lead to 'open finance' and ultimately 'open utilities' as the model can be replicated in other industries such as utilities and real estate. For example, the use of aggregated data and APIs will enable changes in a person's financial life to be identified (e.g. an annual increase in their rental payments) and personalised services to be solicited from comparison sites.

Technology Contracting Risks

Collaboration and outsourcing with FinTech firms and other technology vendors can unwittingly introduce new points of compliance failure for banks, particularly in an environment where the technology supply chain and ecosystem is becoming ever more interconnected and complex. The proliferation of numerous FinTech solutions, third party software, and cloud services etc. requiring configuration, integration and/or implementation with legacy technology infrastructure will require special contracting focus in order to ensure regulatory compliance and mitigate risk.

For further information, please contact Haroun Khwaja (h.khwaja@tamimi.com).

ISDA Agreements; Considerations in Setting up the Relationship

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You want to hedge currency or interest rate risk or even use derivatives to address credit risk or leverage your balance sheet? Your bank wants you to enter into International Swaps and Derivatives Association, Inc. ('ISDA') agreements? You think that the ISDA agreement is a standard form document with limited negotiable points?

While the ISDA agreement is highly standardised and is used in a wide variety of derivatives transactions, it is not a standard form document. In this article, we will examine certain key issues that should be considered in order to set up a derivatives trading relationship.

Document Architecture

First, back to basics. The parties will need an ISDA agreement to enter into any over-the-counter ('OTC') derivatives trades between them. The constituent parts are:

- the ISDA master agreement – this is the pre-printed master agreement that forms the basis of the OTC derivatives relationship between two parties. It is, by itself, not negotiated or amended; multiple transactions across different asset classes and products are documented under the same ISDA master agreement;
- schedule to the ISDA master agreement – this document amends the term of the ISDA master agreement based on the requirements of the parties;
- credit support documents – in addition to standard credit support documents such as guarantees, ISDA has published various forms of credit support annexes and credit support deeds to assist in providing security or exchanging collateral in respect of the transactions under the ISDA master agreement; and
- confirmations – this is the short document that sets out the economic terms of a transaction and usually incorporates a set of ISDA's published definitions which is most relevant to the asset class. While this may seem to be the simplest part of the puzzle, this often can be the most complex one. The ISDA documents are set up so that the terms of the Confirmation prevail over the ISDA Master Agreement but this can lead to unintentional changes to the ISDA Master Agreement.

It is in the interest of both parties to establish this framework before they commence trading derivatives. The documents will need to be amended to reflect the type of and creditworthiness of the parties as well as the type of transactions being contemplated between the parties.

> **While the ISDA agreement is highly standardised and is used in a wide variety of derivatives transactions, it is not a standard form document.**

Counterparties

While the creditworthiness is an important factor in determining whether to trade with them, the counterparty's jurisdiction of incorporation is also a key point that should be considered. Two main factors dominate the counterparty's jurisdiction discussion: the insolvency risk. and the regulatory issues.

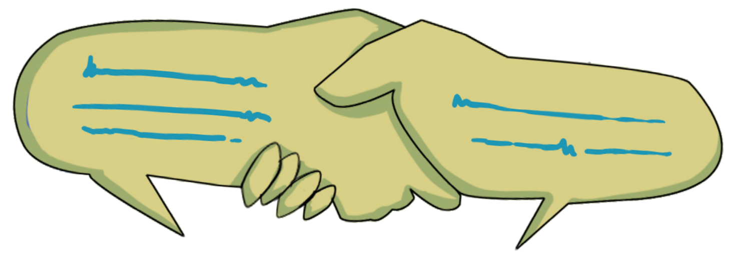
Insolvency risk

Derivatives master agreements include the concept of close-out netting which is the process used to determine the net obligations of a defaulting counterparty to the derivatives transactions entered into under the master agreement. In summary, the defaulting counterparty's remaining contractual obligations are terminated, and the final positive and negative replacement values of its positions are combined into a single net payable or receivable amount. However, this is possible when the relevant bankruptcy laws of a jurisdiction include carve-outs for close-out netting. While certain countries in the middle east have adopted relevant netting legislations to exclude close-out netting from the purview of bankruptcy laws, a few countries that have not adopted separate netting laws remain and thus, local counsel should be consulted in order to analyse whether existing bankruptcy laws allow for close-out netting.

Regulatory issues

Derivatives have been in focus since the 2008 financial crisis which led to a series of reforms by the United States of America, the European Union and certain other countries. The Dodd-Frank Wall Street Reform and Consumer Protection Act in the USA and the European market infrastructure regulation in the European Union introduced obligations including trade reporting, central clearing, margin requirements and special resolution regimes to improve the OTC derivatives market. Most of these regulatory regimes focus on the same points though there are nuances between them. To assist market participants to comply with these regulatory changes by various authorities, ISDA created a series of protocols. However, when entering into a new ISDA agreement, the parties should consider relevant applicable regulations and related obligations and reflect those while drafting the ISDA agreement.

As consequence of the above factors, it is important to investigate the resultant choice of an entity to enter into derivatives transactions from a credit and regulatory perspective. As an example, it is worth considering whether you may be asked to exchange variation or initial margin for



transactions when dealing with banks from certain jurisdictions or whether close-out is more prolonged for your bank's default due to the special resolution regimes applicable in those jurisdictions. Similarly, as many banks have complex corporate structures, it may be helpful to deliberate on tax considerations or additional changes or termination events required to address any concerns arising from such structures.

Hedging Facility Linked Swaps

You are contemplating entering into a large financing facility and your bank wants you to enter into a new finance linked ISDA Agreement to document the related swap A finance linked ISDA agreement is considerably different from the standard ISDA agreement. The key issue is interlinking the finance facility and swap and the respective documents. In this process, you should consider, among others:

- the inter-relation between the ISDA agreement, facility agreement and any inter-creditor deed and addressing the related issues holistically;
- the treatment of ISDA Agreement events of default, facility agreement defaults and pre-payments;
- the applicability of the events of default to your hedge counterparty; and
- crucially, there is no mis-match between the swap terms and the finance facility.

Conclusion

In summary, the ISDA agreement is not a standard form document that can be signed without negotiations. In this article, we have touched on just a few of the issues which need to be considered when documenting derivatives; there are many more negotiating points and potential pitfalls. Accordingly, although often viewed as a standard, it is essential to seek guidance from experts while negotiating the ISDA agreement.

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Projects into 2020: PPP Leads the Way

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Welcome to this special section of Law Update focusing on developments on and insights into projects and public private partnerships across the region and the jurisdictions in which Al Tamimi & Company operates.

We have witnessed first-hand (and have been fortunate enough to act as advisers to) the fast-expanding area of private sector involvement in the delivery of government-related projects in the Middle East & North Africa. Governments have very much recognised that private investment, whether through independent power/water producer or PPP models, is an effective way to free up resources for other purposes and thereby ease public budgetary constraints. This is particularly evident where historical revenue channels have been reduced or need to be conserved.

Governments have also been keen adopters of innovative and leading technologies, new-to-the-region solutions and are at the forefront of global energy trends. Nuclear, solar and wind power as well as waste-to-energy all feature as part of the regional 'new' energy ecosystem where previously such concepts did not exist. World record low tariffs for solar power are constantly being bettered by the latest projects. Most countries have clear (and often aggressive) targets to transition away from fossil fuels to renewable energy. 2020 looks to be a particularly active year for solar regionally with the 2,000 MW Al Dhafra (PV2), Abu Dhabi project due to be awarded shortly, FEWA announcing a 500 MW PV project in Umm Al Quwain, the progression of REPDO's rounds 2 and 3 in Saudi Arabia, expected financial close of the 200 MW Kom Ombo project in Egypt, prequalification for Manah 1 and 2 in Oman and the award in January of the Al-Kharsaah 800 MW project in Qatar.

Legal regimes have not been idle either. In recent years there has been a steady introduction of amendments to PPP legislative frameworks in various jurisdictions. In 2019 alone, Egypt's Cabinet has approved amendments to its PPP law, Abu Dhabi and Oman have introduced a PPP law and Jordan is expected to update its PPP law shortly. You can read about the new Omani PPP law in the pages that follow. We also have articles offering our perspective on education in Qatar and Egypt, renewables in Saudi Arabia, helpful changes in Bahrain's real estate laws for projects and more. We hope that you find our region-wide Projects' update engaging and informative.

Musat-aha! How Development Leases can Aid Project Finance in Bahrain

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Law No. 27 of 2017 promulgating the law regulating the real estate sector ('Real Estate Law') came into effect in the Kingdom of Bahrain ('Bahrain') on 1 March 2018. This law made a number of important changes to real estate law in Bahrain, including the establishment of a Real Estate Regulatory Agency ('RERA') to regulate the Real Estate sector. The law also introduced a number of new categories of real property rights ('in rem' to lawyers)—the musataha, usufruct and long-term lease. In this article, we explain these property rights and how they could aid project financiers to projects in Bahrain.

The Musataha

The Real Estate Law defines the musataha right as a right in rem over property conferring upon the holder thereof the right to establish facilities or buildings on the land of others for a specified period. That is, it provides the lessee the right to develop the land. Accordingly, is common to describe the musataha as a development lease.

Following are the key features of musataha right under the law:

1. the musataha term may not exceed ninety-nine years;
2. the holder of the right of musataha shall own the buildings or facilities he built on the land. He/she may dispose of the same under the right of musataha, unless agreed otherwise in writing;
3. for a period of more than ten years, the holder of the right of musataha may dispose thereof, including mortgage without the owner's permission, unless otherwise agreed in writing. It is not permissible to prevent the holder of the right of musataha from exercising his/her right except for a legitimate reason;
4. an assignee can replace the holder of the right of musataha in terms of his/her rights and obligations, unless otherwise agreed in writing;
5. the landowner may mortgage his/her land if it imposes the right of musataha without the permission of the holder of the right of musataha, unless otherwise agreed in writing;
6. the right of musataha does not extinguish with the demise of the buildings or facilities before the end of the period;
7. upon expiry of the right of musataha, if the holder of the right of musataha builds buildings or facilities, the landowner, at the expiry of the right of musataha, may either require him/her to demolish such buildings or remove such facilities or own the newly-established items in consideration of the value of such demolition or removal if the same is harmful to his/her land; and
8. if such demolition or removal does not harm the land, the landowner may not keep the same without the consent of the holder of the right of musataha, all unless otherwise agreed in writing.

No mortgage interest can be taken in the project lease in favour of the project's financiers. The Real Estate Law now provides an alternative possibility.

The Usufruct

The Real Estate Law defines usufruct right as a right in rem over property conferring upon the holder thereof the right to use and exploit the property or real estate unit in accordance with its provisions and the law.

The musataha right and the usufruct right are both property rights conferred by the Real Estate Law except that the musataha right gives the owner of the musataha right the right to build, own and use the building during the term of the musataha. Usufructs only provide the right of use.

The term of a usufruct right may be for up to fifty years in Bahrain—in contrast to the musataha, which can be ninety-nine years.

The Long-term Lease

A long-term lease right is defined as a right in rem over property of a term not less than ten years and not exceeding ninety-nine years unless it is agreed that it be renewed. The provisions in the law applicable to usufructs also apply to long-term leases unless otherwise agreed.

Unlike the musataha and usufruct, the law does not prescribe a specific purpose of the long-term lease so it can mostly be defined by what it is not; meaning, the long-term lease is not an usufruct or a musataha. Typically, it would be the long-term rental of an existing building and the land. The term of a lease right is also for a period of up to fifty years.

Projects

Historically, for power projects in Bahrain a project company would enter into a lease with the Government entity involved in the projects as the owner of the land used for the project. This is, in our experience, structured as an ordinary lease and is not registered with the Survey Land and Registration Bureau (Bahrain's land department and registry) as they do not constitute a proprietary right in the land. Consequently, no mortgage interest can be taken in the project lease in favour of the project's financiers. The Real Estate Law now provides an alternative possibility.

Long-term leases or musataha rights are registrable property rights. It is also expressly contemplated in the Real Estate Law that these rights can be mortgaged (the Real Estate Law also sets out a process for the enforcement of a mortgage also). For a large-scale project that requires construction of a fixed item of infrastructure, a musataha agreement would be a preferable option for the developer since it confers on the owner of the musataha right the right to develop the property and own the building constructed. The project financiers, as a result, can mortgage the musataha right and the buildings. In contrast, a long-term lease would provide only a mortgage interest in the lease rights.

Conclusion

The concept of long-term leases and musataha are relatively new in Bahrain. To our knowledge, they have not yet been employed in a Bahrain infrastructure project. The Real Estate Law now offers this possibility and, if used, would align Bahrain with other GCC jurisdictions such as the UAE. However, this would be a material change from existing precedent so would need to be supported by Government procuring agencies as there could be a consequential impact on project costs (for registration) and termination rights.

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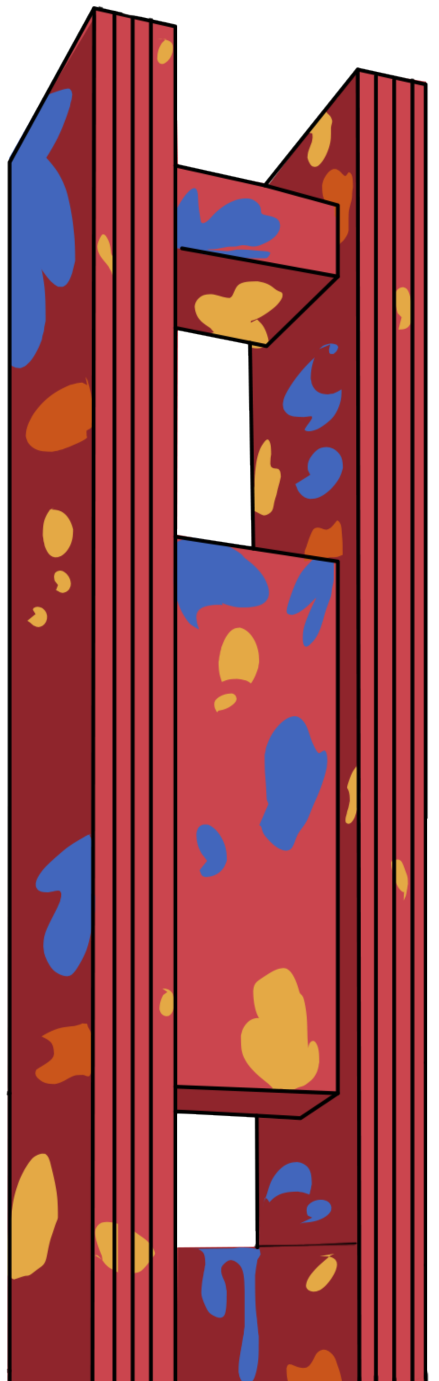

Challenges and Opportunities of Education Sector Finance in Egypt

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Education continues to be one of the central pillars of economic growth and prosperity across the globe, with investment in education increasing dramatically to reflect the ever-growing positive correlation between the quality of education and growing economies. The steady growth that the Egyptian economy has witnessed throughout the last few years has been accompanied by a strong comprehensive move by the Government of Egypt towards creating a more robust, modern and all-inclusive education sector in Egypt. This move towards developing the education sector is clearly underlined in Egypt's Vision 2030, with radical educational reform, particularly at the level of higher education, being at the very core of Vision 2030.

The regulatory framework governing the education sector in Egypt is set out in a number of laws, decrees and regulations which govern the various types of education systems and educational institutions in Egypt. These laws and regulations also govern establishment processes and licensing requirements, permitted use of funds, disposal of assets, standards to be upheld in relation to quality of education, as well as the general operation of educational institutions in Egypt. Under Egyptian law, universities are entities, which do not fall under the legal definition of companies, civil society organisations or non-governmental organisations, established for non-profit purposes and with the aim of enhancing the prevailing levels of education and scientific research. To this day, Egypt continues to rely on a highly subsidised public education system in order to meet the increasing demand for education.

Universities operating in Egypt fall under the following categories (with each category being governed by a separate set of laws and decrees): (1) public universities; (2) private universities; and (3) branch campuses of foreign universities. Public universities in Egypt continue to depend solely on funds injected by the Egyptian Government into public sector education and therefore fall largely outside the scope of private sector investments.

Private universities in Egypt are governed by virtue of the provisions of law No. 12 of 2009 and its executive regulations issued by virtue of decree No. 302 of 2010 (collectively the 'Private Universities Law'). The provisions of the Private Universities Law stipulate that private universities shall not be established with the main purpose of procuring profit but shall be established with the core purpose of enhancing the level of education as well as scientific research in Egypt. Moreover, private universities are established in Egypt by virtue of a decision issued by the President of Egypt based on a request presented by the founders of the university in question and the approval of the Egyptian Council of Ministers.

The framework regulating the establishment of International Branch Campuses ('IBC(s)') of foreign universities in Egypt is set out under law No. 162 of 2018 and Ministerial Decree No. 4200 of 2018 (collectively the 'IBC Law'),

The Egyptian Ministry of Education and Technical Education ('MoETE') has developed an education reform program 2018-2030 with a total expected cost of US$2 billion.

whereby the IBC Law provides two paths for foreign universities to establish an IBC in Egypt: (i) by applying directly before the Ministry of Higher Education (the 'Ministry'); or (ii) by applying through an Educational Institution. IBCs, as is the case with private universities, are established for the core purpose of developing and improving the higher education system and scientific research in Egypt.

A study conducted by PricewaterhouseCoopers (PwC) in 2019 on education in the Middle East concluded that Egypt has the largest education system in the Middle East and North Africa (MENA) region and therefore offers excellent opportunities for investors seeking a foothold in the MENA region. The report lists the following favourable investment fundamentals in relation to the education sector in Egypt:

1. a sustainable demand for education due to steady population growth;
2. an improving macroeconomic setting showing strong signs of recovery;
3. the Government of Egypt actively encouraging private sector participation;
4. a stable institutional setting owing to the maturity of Egypt's education system; and
5. a need for investment in bridging skills' gaps through vocational training and enhanced higher education offerings.

Egypt's growing population as well as the insufficiency of Government funds has placed enormous strains on the education system in its entirety in Egypt, which has, in turn, led to the Government of Egypt to turn to private sector investment in the education sector, particularly in universities, in order to meet the ever-rising demand for education as well as provide better quality education at all levels.

However, despite the favourable investment fundamentals listed above, Egypt's education sector continues to be extremely underfunded due to various obstacles which continue to face investors that are willing to extend finance to private educational institution. One of the most evident obstacles is the issue of obtaining securities in relation to investments in private sector education.

Since the private universities' main purpose is not to achieve commercial profit, financial institutions tend to extend financing to corporate founders (in case such founders are corporate entities) rather than extending the financing directly to the private universities in question. Under the existing legal regime governing universities, the ability of private universities to guarantee the obligations of its founders is largely a grey area that has not been tested by the highest courts of the country.

According to the provisions of the Private Universities Law, the funds of private universities shall be utilised for the sole purpose of funding the activities of the university and for investment in the continued enhancement of its operations and the quality of the education provided by it. Excess profit accrued by private universities, beyond what is needed for improving educational services, shall be distributed among the founders in accordance with the university's bylaws. Moreover, the Private Universities Law stipulates that funds deposited in the accounts of private universities shall not be drawn upon for reasons other than for the benefit of the university. Such a prohibition on disposal and use of funds extends to cover the assets of the university in question and shall not be disposed of except for the benefit of the university. Accordingly, the argument that a founder may obtain financing guaranteed by the assets of the private university in question is largely based on merits and would depend on whether the founders will use all actual financing obtained solely for the benefit of the private university in question. Such legal argument has not yet been tested by the highest courts of Egypt. The board of trustees of each private university in Egypt controls, as per the provisions of the Private Universities Law, the management of its funds. It is rarely the case in practice that the board of trustees is actually controlled, de facto, by the founding entity.

Accordingly, creating any mortgage, pledge or any other form of security over private universities' assets, including buildings and lands necessary for the operation of the university is highly likely to be deemed as a form of guarantee to the founders. The enforceability of such mortgages/pledges has not yet been tested. It follows, Egyptian law restricts the ability to create/enforce security on private assets earmarked for public use. While, from a practical standpoint, it is common market practice to create such bankable securities, the enforceability of the same remains a grey area.

Private universities do not issue shares and are, as mentioned previously, created by virtue of specific presidential decrees. Accordingly, it is common that funding institutions request the sponsors to pledge their shares in the corporate founding entities (to the extent that the founder is a corporate entity). As such banks would have indirect access to university as an ongoing concern. However, the enforceability of such security is, again, a largely grey area that is yet to be tested. This is due to the fact that the provisions of the Private Universities Law as well as the IBC Law stipulate that the Ministry must be notified prior to any proposed change in the documents or information, including any change in the founders, relating to the university (whether it is a private university or an IBC) in question and on the basis of which the decision establishing said university was initially issued. The Private Universities Law further stipulates that the Minister of Education is vested with the power to either approve of or reject the proposed change. While on the other hand, the IBC Law stipulates that any such amendments or changes are to be approved or rejected by the President of Egypt after having been presented to the Egyptian Council of Ministers. Accordingly, it could be argued that any change in founders which comes into effect due to a pledge of shares agreement in relation to shares of the founders may be rejected by the Minister of Education or the President of Egypt, as the case may be.

Although the Government of Egypt has shown unwavering support for private sector investments, it appears that the bankability of private and IBC universities financing in Egypt is largely a grey area when considered from a collateral perspective. However, and due to the ever-increasing demand for better quality education as a means of securing future economic benefits, private sector education continues to be a largely untapped market with seemingly endless potential.

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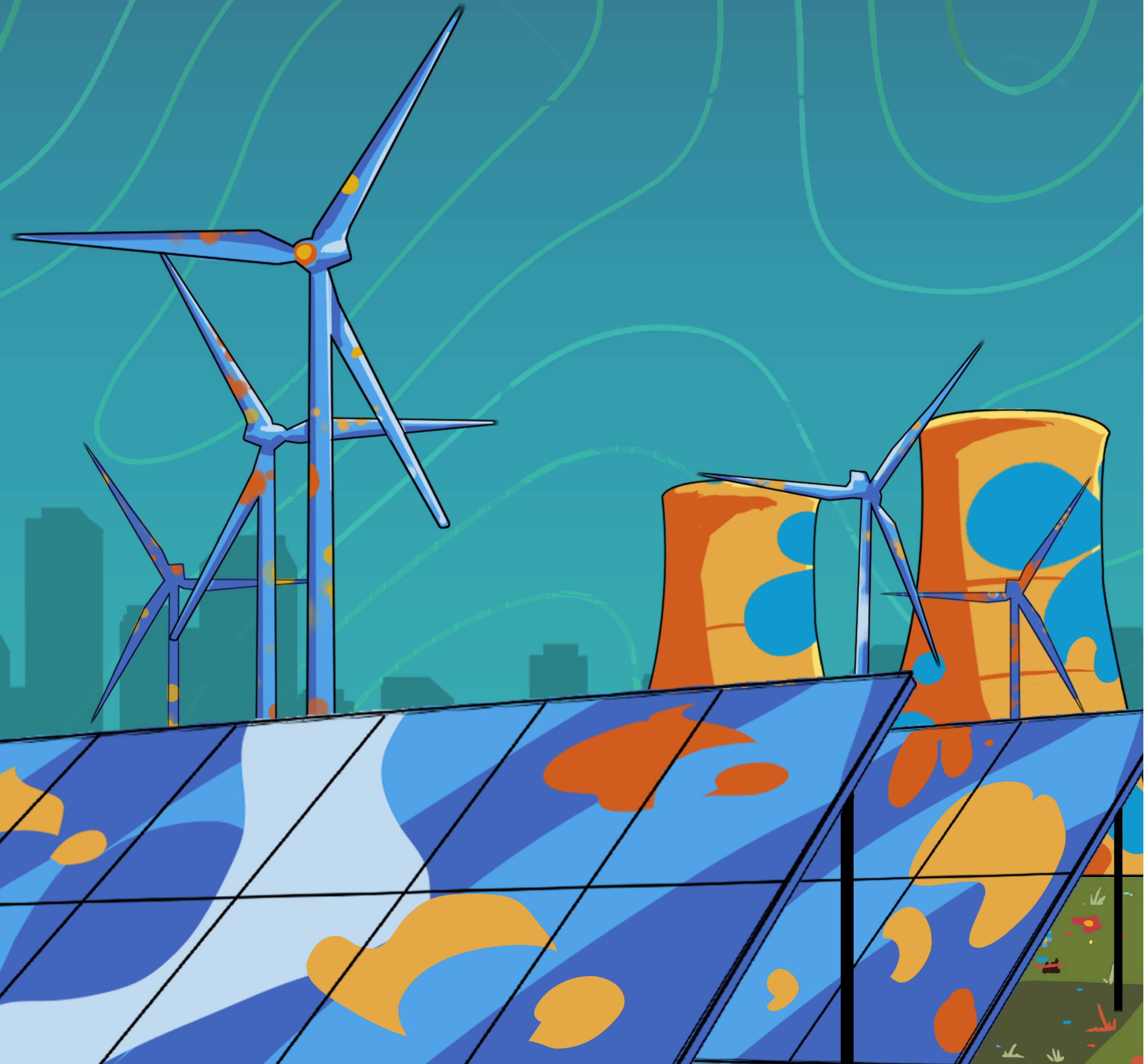
Time for Renewables in KSA



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With COP25 having taken place in Madrid it is time to take a fresh look at the prospects for renewable energy in Saudi Arabia. Before doing so, it is also worth revisiting our previous survey of the geo-political context in which climate measures are being taken and examine the governance, risk and compliance framework which is reasonably foreseeable to be adopted in the short to medium term. Finally, we will look at concrete measures which are being taken in Saudi Arabia to address the challenge of climate change.

Regulatory Stepping Stones

The Extinction Rebellion protests which took place this summer in London and other major cities were hard to miss. Thousands of interested citizens, many of whom would previously not have contemplated participating in direct political action, drawn from the broadest spectrum of ideological backgrounds, were determined to engage in peaceful protest (and yet risk being arrested) in order to focus attention on the climate crisis. Basing their actions on the hard science of climate change, they have certainly succeeded in ratcheting the issue up political and corporate agendas. Although the rhetoric and tactics of the protests have drawn criticism, the direction of travel is clear. The protestors are however the tip of an iceberg – the divestment movement, which seeks to encourage institutional investors (such as sovereign wealth funds, banks, global asset managers and insurance companies, cities, pension funds, health care organisations, universities, faith groups and foundations) to reconsider their portfolios on ethically green lines has had a profound impact. The value of portfolios committed to divestment have increased from US$52 billion in 2014 to more than US$11 trillion in 2019, an increase of 22,000 per cent.

Progress will however have to accelerate if the Intergovernmental Panel on Climate Change ('IPCC')'s warnings are to be heeded. The reality is stark:

- implementing current unconditional Nationally Determined Contributions ('NDCs') would lead to a global mean temperature rise of between 2.9°C and 3.4°C by 2100 relative to pre-industrial levels, and continuing thereafter; and
- the current level of NDC ambition needs to be roughly tripled for emission reduction to be in line with the 2°C goal and increased fivefold for the 1.5°C goal.

A temperature rise of more than 2°C would be catastrophic. We have already breached the 1.1°C threshold.

Unsurprisingly, the requirement to report climate impacts on a regular basis is likely to become a fact of life for all corporates as part of their Governance, Risk and Compliance ('GRC') frameworks. The Task Force on

Climate-related Financial Disclosures ('TFCFD'), led by former Mayor of New York, Michael Bloomberg, has been particularly active in this regard. The foreword to the June 2019 TFCFD report bears repetition here:

> *"Based on a recent report issued by the [United Nations'] Intergovernmental Panel on Climate Change urgent and unprecedented changes are needed to meet the goals of the Paris Agreement." The report warns limiting the global average temperature to a maximum of 1.5°C "require[s] rapid and far-reaching transitions in energy, land, urban and infrastructure [systems] (including transport and buildings), and industrial systems." In fact, according to a recent United Nations Environment Programme report on emissions, global greenhouse gas emissions have to peak by 2020 and decline rapidly thereafter to limit the increase in the global average temperature to no more than 1.5°C above pre-industrial levels. However, based on current policies and commitments, "global emissions are not even estimated to peak by 2030—let alone by 2020." As a result, governments and private sector entities are considering a range of options for reducing global emissions, which could result in disruptive changes across economic sectors and regions in the near term."*

The World Economic Forum ('WEF'), famous for its Davos meetings of key leaders at the public/private interface, also continues to work with members of its Alliance of CEO Climate Leaders. WEF is also partnering with law firms to help corporate legal departments better understand climate-related risks. Climate governance principles have been promulgated for how corporate boards should address climate-related risk. Furthermore, in April 2019, S&P Global Ratings released its Environmental, Social, and Governance ('ESG') Evaluation Analytical Approach. The ESG Evaluation "is a cross-sector, relative analysis of an entity's capacity to operate successfully in the future and is grounded in how ESG factors could affect stakeholders." The ESG will assess (at the request of an entity) whether and to what extent a company has complied with the TFCTF's 11 recommended disclosures related to climate change which include measures under governance, strategy, risk management and the setting of metrics and targets. Other ratings agencies (including Fitch and Moody's) are also active in this new market for tangible validation of sustainability measures.

General Counsel in all sectors should be raising and discussing these issues with their commercial counterparts as a standing agenda item in all ESG/GRC meetings.

The reality of these measures and their perception in the market will become determinative of corporate success in the future. As Mark Carney, Governor of the Bank of England and recently appointed UN Special Envoy for Climate Action and Finance, has said: "There will be industries, sectors and firms that do very well during this process because they will be part of the solution…but there will also be ones that lag behind and they will be punished." His core message is that: "Companies that don't adapt will go bankrupt without question." These are the considerations which will animate innovation for the foreseeable future. General Counsel in all sectors should be raising and discussing these issues with their commercial counterparts as a standing agenda item in all ESG/GRC meetings – not just in terms of their own businesses but also as regards their supply chains.

At a time when digitisation and innovation are key themes for business it also worth noting that the global energy burden of ICT could comprise 20 per cent of all the world's electricity demand by 2025. The fourth industrial revolution will therefore have to be very carefully calibrated to take account of its environmental footprint. The challenge is clear:

> *"The situation is alarming," said [Anders] Andrae, who works for the Chinese communications technology firm Huawei. "We have a tsunami of data approaching. Everything which can be is being digitalised. It is a perfect storm. 5G [the fifth generation of mobile technology] is coming, IP [internet protocol] traffic is much higher than estimated, and all cars and machines, robots and artificial intelligence are being digitalised, producing huge amounts of data which is stored in data centres."*

Moreover, the kinds of reporting requirements described above are likely to harden: Carney has warned major corporations that they have two years to agree rules for reporting climate risks before global regulators devise their own and make them compulsory. The International Renewable Energy Agency ('IRENA') predicts that nearly US$148 billion will be required each year until 2050 to limit global temperature increases to 1.5 C above pre-industrial levels – investment on this kind of scale will be subject to significant scrutiny and reporting requirements. Raising funds for significant projects or innovations that do not have auditable green credentials will be difficult if not impossible. If this is not easy reading for those engaged in oil and gas, it is deeply troubling for the shale industry which has, in recent years, operated as a kind of thermostat on the global oil price but remains a deeply polluting source of hydrocarbons. Moreover, businesses which do heed Carney's warning and accept the challenge of moving towards carbon neutrality will want to see that regulations are enforced locally and internationally.

It's not just Mayor Bloomberg, Governor Carney and the WEF. The European Union has agreed (subject to EU Commission approval) a new set of rules governing which financial products can be called 'green' and 'sustainable'. The initiative classifies products into three levels, and also requires full disclosure of all financial instruments, forcing funds without any sustainability claims to disclose that they are not assessed under the green criteria. Under the agreement, all financial products that claim to be green or sustainable will have to disclose exactly what proportion of their investments are environmentally friendly. "With credible and ambitious definitions for sustainable investment the EU will lead the world in sustainable finance…now that we have credible definitions on which economic activities can be considered sustainable, the new Commission will have to start preparing to clearly identify environmentally harmful activities and the investments that currently support them" said EU lawmaker Bas Eickhout, lead negotiator on the matter.

More Than Green Shoots

In 2016 Saudi Arabia's Vision 2030 development blueprint recognised that "the kingdom's impressive natural potential for solar and wind power generation remains largely untapped" and pledged to generate 9.5GW of renewable energy by 2030. 2016 now seems like a long time ago – and initiatives have rapidly expanded in their ambition and scope. Commentator Jonathan Gornall observes:

> *"Saudi Arabia, equipped with the motivation and the funds to carry out bold renewable-energy projects, has shown it can act fast. It is, after all, less than three years since the very first wind turbine was installed in the kingdom – tellingly, to supply 2.75MW of electricity to a facility in Turaif belonging to Saudi Aramco, the world's largest oil and gas company."*

Much has been written about the short-term success of the recent Saudi Aramco IPO – but perhaps the key determinant of its long term impact will be the ability to sustain and accelerate the kind of progress described above, and at a pace to maintain alignment with the kinds of international reporting benchmarks that are likely in future – noting what is said above about the huge surge in data storage requirements. Aramco is not the only large industrial consumer of power in the Kingdom; where it leads others must follow. With a young population that is adept at adopting new technology, contributing to the tsunami of data indicated above, the imperative is clear.

The opportunity is however significant, according to Michael Hayes, global head of renewables, KPMG International (reported in Arab News 20 November 2019):

> *"The amount of capital required to support the energy transition is vast and it is for this reason that a whole new sector called green finance has emerged in recent years delivering new products such as green bonds and green insurance. Much of the expenditure in renewables over the next 20 years will be in emerging markets and so Saudi Arabia should concentrate on creating a centre for green finance for emerging markets".*

The Saudi government intends to attract between US$30 billion and US$50 billion in new investments into renewables by 2030, as it plans to tender around 9.5GW of solar and wind capacities by 2023. More broadly, the government has embarked on a series of initiatives that are squarely aimed at improving the state's green performance.

In July 2019, Renewable Energy Project Development Office ('REPDO') of Saudi Arabia's Ministry of Energy, Industry and Mineral Resources ('MEIM') announced a new global record low LCOE (levelised cost of electricity) for the 400MW Dumat Al Jandal onshore wind project which closed at 1.99 US c/kWh. This comes after REPDO successfully awarded the 300MW Sakaka photovoltaic ('PV') project which also broke global records for the lowest LCOE for solar PV at 2.34 US c/kWh during the time of bid. The two projects will contribute to the Kingdom's target of 27.3 GW of renewable energy capacity by 2024 and 58.7 GW by 2030. Following the successful financial close of the Dumat Al Jandal project, REPDO recently launched the tendering process for six new projects with a combined energy capacity of 1.47 GW. A further six projects are on track to be tendered by the end of 2019, bringing in an additional 1.58 GW of renewable energy capacity. All projects tendered by REPDO are 100 per cent IPPs that will be backed by 20 to 25-year power purchase agreements.

REPDO also announced details of the bidding process and the timeline for 12 renewable energy projects. In June 2019, REPDO qualified 60 companies, including 28 from Saudi Arabia. Qualified companies will now proceed to the RFP stage as either managing member, technical member, or under a newly-created category of 'local managing member'. This new category will encourage greater local and international partnerships during the forming of bidding consortiums.

The projects, which are part of the Kingdom's Round Two of the National Renewable Energy Program ('NREP'), are divided into small 'Category A' projects with the capacity to produce 100 megawatts ('MW') or less, and larger 'Category B' projects with a capacity above 100 MW. The smaller-scale projects are designed to create greater opportunities for local companies to participate in NREP. In January 2019, REPDO invited expressions of interest for the first six solar PV projects to be tendered in Round Two of the NREP, with generation capacity ranging from 20 to 600 MW. This is compared to a total of 42 companies which qualified for Round One NREP projects in 2017.

The Ministry expects these projects to attract approximately 5.2 billion Saudi riyals (US$1.4 billion) of private sector investment. All Round Two projects will require a minimum percentage of local content that will be calculated according to the mechanism defined by the Local Content & Government Procurement Authority ('LCGPA'), which aims to increase the value added contribution of products and services to the national economy. As part of Vision 2030, NREP paves the way for the Kingdom to build a reliable and efficient domestic renewable energy sector over the next decade, and these will include power generation projects as well as local manufacturing of related components. Projects within Round Two will carry a minimum requirement of 17 per cent local content as calculated by the mechanisms defined by the LCGPA, which aims to increase the value-added contribution of products and services in the national economy.

It is not just big projects that are in play (and we have not touched on mega-projects such as Neom in this article). The King Abdullah Petroleum Studies and Research Centre ('KAPSARC') recently published a study in relation to rooftop solar installations in Mosques. A 124 kilowatt PV system was installed and commissioned on the rooftop of a mosque in Riyadh, Saudi Arabia. With net metering, PV reduces the mosque's energy bill by 50 per cent. With appropriate planning, net metering could bring the bill down to zero. Using satellite data the KAPSARC analysis considered rooftops in residential, mosque, shopping mall, and health care buildings within the Riyadh area. The upper limit of rooftop solar PV capacity that can be deployed in the city of Riyadh was found to be 4.34 gigawatts (GW). This capacity represents nearly 22 per cent of the peak load and can satisfy approximately nine per cent of the energy requirement in the greater Riyadh region. The prospects for rooftop solar in the Kingdom are significant. The Public Investment Fund has also recently established the National Energy Services Company ('Tarshid'), a collaborative effort between the Ministry of Energy, Industry and Mineral Resources, the Ministry of Finance and the Saudi Energy Efficiency Center, to act as a catalyst for the development of a more energy efficient Saudi Arabia. Its particular focus will be buildings and street-lighting retrofits and renewable energy. These kinds of benchmarks will also have to wash through to the country's emerging PPP programme. Seeding this kind of local ecosystem will create thousands of sustainable jobs – again a key target of the country's transformation agenda.

Since 2016 huge strides have been in realising the goals of Vision 2030. Fully embedding and mainstreaming environmental initiatives is a crucial part of that platform for renewal. As indicated above in our sketch of the developing regulatory environment the burden will rapidly shift onto proving your business' green credentials – the era of green-washing is over.

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Reaching Financial Close in Kuwait WTTP Project

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In May of 2015, the Kuwait Authority for Partnership Projects ('KAPP') launched a tender for the Um Al-Hayman Wastewater Treatment Plant project (the 'UAH Project'), and in November of 2018, KAPP announced that the winning bidder of that tender was a consortium comprised of WTE Wassertechnik GmbH Group and International Financial Advisors (the 'Investors'). The UAH Project is a US$1.6 billion project that consists of the construction, operation, maintenance and management of a new wastewater treatment plant within the parameters of the existing Um Al-Hayman plant in southern Kuwait, which will initially treat an estimated 500,000 cubic metres of average daily flow. It was tendered by KAPP, the authority tasked with the responsibility of initiating and overseeing Kuwait's ambitious public-private partnership projects ('PPP') programme, pursuant to Kuwait Law No. 116 of 2014 and its executive regulations, Decree No. 78 of 2015 (the 'PPP Law'). The UAH Project is the second PPP to be awarded by KAPP since the enactment of the PPP Law. Since the announcement of the winner, the Investors, with assistance from KAPP, have been in the process of working towards financial close, after which, construction will begin in earnest. Under the PPP Law, there are a number of events that must occur in order to reach financial close.

Execution of a Letter Agreement and Agreement in Principle on the Project Documentation

In accordance with the PPA Law, the winning bidder, the Investors, KAPP and the public authority participating in the UAH Project, the Kuwait Ministry of Public Works ('MPW'), initially signed a letter agreement (the 'Letter Agreement') which provides the road map that the parties shall follow from the date of the announcement until financial close. Attached to the Letter Agreement were a variety of project agreements which the parties agreed to in principle (but will not be formally signed or become legally effective until financial close is achieved) and which will eventually govern the implementation of the UAE Project. The suite of project agreements includes:

- a Transmission and Sewage Treatment PPP Agreement;
- several Land Lease Agreements in relation to the site of the wastewater treatment plant, the site at which emergency sea outfall will be directed and the site of electrical facilities;
- a Shareholders Agreement which will govern the parties' ownership, rights and obligations in the Project Company (hereinafter described); and
- a Step-in Agreement which will allow substitution of the Investors in the event they materially fail to implement the UAH Project in accordance with the agreed requirements.

Subsequent to the signing of the Letter Agreement, the Investors then began establishing the corporate and financial structure under which the UAH Project will be implemented.

Moving towards Financial Close

After execution of the Letter Agreement, the first order of business for the Investor to complete, pursuant to the PPP Law, was the establishment of a Kuwaiti company (the 'Consortium Company') which serves essentially as a holding company through which the Investors will exercise their ownership rights and obligations in the Project Company (hereinafter defined). The Consortium Company will then be a party to the Shareholders Agreement that governs the management and operations of the Project Company. The Investors completed establishment of the Consortium Company in November of 2019. While Kuwait law imposes certain restrictions on the amount of equity that non-GCC nationals can own in a Kuwaiti company, the PPP Law expressly waives such restriction vis-à-vis the Consortium Company and the Project Company. As such, WTE Wassertechnik GmbH Group was legally permitted to own the majority of the equity in the Consortium Company.

Now that the Consortium Company has been established, the Investor, KAPP and the MPW have begun the process of incorporating the Kuwaiti company that will perform the UAH Project (the 'Project Company'). The Project Company will enter into all of the other project agreements (aside from the Shareholders Agreement, the parties to which will initially be the Consortium Company and KAPP). The Transmission and Sewage Treatment PPP Agreement will be entered into between the Project Company and it will serve as the master framework agreement pursuant to which the UAH Project will be undertaken. The Project Company and the MPW will also enter into the various Land Lease Agreements which will ensure that the Project Company has the requisite access and usage rights to the land on which the wastewater treatment plan will be constructed.

> **"Although it is not the first PPP to reach financial close under the KAPP's stewardship, it does mark an important milestone for KAPP, its PPP programme and for the development and international standing of Kuwait as a whole.**

The Letter Agreement provides that the Project Company will be capitalised in a series of increments based on a timeline that starts from the date of incorporation of the Project Company. At the outset, the Consortium Company will own 40 per cent of the equity shares in the Project Company and KAPP will own the remaining 60 per cent. However, KAPP's primary role in its ownership of such shares is to warehouse them until the UAH Project reaches a state of commercial operations. At that point, 50 per cent of the shares that are owned by KAPP will be listed on the Boursa Kuwait and offered to Kuwaiti citizens in an initial public offering. The remaining 10 per cent of the shares that are owned by KAPP will be transferred to the MPW and the MPW will then effectively become a party to the Shareholders Agreement.

Through the provisions of the Shareholders Agreement, and pursuant to the PPP Law, the Consortium Company (and, by extension, the Investors) will exercise effective managerial control over the Project Company even though it will only own 40 per cent of its shares. The Shareholders Agreement contains voting obligations that ensure that the Consortium Company will, at all times, be able to seat a majority of the board of directors of the Project Company and appoint the primary executive officers of the Project Company.

One of the most important changes that the PPP Law made to the PPP regime in Kuwait was the expansion on the assets and rights that can be legally pledged in favour of lenders in order to secure financing for projects. Prior to the PPP Law, Kuwait law was seen by many international lenders as too restrictive and unreliable because it prohibited the mortgage of land as well as the buildings and arguably even the equipment situated on the land. Lenders were effectively prevented from being able to take effective security over the material assets of the project, which diminished lenders' willingness to provide the necessary financing for carrying out projects. Due to the nature of limited recourse financing, lenders need to ensure that any and all security available to them is properly registered and perfected. The PPP Law has relaxed such restrictions and prohibitions and clarified what may be pledged as security. The PPP Law codifies some of the financing techniques that will be applied in the UAH Project such as assignments of proceeds, pledges against shares in both the Project Company and the Consortium Company, and mortgages over the assets comprising the UAH Project (other than the land on which the project will be conducted). The PPP Law also provides more clarity than previously existed on the procedures to be undertaken in the event the project needs to be transferred to new investors, and such procedures are contractually reflected in the Step-In Agreement that will be entered into between MPW, the Project Company and a security agent on behalf of lenders. These changes that the PPP Law has implemented have created a legal environment that makes PPP in Kuwait more bankable and attractive to international lenders and they have proven to be instrumental in helping get the UAH Project this close to financial close.

Conclusion

Once the Project Company is established (which is expected to occur by the end of January 2020) and the last remaining conditions precedent to financial close (which will consist primarily of the obtainment of regulatory approvals, permits and licenses for the Project Company and its subcontractors), construction of the wastewater plant will begin in earnest. When that happens, the UAH Project will be the second PPP to reach financial close since the inception of the PPP Law (the first being Phase One of the Az-Zour North Independent Water and Power Project). Although it is not the first PPP to reach financial close under KAPP's stewardship, it still marks an important milestone for KAPP, its PPP programme and for the development and international standing of Kuwait as a whole. The UAH Programme signals to international lenders and companies that engage in PPP that Kuwait is taking its PPP programme and its infrastructural development seriously and that it has a legal and political environment in which PPP are bankable and feasible. As a result, there are a number of other PPP in KAPP's pipeline that appear to have a high likelihood of eventually coming to fruition, in sectors such as transportation, real estate development, power production and solid waste management.

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Oman Refines its Legislative Framework to Incentivise Enhanced Private Sector Investment

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Commitment to Market Liberalisation

Further to our March 2018 Law Update article 'The Projects and Privatisation Landscape in Oman', significant legislative changes have been put in place in Oman. The changes are viewed as clearly confirming the government's commitment to market liberalisation in terms of encouraging private sector investment in key projects and state-owned assets.

In July 2019, His Majesty the late Sultan Qaboos Bin Said issued Royal Decrees approving new laws for Public Private Partnerships ('PPP') (Royal Decree No. 52 of 2019), Privatisation (Royal Decree No. 51 of 2019), Foreign Capital Investment (Royal Decree No. 50 of 2019) and Bankruptcy (Royal Dceree 53 of 2019) in Oman. These new laws followed quickly on the heels of the new Commercial Companies Law (Royal Decree No. 18 of 2019), which we covered in our September 2019 Law Update article, and can be viewed alongside Ministerial Decision number 95/2017 issued by the Ministry of Housing and which regulates the conditions of ownership in real estate investment funds. The new laws were announced in a statement issued by the sultanate's Government Communication Centre ('GCC') in conjunction with the Ministry of Finance, the Ministry of Commerce and Industry, and the Public Authority for Investment Promotion and Export Development (Ithraa).

Senior executives in Oman have welcomed the raft of new laws as likely to have a profound effect on both performance and investor confidence in the Muscat Securities Market ('MSM'). MSM aims to further establish itself as a safe repository of wealth for the general public and international investors.

Legislative Advances and the Public Private Partnership Model

In this article we focus on the new Public Private Partnership Law, given Oman's longstanding track record in privatisation of power and water generation assets. The independent power and water project ('IPWP') model is seen as the core format likely to be utilised by the government to exploit the new legislative framework to assist in attracting private partners to invest in state assets in sectors such as healthcare, education, construction and telecoms.

The PPP law should be viewed against the wider legislative activity as briefly described below:

- Royal Decree 50/2019 promulgating the Foreign Capital Investment Law under which all procedures and permits required for foreign investments in Oman will be approved through the Investments Services Centre of the Ministry of Commerce and Industry. Detailed regulations are awaited but it is expected that a minimum level of Omani participation will be required where foreign investors acquire or set up corporate entities in Oman (currently at least 30 per cent) but project and privatised entities will be capable of 100 per cent foreign ownership. Additionally, land for investment projects will be allotted for long-term leases or usufruct agreements, effectively bypassing the provisions of Royal Decree 5/81, which otherwise regulate usufruct matters as part of land laws in Oman;

- Royal Decree 51/2019 promulgating the Privatisation Law provides for government policies to improve ownership and management roles for the private sector in various economic activities in the Sultanate. Detailed regulations are currently being drafted but the law clearly evidences a commitment to privatisation where 100 per cent foreign ownership will be permissible.
- Royal Decree 52/2019 promulgating the Public Private Partnership Law regulates PPPs with the aim of encouraging the private sector to invest in various infrastructure and public services projects in the country. Detailed regulations are currently being drafted; and
- Royal Decree 53/2019 promulgates the Sultanate's Bankruptcy Law provides long-needed protections for affected parties if an Omani company files for insolvency and should assist in the facilitation of project finance and funding requirements.

PPP in Oman

PPPs tend to involve long-term contracts between a private enterprise and a government entity, to develop or enhance a public asset or service. The private party will be expected to bear significant risk and management responsibility. Remuneration is linked to performance as the government withdraws from a state monopoly or subsidised utility. The PPP model is commonly used for public infrastructure projects such as airports, power plants, new roads, hospitals, schools and/or telecommunication systems.

PPP is one of the cornerstones of the Vision 2040 developmental strategy for Oman. Vision 2040 provides for project procurement planned through further successive five-year-development plans. During the current 9th Five Year Plan projects valued in the region of RO 2.5 billion (US$6.5 billion) are envisaged for implementation under the PPP model.

Prior to the new law, PPPs in Oman were regulated by the previous Privatisation Law, Royal Decree 77 of 2004 which provided for public utilities to be privatised or restricted under the law. IPWPs were tendered by the state-owned Oman Power and Water Procurement Company ('OPWP') pursuant to Royal Decree 78 of 2004 as amended ('Sector Law') and Royal Decree 36/2008 ('Tender Law') both of which are still in force. The Tender Law is the key legislation that regulates government procurement in Oman.

"Oman rose ten places to 68th in the 2019 World Bank Ease of Doing Business index.

Public Private Partnerships Law (Decree No. 52/2019) and Privatization Law (Decree No. 51/2019)

It is not possible to fully evaluate the effect of the new legislation pending issue of the associated regulations for both the PPP Law and the Privatisation Law. The regulations should be released one year from the date of publication. One key issue that investors will be keen to see determined under the regulations will concern whether a sovereign guarantee will be available in respect of relevant projects. Investors will want to consider any regulations as soon as possible, so they can more fully evaluate the viability of PPP projects in Oman. Pending issue of the regulations, the decrees do however, absent the detailed regulations, allow for certain features of the future PPP and privatisation framework in Oman to be described under the themes below.

Economic and Social Return

The new Public Authority for Privatisation and Partnership ('PAPP') oversees PPP projects in Oman. Whilst Ministries will retain responsibility for managing projects, the PAPP will lead the process of awarding tenders for PPP projects following its preparation, evaluation and negotiation of bids in consultation with the relevant Ministry or authority.

Prior to tendering any project, the PAPP will seek Ministry of Finance approval. Projects must offer 'economic or social' return and conform to the governments 'strategy and development plan'. This has been interpreted as allowing a wide discretion as to the type of projects that may qualify. Interaction between Ministries and private enterprises, for the purposes of contracting for PPP, will be new to many departments and authorities and significant dialogue and consideration between prospective parties may be required as novel projects are initiated in Oman.

Bids

The Tender Law (Decree No. 38/2008) does not apply to projects established pursuant to the PPP Law or the Privatisation Law, nor consultancy contracts associated with such projects.

The PPP Law legitimises direct approaches by prospective sponsors and direct awards without following a tender process, subject to the approval of the Council of Ministers. In the prescribed bidding process outlined in the PPP Law, competitive dialogue is expressly cited as an acceptable way to determine an award for projects of a special nature.

There is specific provision in the PPPLaw that where prices "unjustifiably exceed" the compared cost, the PAPP may reject bids, suggesting that concerns raised in mature markets over value for money have been taken into account when the legislation was drafted.

Contracts

A high-level description of envisaged contracts is included in the PPP Law but the detail on important issues, such as changes in law, compensation and termination, are yet to be fleshed out. This again may initially just be a matter of dialogue with relevant authorities. One positive provision for prospective investors to note is that the duration of the PPP contract cannot be more than a generous 50 years, considerably longer than current IPWP terms.

Project assets revert to the government on termination or expiry under the PPP Law. It does appear that agreed compensation will be paid which, in turn, suggests that BOT or BOOT type structures should be used in Oman. This appears contrary to the trend in the region for governments to try to divest themselves of assets and, therefore, not use transfer-back models.

Foreign ownership

Both the PPP Law and the Privatisation Law explicitly state that 100 per cent foreign ownership of project and privatised entities is permitted. The required capital and other details of the project company will be set out in the regulations.

The PPP Law imposes controls on project companies. Approval of the PAPP is required prior to a project company's sale of shares, creation of security or assignment. The PPP Law does not apply to public utilities, however, an important provision of the Privatisation Law for prospective investors to note, is that where Omani employees are to be transferred to a project company, they must be transferred on the same terms and conditions of employment (including pension provision, where civil service pensions can be generous) as previously enjoyed, and that these terms and conditions are to remain the same for five years following any such transfer.

Disputes

The PPP Law and the Privatisation Law provide for a specific appeals process for disputes relating to the tender process, project award and implementation. How the appeal process will ultimately interact with the court system (and arbitration mechanisms) in Oman cannot be fully confirmed ahead of the issue of regulations but the presence of a mechanism to challenge any perceived unfair decisions must be considered positive for investors.

Future outlook

Oman rose ten places to 68th in the 2019 World Bank Ease of Doing Business index. At the same time, the newly established Public Authority for Privatisation and Partnership is currently examining as many as 38 projects for implementation via the Public Private Partnership route. Projects in the health, education, transportation and public services sectors are under consideration, involving numerous different government ministries and authorities. We are already seeing significant investor activity in Oman and expect activity to continue and intensify, as prime movers work with authorities in Oman to inform the interpretation and application of the new and developing legislative framework. The non-oil sector's rising contribution to GDP in Oman evidences the success of the government's efforts to liberalise the economy. Non-oil contribution to GDP rose to an impressive 70 per cent in 2018, achieved in large part by the increasing role played by the private sector.

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A Piece of the Action: PPP Projects in Qatar

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Qatar is embarking on the introduction of a number of significant Public Private Partnership Programmes ('PPP') in the immediate future which will complement the already significant developments arising from Qatar's hosting of the FIFA World Cup in 2022. Forecasts envisage the Qatari construction market registering a compound annual growth rate of 9.6 per cent between 2019 and 2024. This would make Qatar one of the most robust construction markets in the world. This massive construction will be driven by public investment but also aims to attract private sector investments at levels previously unseen.

Under the Qatar National Vision 2030, the country is set to award an estimated US$85 billion worth of planned projects. Over US$12 billion worth of projects are already underway or planned for the oil and gas project market alone. Large developers such as Barwa, Qatari Diar and Msheireb Properties have already contributed to the development of Qatar with significant projects completed or near completion. A focus on PPP projects should prove to continue and expand upon this trend.

In April 2019, the Qatar Cabinet approved the draft PPP law which, it is hoped, will stimulate several massive investment projects in Qatar. The PPP law is planned to be in place early this year and, according to interviews in the Qatar Press with senior government officials, will involve the allocation of government land to the private sector on a long-term lease or usufruct basis for development by one of (a) build- own-operate-transfer ('BOOT'); (b) build-operate-transfer ('BOT'); (c) build-transfer-operate ('BTO'); or (d) operations and maintenance ('OM') among other provisions.

In 2011 the Qatar government set up a company, Manateq, to establish Special Economic Zones, Industrial Zones, Logistics Parks, and Warehousing Parks in various parts of Qatar including Messaied, Al Wakra, Aba Saleel, Birkat Al Awamer and Jery Al Samur. Coupled with this, in 2018 Qatar put into place Free Zone Regulations permitting activities such as Industrial Products & Services; Aerospace & Aviation; Energy & Environmental Technologies; Pharmaceuticals, Life Sciences and Medical Services; Automotive & Transport Equipment; Marine Activities & Services; Information and Communication Technologies amongst many others. The Qatar Free Zones Authority has been established to administer and regulate the free zones.

The PPP law is expected to pave the way for many new projects in Qatar such as the building of: new roads; tunnels; schools; telecommunication projects; hotels; and hospitals. The government has indicated that PPPs will also be used to support projects connected to the Qatar National Vision 2030 and the FIFA World Cup. Notwithstanding that the law has yet to be enacted, a number of very significant PPP projects are already being put out to tender by such government authorities such as Ashghal (the Public Works Authority) and Kahramaa (the Electricity

Qatar National Vision 2030 will result in the award of over US$85 billion worth of contracts.

and Water Authority). Whilst some of these projects relate to widening existing services such as sewage and water treatment, others involve state of the art new technologies and industries such as the Al Kharsa Solar Project. Even contracts for the construction of around two million square metres of warehousing space within free zones was awarded to developers in the field of warehousing and logistics services on a BOT basis.

Another significant step in the PPP programme was the recently launched education PPP initiative. Under this initiative, the government plans to build 45 new public schools at a capital cost of over US$1 billion to provide an additional 34,000 student places. This education PPP, whilst common in many other countries, is the first time this type of partnership will be used in Qatar for social infrastructure. This PPP is attracting a great deal of interest from education providers, the construction industry and financiers as the private sector will design, build and operate the proposed new schools. It is divided into six investment packages, to be offered on a staggered basis.

Qatar has also recently issued new laws and amendments to existing legislation with a view to attracting and encouraging domestic and foreign investments. These include amendments to the Investment Free Zones Law and the Foreign Capital Investment Law. The Consumer Protection Law is also being reviewed to take into account developing international standards and cross-border consumer e-commerce.

The private sector, from the construction industry to operators and financiers will be keen to take advantage of what could prove to be lucrative and long-term opportunities facilitated by these developments. Qatar is forecast to be one of the few GCC economies to show sustained growth over the short and medium term, and there are aggressive plans for population growth over the coming years. These factors underpin the government's ambitious infrastructure PPP plans, allied to a stated goal of Qatar becoming an easier place for foreign entities in which to do business. It will be fascinating to see how PPP develops in Qatar.

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Electric Change: Implementation of UAE Power and Water Sector Shake Up

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Historically, the UAE electricity sector was highly fragmented. This was due to power and water being controlled at an Emirate-level, rather than federal, in the largest Emirates though the various electricity and water agencies (EWEC (formerly ADWEA/ADWEC), DEWA and SEWA) with FEWA having the mandate for the remaining northern Emirates.

There have been a number of initiatives or practical developments that have reduced the siloed nature of this UAE market in the last decade. For example, the plan for the Emirates National Grid to connect the four separate systems was announced by the UAE Government in 2013. Abu Dhabi has become a significant supplier of electricity to the northern Emirates. In 2018, Abu Dhabi and Dubai entered into a memorandum of understanding to study water connection between the two Emirates. In February, Abu Dhabi Power Corporation offered to merge its power and water assets with Taqa to create a AED 200 billion electricity behemoth. 2018 and 2019 heralded significant legislative change that was set to underpin the next stage of development.

The new Abu Dhabi Framework

The Emirates Water and Electricity Company was incorporated under Law No. 20 of 2018 (the 'EWEC Law') as a replacement for the Abu Dhabi Water and Electricity Company (originally established by the Water and Electricity Law, Law No. 2 of 1998). Also in 2018, the Department of Energy of the Government of the Emirate of Abu Dhabi (the 'DOE') was formed pursuant to Abu Dhabi Law no. 11 of 2018 (the 'DOE Establishment Law') the purpose of which was to replace ADWEA and its regulatory responsibilities and the Regulation and Supervision Bureau (the 'RSB') with the DOE. This was then followed in early 2019 by changes to the role of Abu Dhabi Power Corporation ('AD Power').

As a result of these changes, the new regulatory framework introduced by the DOE Establishment Law, the EWEC Law and the AD Power amendment law had the following impact:

1. the DOE became the single regulator of the electricity and water sector in Abu Dhabi (in place of ADWEA and the RSB). The DOE now grants generation and production licences to regulated entities;
2. transfer of commercial assets and shares owned by ADWEA to AD Power;
3. ownership of AD Power to the new Abu Dhabi Development Holding Company from ADWEA; and
4. replacement of ADWEC by EWEC.

The restructuring has had the key benefit of separating and transferring the commercial and regulatory aspects of the electricity and water sector that rested with ADWEA to AD Power and the DOE respectively. ADWEA was a public authority directly owned by the government; AD Power is a government corporation and owned by Abu Dhabi Development Holding Company. ADWEA's role was corporate insofar as it owned AD Power and had the power to form subsidiaries but, had public responsibilities insofar as its objectives were to promote conservation, research, the provision of public information in respect of the water and electricity sectors. However, AD Power's objectives under law are purely corporate (e.g. to invest in projects, establish subsidiaries, and provide security, etc.).

For EWEC, the restructuring led to an enhanced role reflecting the trend of greater integration in the UAE power and water markets. Under the EWEC Law its role is to act as the sole provider for production of water and electricity in a geographical scope to be determined by Abu Dhabi's Executive Council. This contrasts with ADWEC which was only statutorily responsible for Abu Dhabi. EWEC's changed geographical scope was explained by public announcements from EWEC that it would be responsible for the procurement of water and electricity in Abu Dhabi and the Northern Emirates. This requires arrangements to be made with FEWA as the federal agency for electricity and water (media reports state that these discussions are underway).

"Understanding the impact of the legislative changes to new projects was of particular importance in 2019 as numerous projects were in process.

Implementation

More than a dozen projects have been completed since the introduction of the 1998 Water and Electricity Law. The Abu Dhabi IPP/IWP programme was a notable example of a successful private sector participation programme and influenced other Emirates to follow its model. The well 'road-tested' regime made each new project a more certain undertaking as the transaction documents and legal framework had been banked numerous times. Understanding the impact of the legislative changes to new projects was of particular importance in 2019 as numerous projects were in process. EWEC awarded one water project (Taweelah IWP) and invited bids for two more (Fujairah F3 IPP and Al Dhafra Solar IPP).

A reading of the EWEC, DOE and AD Power laws together indicates that there is no intention to change the risk being assumed by developers and lenders involved or bidding for an Abu Dhabi IPP or IWP. However, these laws need to be overlaid with the original 1998 law as the DOE Law only repealed it to the extent there was contrary provision. Parties interested in the 2019 projects wanted to ensure that the new laws effectively transferred the assets, rights and obligations of the old entities to the new, that powers of the new entities were aligned with the old regime, which of the new entities would provide consents and approvals and that the laws duly authorised the new entities to perform their replacement roles. The successful closing of Taweelah in October 2019 and bid demand for the Fujairah F3 IPP and Al Dhafra Solar IPP seemed to be strong endorsements that the statutory changes did not adversely impact the attractiveness of an Abu Dhabi project to the private sector.

The Future

In September 2019, the Climate and Environment Minister of the UAE Government, Dr Thani bin Ahmed Al Zeyoudi, announced, at the United Nation's Climate Action Summit in New York, a target of 50 per cent clean energy by 2050 for the UAE. It is proposed this would be made up of 44 per cent from renewables and six per cent from nuclear. The Dubai Government has its own goal of 75 per cent clean energy by 2050. The achievement of these goals, both laudable and ambitious, will necessitate coordination between the Emirate and Federal governments and their agencies. Accordingly, we anticipate the further reduction of market barriers and integration of the power and water sector in the years to come.

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FEDERAL DECREE-LAWS

4 of 2019	Amending Federal Law No. (3) of 1987 promulgating the Penal Code.
5 of 2019	On the establishment of the Federal Geographic Information Centre.

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FEDERAL DECREE-LAWS

6 of 2019	Amending Federal Law No. (8) of 1980 regulating Labor Relations.
8 of 2019	Amending Federal Law No. (28) of 2005 on Personal Status.
9 of 2019	Amending Federal Law No. (2) of 2001 on Social Security.
10 of 2019	On Family Violence Protection.
11 of 2019	Amending Federal Decree-Law No. (2) of 2015 on Combatting Discrimination and Hatred.
12 of 2019	Amending Federal Law No. (9) of 2006 on the Population Register System and the Emirates ID Card.
13 of 2019	Amending Federal Law No. (2) of 1971 on the Federation's Flag.
14 of 2019	Amending Federal Law No. (12) of 2014 regulating the Audit Profession.
15 of 2019	Amending Federal Law No. (4) of 2000 on the Emirates Securities and Commodities Authority and Market.
16 of 2019	Approving an additional allocation to the budget of the Federation and to the ancillary budgets of independent bodies for the financial year 2019.
18 of 2019	Amending Federal Law No. (3) of 1983 on the Federal Judicial Authority.
19 of 2019	Regarding Insolvency.

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29 August 2019

FEDERAL DECREE-LAWS

17 of 2019	On firearms, munitions, explosives, military hardware, and hazardous materials.
20 of 2019	On the establishment of the Monitoring and Control Center.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 662 Supplement
16 Muharram 1441H
15 September 2019

FEDERAL DECREE-LAWS

21 of 2019	Regarding Emirates Post Group.
22 of 2019	Regarding Emirates General Transport and Services Corporation.
23 of 2019	Amending Federal Decree-Law No. (9) of 2016 on Bankruptcy.
24 of 2019	Amending Federal Law No. (20) of 2016 on Mortgaging of Movable Assets as Security for Debts.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 662 Supplement 1
16 Muharram 1441H
15 September 2019

FEDERAL DECREE-LAWS

26 of 2019	On public finance.
27 of 2019	Amending Federal Law No. (6) of 2014 on National and Reserve Service.
28 of 2019	On the establishment of the National Counseling Center.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 665
3 Rabīʿ al-Awwal 1441H
31 October 2019

FEDERAL DECREES

115 of 2019	Terminating the duties of the UAE Ambassador to Montenegro.
116 of 2019	Transferring the UAE Consul General to Hong Kong to the Headquarters of the Ministry of Foreign Affairs and International Cooperation.
117 of 2019	Transferring the UAE Ambassador to Norway to the Headquarters of the Ministry of Foreign Affairs and International Cooperation.
118 of 2019	Transferring the UAE Ambassador to Bulgaria to the Headquarters of the Ministry of Foreign Affairs and International Cooperation.
119 of 2019	Appointing a UAE non-resident ambassador to Gabon.
120 of 2019	Appointing a UAE non-resident ambassador to the Democratic Republic of the Congo.
121 of 2019	Appointing a UAE non-resident ambassador to South Sudan.

MINISTERIAL DECISIONS

- From the Ministry of Justice

914 of 2019 On the formation of the Asset Freeze, Seizure and Confiscation Committee.

- From the Ministry of Climate Change and Environment

468 of 2019 On the regulation of net fishing of pelagic fish.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority (SCA)

32/RM of 2019	Chairman of the Board Resolution on the procedures for listed companies with a cumulative loss of 20% or more of their issued capital.
33/RM of 2019	Chairman of the Board Resolution on the definition of "material information" (and related amendments).
34/RM of 2019	Chairman of the Board Resolution amending Board Resolution 2 of 2001 concerning the Regulations as to Trading, Clearing, Settlement, Transfer of Ownership and Custody of Securities.
35/RM of 2019	Chairman of the Board Resolution on financial reports for SCA-licensed activities.
36/RM of 2019	Chairman of the Board Resolution on general clearing member activity.
37/RM of 2019	Chairman of the Board Resolution on the definition of "qualified investor."

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 666
17 Rabīʿ al-Awwal 1441H
14 November 2019

FEDERAL DECREES

122 of 2019	Inaugurating the 17th Legislative Chapter of the Federal National Council.
123 of 2019	Convening the Federal National Council.

REGULATORY DECISIONS OF THE CABINET

60 of 2019	On the implementation of the UAE mandatory standard for food additives.
61 of 2019	On the Emirates Conformity Assessment & Classification Scheme for Auto Repair and Service Centres.
62 of 2019	On the Unified National Number System for Customers (Traders, Clearance Companies, Exporters, Importers) of Customs Departments Nationwide.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority (SCA)

30 of 2019 Chairman of the Board Resolution approving a UAE standard specification.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 666 Supplement
17 Rabī' al-Awwal 1441H
14 November 2019

FEDERAL LAWS

6 of 2019 On consolidating the general budget of the Federation and the ancillary budgets for its independent bodies for the financial year 2020.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 667
1 Rabī' al-Ākhar 1441H
28 November 2019

DECISIONS OF THE FEDERAL SUPREME COUNCIL

2 of 2019 On the re-election of the President of the UAE.

FEDERAL DECREES

124 of 2019	Appointing an advisor at the Ministry of Presidential Affairs.
125 of 2019	Appointing a UAE non-resident ambassador to Lithuania.
126 of 2019	Appointing the UAE Ambassador to Montenegro.

REGULATORY DECISIONS OF THE CABINET

63 of 2019 On the Education Support Fund.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority (SCA)
  - Certificate of approval of amendment of the Articles of Association of Takaful Emarat PSC.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 668
18 Rabī' al-Ākhar 1441H
15 December 2019

DECISIONS OF THE UAE PRESIDENT

7 of 2019	Appointing the Secretary General of the Federal National Council.

MINISTERIAL DECISIONS

- From the Ministry of Health & Prevention

932 of 2019	On price reductions on select medicines.

- From the Ministry of Community Development

201 of 2019	Renaming Dubai Folklore Theatre.
260 of 2019	Giving public notice of Emirates Congenital Heart Disease Association.
261 of 2019	Giving public notice of Saeed Mohammed Al Raqbani Charitable and Humanitarian Foundation.
276 of 2019	Giving public notice of the Takaful Social Security Fund for Staff of the Federal Authority for Identity & Citizenship.
304 of 2019	Giving public notice of the UAE Inventors Society.
350 of 2019	Renaming Bani Yas Theatre.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 669
5 Jumada al-Ula 1441H
31 December 2019

FEDERAL LAWS

7 of 2019	On medically-assisted procreation.
8 of 2019	On medical products, the pharmaceutical profession, and pharmaceutical establishments.
9 of 2019	On the rights of senior citizens.
10 of 2019	On the regulation of judicial relations between the federal and local judicial authorities.
11 of 2019	On rules and certificates of origin.
12 of 2019	On the regulation of the space sector.

FEDERAL DECREES

127 of 2019	Terminating the duties of the UAE Ambassador to Chad.
128 of 2019	Terminating the duties of the Permanent Representative of the UAE to the North Atlantic Treaty Organization (NATO).
129 of 2019	On performing the duties of the Permanent Representative of the UAE to the North Atlantic Treaty Organization (NATO).
130 of 2019	On performing the duties of the UAE Ambassador to Mali.
131 of 2019	Transferring and appointing a UAE ambassador.
132 of 2019	Transferring and appointing a UAE ambassador.
133 of 2019	Appointing a UAE non-resident ambassador to North Macedonia.
134 of 2019	Appointing a UAE Consul-General in Melbourne.
135 of 2019	Appointing judges in the Federal Courts.
136 of 2019	Ratifying the UAE-Surinam Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.
137 of 2019	Ratifying the UAE-Chad Agreement on the Encouragement and Reciprocal Protection of Investments.
139 of 2019	Ratifying the UAE-Gabon Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.
141 of 2019	Ratifying the UAE-Gabon Agreement on the Encouragement and Reciprocal Protection of Investments.
142 of 2019	Ratifying the UAE-South Korea Agreement for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance.
144 of 2019	Ratifying the Memorandum and Articles of Association of Gulf Payments Company.
145 of 2019	Ratifying the Protocol Amending the UAE-Belarus Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Real Estate.

MINISTERIAL DECISIONS

- From the Ministry of Interior

828 of 2019	On the exchange of a South Korean driving license for one from the UAE.

- From the Ministry of Climate Change and Environment

582 of 2019	On the reconstitution of the National Food Safety Committee.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority

-	Certificate of approval of amendment of the Articles of Association of Emirates NBD PJSC.

Tokyo, Japan

20th NOV

Infrastructure and Energy Projects Seminar with Atsumi & Sakai

Partner Mark Brown recently travelled to Tokyo to speak at a legal seminar, with Japanese law firm Atsumi & Sakai, entitled 'Trends and Key Points on Infrastructure and Energy Projects Abroad'. Also serving to launch the book 'Contracts and Practice of Overseas Energy Projects", to which Al Tamimi & Company contributed four chapters, the seminar featured lawyers from various jurisdictions covering most of the globe, who had also contributed articles to the book. Guest speakers covered a number of key issues Japanese investors should give consideration to, including:

1. the development or trends / situation of investment by foreign companies into the infrastructure and energy industry in their countries;
2. legal restrictions on foreign investment or restrictions on profit transfer; and
3. significant finance related issues which are unique to their jurisdictions.

Well attended, and highly informative, the seminar brought together attendees from a broad range of Japanese companies, banks, professionals and investors. Prior to the event Mark visited a number of key clients that Al Tamimi & Company has acted for recently on project transactions or are targets, including JBIC, NEXI, Sumitomo, Mitsui, Marubeni, Itochu and law firm referrers. One corporate structuring mandate has already been referred as a result.

Egypt

7-9th NOV

BiznEX Exhibition & Conference 2019

Egypt International Exhibitions Center, Cairo

The Egypt office partnered with BiznEX to be the sole strategic legal partner of the event that was held from the 7th to the 9th of November and was opened by Sahar Nasr the Minister of Investment and the Prime Minister Mostafa Madbouly as the key note speaker.

Hossam Gramon, Partner and Head of Banking & Finance excelled in a panel addressed the future of investment opportunities in Egypt highlighting to the investors how to establish a business under the new investment law, the role of the Banks in financing the new projects and spoke as well about the investment climate reforms in general. Hossam was interviewed by CBC extra & DMC channels.

Rasha Al Ardah, Senior Associate, Intellectual Property participated on a panel that addressed Internationalization & Localization of brands as franchising.

The conference was very well covered by several T.V. channels and all the local newspapers especially in Dubai and Saudi Arabia. We also received an award at the end of the 3 days exhibition and conference for accepting to be the strategic legal partner of the event and offering free advice for new projects and businessmen searching for investment opportunities in Egypt.

Kingdom of Saudi Arabia

4th
NOV

Ibtissem Lassoued Speaks at Refinitiv's 11th Compliance and Anti-Money Laundering Seminar

Al Faisaliah Hotel, Riyadh

On 4th November, Ibtissem Lassoued joined Refinitiv for their 11th Compliance and Anti-Money Laundering Seminar in Riyadh to speak during a panel session on the Global Regulatory Outlook in 2020. Saudi Arabia's induction as a full member of FATF in June 2019 marks a significant shift in the Kingdom's AML/CTF approach and, as the first Middle Eastern country to gain this status, neighbouring states will be looking to Saudi's reform efforts as an example of regulatory compliance. Ibtissem discussed the importance of learning from leading jurisdictions on emerging threats and risk factors such as disruptive financial technology and cryptocurrency regulations, and fluctuations in the international sanctions framework. More than 400 professionals from Saudi Arabia's financial sector joined for the event providing a clear indication of the elevated significance of this issue in the market its potential impact on the Kingdom's commercial profile moving forwards.

13th
NOV

Construction Disputes, Legal and Technical & Legal Insight in collaboration with HKA Global

Crowne Plaza Hotel, Riyadh

On November the 13th, Al Tamimi and Company and HKA Global collaborated for a one-day Conference on "Construction Disputes, Technical & Legal Insight". The event was divided into four different panel discussions, which was moderated by Partner Ahmad Ghoneim (FCIArb), who also served as a speaker. Abdullah Al Tamimi (Partner), Emad Salameh (Partner), Dr. Ahmad Basrawi (Partner), John Gaffney (Senior Counsel), and Euan Llyod (Senior Counsel) participated as speakers from Al Tamimi & Company, along with HKA representatives, Haroon Niazi (Partner), Tim Whealy (Partner), and Nader Emile (Associate Director).

The first panel discussed the dispute resolution where the panel elaborated the contrast between arbitration and litigation proceedings in KSA, in addition to the updated GTPL, which allows for arbitration in government-related disputes and increases the maximum delay penalty that may awarded.

The second panel discussed the cost claims where the panel explored the importance of giving high quality expert advice in domestic arbitration and touched on the preparation of prolongation, disruption and acceleration claims in KSA.

The third panel discussed the project finance where the panel highlighted the liquidity status of the market, and how delayed payments have affected distressed projects.

The final panel discussed the delay claims where the panel spoke about the challenges faced by the contractors when preparing extension of time claims and the technical and legal complexities involved in proving extension of time entitlement.

The event was very well-received, with 80 people in attendance. The panels were very dynamic, impressive, engaging, and made the discussions more interactive and enjoyable. There was also a room for networking and socializing amongst attendees and speakers.

United Arab Emirates

13th NOV

Kicking It with FIFA and Bär & Karrer: Financial Crime Hosts a Joint Breakfast Seminar on Corruption Risks and Business Opportunities in Sports

Palace Downtown, Dubai

On Wednesday 13th November, Al Tamimi & Company hosted a joint breakfast seminar with leading Swiss law firm Bär & Karrer on Corruption Risks and Business Opportunities in the Middle East's Sports Sector. Organised by the Regional Financial Crime Department, our Partners Ibtissem Lassoued and Steve Bainbridge joined leading white collar and sports law experts from Bär & Karrer, as well as speakers from FIFA, AC Milan and NEOM for two panel sessions on corruption risks in football and business opportunities that are being brought to the Middle East by a flourishing mega-events industry.

Special guests Emilio Garcia Silvero, Chief Legal and Compliance Officer from FIFA and Miguel Lietard, Director of Litigation for FIFA, both brought positive messages of optimism regarding changes that have been brought in to effect greater financial integrity in football, including the new FIFA Law and ongoing investigative efforts with national authorities all over the world.

Drawing on the experience of the speakers and their involvement in the highest profile investigations in football, the first panel session focused particularly on the issue of match-fixing, and the reliance of football associations on the cooperation of authorities in host nations to prosecute corruption.

As the seminar shifted to the second session of the day on commercial opportunities, speakers also expressed differing views of the trends that are shaping sports consumerism and how Gulf countries that are building state of the art facilities can capitalise on diverse new forms of entertainment.

The sports and events industry is on the front edge of Gulf countries' drive for futuristic economies, and their ability to be early adopters of new forms of entertainment whilst taking a proactive approach to sports integrity will be a vital aspect of their success in this endeavour.

17-21 NOV

Dubai Arbitration Week

Looking back from another successful Dubai Arbitration Week, with the programme being the biggest yet, it was great to see many attendees at our events where we were able to reconnect and discuss some of the hot topics impacting the arbitration community.

The inaugural event of Dubai Arbitration week was jointly organised by Al Tamimi & Company, DIFC-LCIA & Young ICCA on the Young ICCA Skills workshop. The session focused on document management and production in International Arbitration: Perspectives from Civil and Common Law. One of the highlights was Jan Paulsson's key note speech.

On day 2, Our Head of Arbitration and Partner, Thomas Snider along with expert guest speakers from London, Singapore, Dubai and Nigeria spoke about Global Topics in International Arbitration and explored four discrete but salient topics in international arbitration; oil-and-gas disputes, construction disputes, disputes in Africa, and third-party funding.

Day 3 started with Al Tamimi & Company and Delos Dispute Resolution addressing a small targeted group of in house counsel looking at latest developments in arbitration and addressed the issue of cost efficiency in arbitration through a presentation of the Delos model.

On day 4 of the week, we held a networking lunch and seminar in our DIFC office in collaboration with the Korean Commercial Arbitration Board (KCAB International), DIFC-LCIA, KETA & ICAK. The panellists had the opportunity of discussing recent developments in international arbitration in the UAE as well as insight into the related issues from Korean speakers.

10th
DEC

She Breaks the Law

The Hundred Wellness Centre, Dubai

On Tuesday 10th December, following the success of the events hosted in London, New York, Chicago, Amsterdam, Sydney, Paris and Mumbai, She Breaks the Law co-founded and run by Priya Lele in collaboration with Al Tamimi & Company came to Dubai! The event brought together over 50 legal professionals to the Hundred Wellness Centre with an opportunity to share their stories and to connect.

Topics discussed included: How to come back to work after a career break, #Sorrynotsorry- female assertiveness/making an impression, Quietening the imposter syndrome voice in your head, How to make flexible working work for you and your organisation, Your personal brand as a leader of disruption and & Meet one of the founders: what do you want to get from this network.

The event was a success with positive feedback and attendees asking to make this event a regular fixture – watch this space!

Other Events

Sunday, 10th November
Managing Employment Disputes in KSA
DIFC Office, Dubai, UAE

Speakers:
Zahir Qayum
Senior Counsel, Employment & Incentives

Mohsin Khan
Senior Associate, Employment & Incentives

Monday, 11th November
KSA Labor Market Reforms and Their Impact on the Search and Staffing Industry
LinkedIn, Dubai, UAE

Speakers:
Zahir Qayum
Senior Counsel, Employment & Incentives

Mohsin Khan
Senior Associate, Employment & Incentives

Tuesday, 12th November
Islamic Finance News (IFN) Kuwait Dialogue
JW Marriott, Kuwait City, Kuwait

Speakers:
Alex Saleh
Partner, Co-Head of Office – Kuwait

Madhurima Basu
Senior Associate, Banking & Finance

Monday, 25th November 2019
ADGM on the Move
Abu Dhabi Office, Abu Dhabi, UAE

Speakers:
Alex Ghazi
Partner, Head of Office – Abu Dhabi

Izabella Szadkowska
Partner, Corporate Structuring

Ivor McGettigan
Partner, Employment

Rita Jaballah,
Partner, Head of International Litigation Group

Hassan Al Jarrah
Head of Corporate Structuring – Abu Dhabi

Ashish Banga
Senior Associate, Banking & Finance

Linda Fitz-Alan
Registrar and Chief Executive, ADGM Courts

Tuesday, 26th November
Spanish Individuals in the UAE: Tax Implications in Both Countries, in Collaboration with the Spanish Business Council
DIFC Office, Dubai, UAE

Speaker:
Xavier Solanes
Associate, Tax

About Us

Al Tamimi & Company has unrivalled experience, having operated in the region for over 30 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 MENA region.

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 •

Sectors

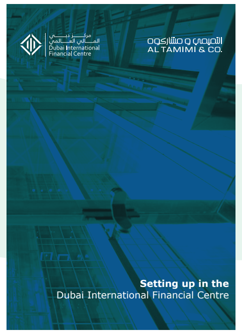
Automotive • Aviation • Education • Expo 2020 • FMCG • Healthcare • Hotels & Leisure • Projects • Rail • Shipping • Sports & Events Management • Transport & Logistics •

Country Groups

China • India • Korea •

Publications

Al Tamimi & Company is at the forefront of sharing knowledge and insights 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.



Accolades

Regional Footprint

UAE
Abu Dhabi
Dubai, DIC
Dubai, DIFC
Dubai, Maze Tower
Ras Al Khaimah
Sharjah

Bahrain
Manama

Egypt
Cairo

Iraq
Baghdad
Erbil

Jordan
Amman

Kuwait
Kuwait City

Oman
Muscat

Qatar
Doha

Saudi Arabia
Al Khobar
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> **“We appreciate the diversity of the lawyers’ backgrounds – there’s always someone qualified to answer any query.**
>
> *Chambers Global*

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