Issue 326 | February 2020

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AL TAMIMI & CO.

LAW UPDATE

Latest Legal News and Developments from the MENA Region

Settling Family Disputes

Succession Planning

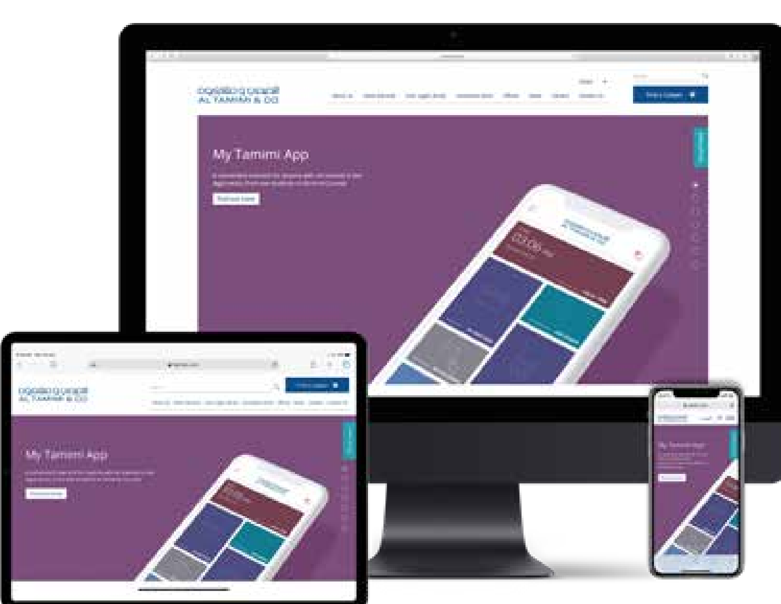
Wealth Management

Family Business & Private Wealth: From Family Trees to Organisational Structures

Enforcement of UAE court judgments in India

Trusts: in succession planning

Recent developments for UK real estate holding companies



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In this Issue

Welcome to February's issue of Law Update!

This month we focus on Family Businesses and Private Wealth in the Middle East & North Africa. Family businesses have long been at the heart of the region's flourishing economies, gaining a foothold in the lucrative markets for regional and international brand names. Beyond the region, the concept of a 'family business' could be perceived as a foreign one, but in the MENA region, it is a very familiar and established, way of doing business: founding partner sets up a business; and when the founding partner passes or decides to step down, the business is distributed amongst family members according to the relevant local/Sharia law(s) so as to guarantee familial continuity. Unfortunately, in some cases re-distribution can be shrouded in controversy arising from family differences and, in the event of disputes, take years to resolve, and can even result in the potential paralysis of the day-to-day business operations to the detriment of profits and all-round competitive edge. Conversely, other family businesses are successful in navigating such issues and are able to forge a path towards continued growth and profitability. The key to this success is often proper succession planning, good decision making and, of course, access to skilled and experienced advisors.

A number of our family business and private clients hold sizeable real estate portfolios and succession planning in the context of family real estate assets is discussed by Mohammed Kawasmi & Abdulla Khaled on page 54. Ashleigh Bruce considers succession planning in the context of corporate governance in business on page 74.

Trust structures continue to play a key role in achieving optimal succession planning - Foutoun Hajjar and Layla Alalwi discuss Bahraini trusts as a solution for family businesses on page 50 and Richard Catling's article 'Trusts in succession planning' on page 44 provides further insight into the benefits of trust arrangements for the preservation of family assets across generations.

Intra-family disputes - whether due to generational gaps, a lack of succession planning, control being in one pair of hands, disagreements regarding financial distributions and so on have the capacity to paralyse families and family businesses, and so the experienced advisor will always recommend legal structures that reduce the likelihood of such disputes arising. On page 68 Peter Smith discusses forms of dispute resolution as well as choosing the right jurisdiction.

On page 48 Dipali Maldonado and Ruksana Ellahi consider the tax implications for both family businesses and private individuals who hold real estate in the UK via special purpose vehicles. Whilst Al Tamimi & Company does not advise on UK tax law, we work very closely with advisors in the UK to ensure that our clients are optimising their real estate asset holdings in light of changes to the UK tax regime.

Another aspect of good succession planning is estate planning. Egypt has a number of laws that focus on inheritance matters and on page 64 Ahmed Zohny and Nada Abouelseoud provide a focus on inheritance issues facing Egyptian Coptic Christians, who comprise some 30 per cent of Egypt's population.

As this month's edition demonstrates, the legal issues facing family businesses and private individuals touch upon many different areas of legal practice, from TMT, Corporate Structuring and Real Estate to International Litigation and Corporate/Commercial. At Al Tamimi & Company, we pride ourselves on our ability to integrate these different service lines, leveraging the collective knowledge of the firm across multiple jurisdictions, in order to provide bespoke and practical solutions to our clients.

I hope you enjoy this month's issue of Law Update. Should you require any further information or have any questions, please do not hesitate to reach out.

Best regards,

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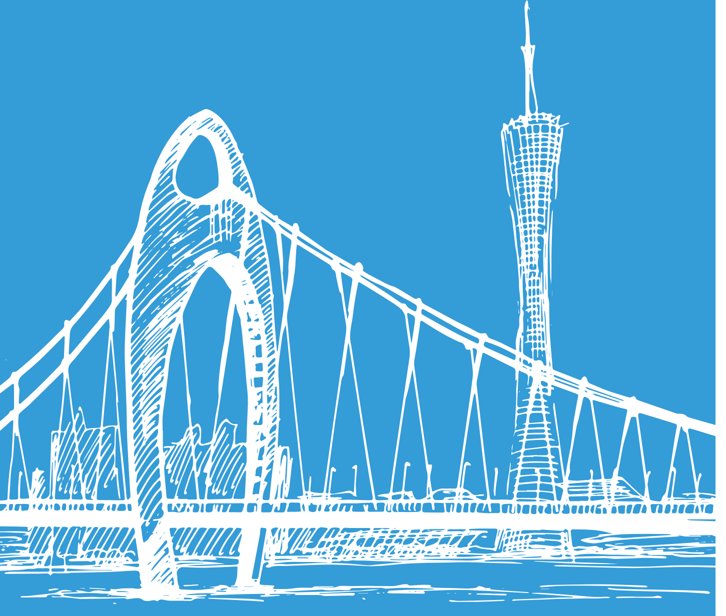
The Qatari Court upholds the fast-track procedures for enforcing mortgages in Qatar



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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In January 2019 the Qatari Civil Court of First Instance issued an interesting judgment in relation to the enforcement of possessive mortgages in which it confirmed a very important principle related to the recognition of the expeditious enforcement of possessive mortgages. The Court ruled that the possessive mortgage shall be recognised and enforced separately from the original substantive case that deals with the determination of outstanding amounts under the facilities agreement. In other words, the possessive mortgage is enforceable by an expedited procedure even where it is related to a civil case regarding the acceleration of the outstanding facility amount is filed and pending before the Court.

Background

What is a possessive mortgage?

Under the laws of Qatar, a creditor may obtain a security interest over movable property in Qatar by executing a mortgage over movables, which is a form of possessory pledge under Law No. 22 of 2004 on the Civil Code ('Civil Code'). Under this method of security, the possession of the relevant movable(s) is transferred to the pledgee (usually a creditor) or a neutral third party who holds the movable(s) on behalf of the pledgee (generally a trustee or bailee). The movable asset(s) would secure the financial obligation of the borrower under the financing agreement between the creditor and the borrower.

Facts of the case

A Possessive Mortgage on movable assets (in this case, Machinery) was signed between a Qatari Bank and its debtor as additional security in respect of the financing facilities granted by the Qatari Bank to the debtor.

Following a default in payment by the debtor, the Qatari Bank filed a civil case in order to claim the outstanding amount in accordance with the facilities agreements before the Court of First Instance.

Simultaneously, the Qatari Bank submitted a separate petition to the Summary Court Judge to seek an order to enforce the Possessive Mortgage and sell the mortgaged movable assets.

Decision of the summary court judge:

The Summary Court Judge dismissed the petition filed by the Qatari Bank for the recognition and enforcement of the Possessive Mortgage without providing any reasoning for his decision.

Court of First Instance

The Qatari Bank, represented by Al Tamimi & Company, appealed the decision issued by the Summary Court Judge on the grounds that the dismissal order was against provisions of Article 241 of Law No. 27 of 2006 on the Qatari Commercial Law (the 'Commercial Code') which states as follows: 'If the debtor does not pay the debt secured by the mortgage within a period of its maturity, the mortgagee, after the expiry date of seven days from the date of notification to the debtor about the payment formally or by registered letter with acknowledgment of receipt, shall submit a petition to the head of the court to seek an order to sell the entire mortgaged item or part of it.'

The Qatari Bank also argued that the Summary Court's refusal to enforce the Possessive Mortgage violates all legal provisions related to mortgage as set forth in the Civil Code and the Commercial Code.

The Court of First Instance accepted the Qatari Bank's argument above and reversed the decision of the Summary Court Judge and confirmed the following important principles relating to the recognition of the expeditious enforcement of a Possessive Mortgage:

1. according to Article 241 of the Commercial Code, the documents required for the enforcement of Possessive Mortgage is to prove that the mortgagee has formally notified the debtor about the payment or by registered post with the acknowledgment of receipt;
2. that the Possessive Mortgage can be executed by expedited procedures even if a related civil case is filed and still pending before the Court; and
3. that the proper way to legally execute the Possessive Mortgage is to submit a petition to the Summary Court Judge to seek an order to sell the mortgaged item.

Significance of the ruling

This judgment is an important development as it constitutes an expedited approach adopted by the Qatari Civil Courts toward the enforcement of Possessive Mortgage. The Civil Court has recognised the value of a prompt and efficient enforcement process which is beneficial for banks when considering lending to the Qatari borrowers. This is of particular importance for the banks as they would be able to collect the debts due to them by enforcing the Possessive Mortgage quickly and being able to sell the pledged movable assets in a prompt and efficient manner. The summary enforcement process is expected to take several weeks compared to the normal court process which may take up to one year.

Al Tamimi & Company's Litigation team in Qatar regularly advises on and conducts all types of litigation in the region, including commercial, banking, criminal, medical, employment, transport, sports, insurance, personal status, construction and intellectual property. For further information, please contact Hani Al Naddaf (h.alnaddaf@tamimi.com) or AbdulKarim Al Soud (a.alsoud@tamimi.com)

Moral damages in personal injury cases: UAE Law and judicial practice

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In the UAE, a claimant may seek moral damages to compensate for non-financial loss. This form of compensation is not awarded to punish the defendant but, instead is awarded as reparations for physical injury caused by an accident that will inevitably cause pain and suffering for both the victim and his family. The question is, when are damages for this type of injury recoverable in the UAE? This article will examine the issues that relate to establishing and quantifying moral damages in the UAE with reference to case law.

Physical injuries are associated with sensory pain felt by the victim which are the physical effects of injury. There is also a psychological and an emotional component to non-fatal physical injuries including that associated with physical disfigurement. According to the Ministry of Justice's commentary on the Civil Transactions Code (Federal Law No.5 of 1985; 'the Civil Code'), grief, disgrace and disfigurement all qualify as moral damage. The victim may also feel inadequate due to physical disability or a fear for one's family's future and one's ability to take care of them. These all qualify for compensation for moral damages; however, the approach by the UAE courts vary.

The Position Under UAE law

There is no explicit UAE law which allows for the recovery of moral damages arising out of or relating to physical injury. However, Article 293 of the Civil Code provides:

1. The right to indemnity for harm shall include moral harm, and an infringement of the liberty, dignity, honour, reputation, social standing or financial credit of another shall be regarded as being moral harm;
2. It shall be permissible for an order to be made for indemnity for moral harm caused to a spouse, or relatives of the family, by reason of the death of the victim;
3. The right to receive indemnification for moral harm may not be transferred to a third party unless the amount of it has been fixed by agreement or by a final judicial order.

Although Article 293(1) relates to tortious liability, the UAE Courts have provided compensation for moral damages in the course of contractual liability as well.

The UAE Courts also apply Article 293(2) of the Civil Code to grant spouses and relatives the right to recover moral damages for the death of a victim. It is argued by many litigators that it is not reasonable however, to allow a surviving relative to recover for pain and suffering caused by the death of a relative but not allow the victim himself or herself to recover for his or her own suffering if their injuries are not fatal.

The Ministry of Justice's explanatory notes also provide an explanation on the rule relating to transferability of the right to recover moral damages. The "right applies also to compensation payable to a spouse or relative. Such compensation shall pass to the heirs only if it has become of ascertained amount by judgment or agreement."

The UAE Courts' approach with respect to the recovery of moral damages

The UAE Courts have consistently allowed the recovery of moral damages in personal injury cases.

In Federal Supreme Court judgment, Cassation No. 322 of 1994, the Federal Supreme Court held:

> *"It is settled that moral damages are recoverable in addition to material damages without the risk of double recovery."*

The Dubai Court of Cassation has also held that:

> *"The assessment of damages is a question of fact for the trial court. The Court of Appeal has identified the elements of material and moral damage in assessing the Respondent's recovery of damages. Those elements were noted as being the Respondent's various physical injuries and the consequences of time off work for medical treatment. Her moral damages include pain, grief, and distress over what she has suffered. The exception taken to the Court of Appeal's decision in this regard is accordingly baseless. Based on the foregoing, the cassation petition shall be dismissed." (Cassation No. 345 of 1999 [Civil]).*

The right of a spouse and relative to recover compensation for Moral Damages

A victim's family can recover compensation for a victim's injuries caused by an accident. Their suffering could be severe if the victim's injuries were fatal. A number of key principles and statements provided in UAE case law shed light on the Courts' approach with respect to the recoverability by a family member.

As mentioned above, the spouse and relatives can claim for moral damages for the death of the victim. A valid marriage must have existed at the time of death, and 'relatives' are defined as family members. Article 76 of the Civil Code provides that "1. The family of person shall consist of his spouse and relatives. 2. All persons coming from a common stock shall be deemed to be relatives."

As such, relatives can be lineal, such as a daughter or son, or collateral, such as siblings. The provision does not specify a degree of kinship and leaves the matter for the courts to assess everything on a case-by-case basis. The relatives of the family who have suffered moral damage due to the death of the victim would then have to be identified, noting that in-laws, and other persons having no common stock, do not qualify for a claim for damages within the meaning of Article 76.

However, this varies between the Emirates, with Abu Dhabi Courts only awarding damages for non-financial losses suffered as a direct consequence of fatal injuries whereas Dubai Courts allow spouses and family members to recover damages for non-financial losses suffered as a consequence of non-fatal injuries too.

Article 293(2) cites death as the sole basis for permitting qualifying spouses and relatives to recover moral damages for pain caused by the victim's physical injuries and so, by its express terms, would rule out the recovery of moral damages if the injuries resulted in physical deformities or disabilities. However, court rulings vary on this matter as explained below.

The approach of the Abu Dhabi Court of Cassation to the recovery of oral Damages for non-fatal injuries

The Abu Dhabi Court of Cassation has held, and the Federal Supreme Court has concurred with the finding, that Article 293(2) cannot be a basis for any entitlement to recovery for non-fatal physical injuries. The Court of Cassation held that: "This Court has held that the law establishes the right of recovery for moral damages then specifies the parties entitled to claim such damages as the aggrieved party and the party morally injured by the death of the victim (spouses and relatives) which accordingly bars the latter from recovering moral damages if the injury is non-fatal" (Abu Dhabi Court of Cassation – Cassation No. 113, 114-2016 – JY11 – 19.02.17, Federal Supreme Court – Cassation No. 134, 137, 138 of JY 20 [Civil]).

The approach of the Dubai Court of Cassation to the recovery Of Moral Damages for non-fatal injuries

The Dubai Court of Cassation holds a different view to the Abu Dhabi Courts and consistently entertains claims for moral damages from spouses or relatives of victims who have sustained physical injuries. Its rulings confirm that the purpose of Article 293 is to identify the parties entitled to claim moral damages for the death of the victim, namely spouses and relatives, to the exclusion of all others. Indeed, the legislative provision in question does not specify standards for claims in terms of death or non-fatal physical injury, but aims to identify the qualifying parties in case of death according to the general rule that compensation includes actual damage. As a result, the Dubai Court of Cassation has held that a person is entitled to recover damages for suffering caused by the injury of his or her relative, be it fatal or otherwise.

The Dubai Court of Cassation also held that the law permits the recovery of moral damages in principle, then restricts the right by reference to the qualifying parties, limiting it in the case of death of spouses and relatives of the family, which is an identification of the persons who are entitled to recover for moral damages and not a delineation of the circumstances and grounds under which a recovery may be pursued.

Article 293 (3) of the UAE Civil Code and the Ministry of Justice Commentary show that compensation for moral damages payable to the injured party himself will not be transferred to the heirs after death, unless the amount has already been determined under a private agreement or by a judgment that has achieved the force of res judicata. That is because that kind of compensation has a personal character. Therefore, it cannot pass by inheritance unless it has taken on a financial character after having been finally assessed by consent or by a judicial order.

It is further settled that physical injuries necessarily and logically entail moral damages for the victim and his or her family members. The assessment of damages in such cases is a matter within the discretion of the trial court. (Dubai Court of Cassation – Cassation No. 307-2014 – 08.01.15).

Although the Dubai Courts approach provides reasonable protection for the victim, it is worth noting that the language of Article 293(2) is clear and limits those who can recover to spouses and relatives. However, other people who suffer non-pecuniary loss, as a consequence of the victim's physical injury, but who are not a spouse or a relative, have no entitlement to a claim for damages. The Ministry of Justice's Civil Code commentary explains that the degree of closeness of relatives entitled to compensation is left to the discretion of the judge in the UAE.

Conclusion

It is well established that a UAE Courts' judge can order compensation for non-financial losses suffered by spouses and family, caused by the death of the injured party. However, this varies amongst the Emirates, with Abu Dhabi Courts only awarding damages for non-financial losses suffered as a direct consequence of fatal injuries whereas Dubai Courts allow spouses and family members to recover damages for non-financial losses suffered as a consequence of non-fatal injuries. A legislative amendment to the UAE Civil code provision, to allow for recovery of damages for severe physical injuries that cause disability, would lead to greater consistency in court rulings across the UAE.

Al Tamimi & Company's Litigation and Arbitration teams regularly advise on personal injury claims in the UAE Courts. For further information, please contact Dr. Omar Al Azawe (o.alazawe@tamimi.com).

Compliance with Economic Substance Rules

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The Central Bank of Bahrain ('CBB') issued Directive No. OG/499/2018 concerning the economic substance requirements for certain financial institutions (defined as the 'Relevant Entities' below) in the Kingdom of Bahrain ('Bahrain') that came into force on 1 January 2019 ('Economic Substance Directive') pursuant to Article 38 of the CBB and Financial Institutions Law No. 64 of 2006 ('CBB Law').

The CBB recently published guidance notes in relation to the Economic Substance Directive and the report that is to be submitted by certain financial institutions (defined as the 'Relevant Entities' below), with the aim of serving as a preliminary guide to these Relevant Entities on the scope and application of the Economic Substance Rules (the 'Guidance Notes'). In this article we provide an overview of the Economic Substance Directive and the Guidance Notes.

Relevant entities

The Economic Substance Directive applies to all CBB licensed:

1. conventional and Islamic (wholesale and retail banks);
2. financing companies;
3. insurance companies;
4. investment business firms (Categories 1 and 2 only); and
5. fund administrators,

in Bahrain (collectively hereinafter referred to as the 'Relevant Entities' and individually a 'Relevant Entity').

The Economic Substance Directive

The Economic Substance Directive prescribes the requirements to be met by the Relevant Entities in Bahrain in terms of confirmations and notifications that must be submitted to the CBB on various matters on an annual basis (the 'Rules'). These requirements are in addition to the existing requirements under the CBB Law and the regulations and do not replace or supersede any existing provisions of the CBB Law or regulations. In addition, any applicant applying to the CBB for a licence to become a Relevant Entity is also required to submit a written confirmation to the CBB that they will comply with the requirements of the Economic Substance Directive.

Some key requirements under the Economic Substance Directive

The Relevant Entities are required to submit a report to the CBB on an annual basis within three months of the Relevant Entity's financial year end confirming (to the extent applicable to the Relevant Entity based on its licence category), amongst other things:

1. the Relevant Entity is directed and managed in Bahrain including confirmation that:
   - the meetings of the board of directors of the Relevant Entity are frequently held in order to enable it to discharge its duties and responsibilities effectively. At least half of all the meetings are to be held in Bahrain. The Relevant Entity must specify the total number of such meetings held within the financial year and specify how many such meetings are held in Bahrain;
   - strategic decisions of the Relevant Entity are set out at meetings of the board of directors as well as the board of directors' committees and the minutes of the meetings should reflect those decisions;
2. all 'approved persons' (as defined in the CBB rulebook) of the Relevant Entity possess the necessary knowledge and expertise to discharge their duties and meet the 'fit and proper' criteria prescribed by the CBB;
3. the Relevant Entity's core income-generating activities (i.e. those principle functions and activities that drive business value, rather than exclusively or mostly administrative support activities) ('CIGA') are being undertaken by the Relevant Entity in Bahrain. Where a CIGA is outsourced (if permitted by the CBB rules), the Relevant Entity is deemed to have complied with all CBB outsourcing rules and requirements as set out in the CBB rulebook. If a Relevant Entity is carrying on more than one CIGA then it is required to satisfy the economic substance requirement for each CIGA);
4. the Relevant Entity has proportionate to the activities of the Relevant Entity:
   - an adequate level of key decision-makers from the executive management;
   - a sufficient number of qualified employees resident in Bahrain. The Rules contain guidance on how the CBB will determine the adequacy of qualification and how full-time equivalent qualified employees is calculated;
   - the Relevant Entity has adequate physical premises in Bahrain; and

- the Relevant Entity has in place an adequate set of internal policies and controls with respect to its operations, compliance, corporate governance and risk management. These policies are reviewed on a regular basis to ensure that they remain appropriate, relevant and in line with any standards set out by the CBB.

"The Economic Substance Directive prescribes the requirements to be met by the Relevant Entities in Bahrain in terms of confirmations and notifications that must be submitted to the CBB on various matters on an annual basis.

Penalties for non-compliance

Failure of a Relevant Entity to comply with any of the provisions of the Economic Substance Directive may result in enforcement action being imposed by the CBB.

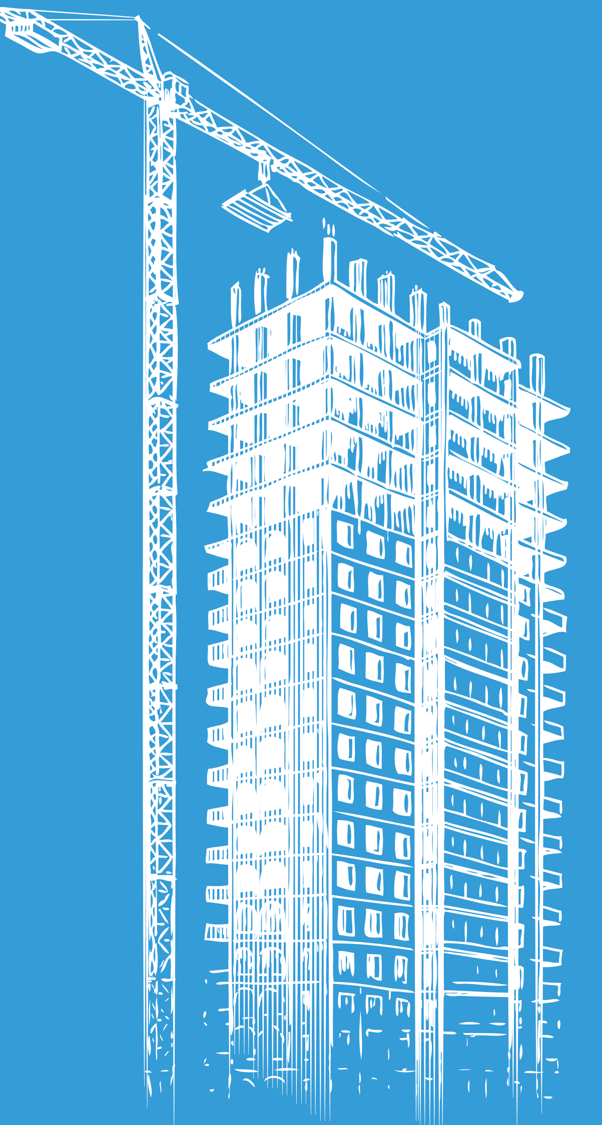
What should you do next?

If you are a Relevant Entity, it is important for you to:

1. understand the Economic Substance Directive requirements and the obligations to be adhered to in order to ensure that your business is compliant;
2. undertake a 'health check' on your existing level of economic substance in Bahrain; and
3. ensure to file the required annual report in the CBB prescribed form within the designated timeframe (within three months of a Relevant Entity's financial year end).

Al Tamimi & Company's Banking & Finance team regularly advises on regulatory matters and is well placed to assess the impact of the Economic Substance Directive on your organisation. For further information please contact Rafiq Jaffer (r.jaffer@tamimi.com), Natalia Kumar (n.kumar@tamimi.com) or Abdullah Puri (a.puri@tamimi.com).

Coronavirus consequences for construction claims in the UAE



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Introduction

The Coronavirus is defined by the World Health Organization ('WHO') is a large family of viruses which may cause illness in animals or humans. In humans, several Coronaviruses are known to cause respiratory infections ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome and Severe Acute Respiratory Syndrome. The most recently discovered coronavirus causes coronavirus disease COVID-19 ('Coronavirus').

This article will shed light on the consequences of Coronavirus for construction claims due to delay in material supply or shortage in labour. We will highlight in this article the contractors' contractual position under the FIDIC 1999, red book, and the potential legal arguments available to employers in response to these types of claims.

This article will examine, in particular, the following questions:

- what are the related contractual clauses on which the contractor may rely to file its claim?
- what potential arguments employers may use to reject this claim?
- what power do the UAE local courts have when considering Coronavirus as a force majeure?

Relevant clauses in the FIDIC Red Book (1999 ed.) that Contractors may use

If a contractor intends to file a construction claim due to Coronavirus' effect on their project progress, the contractors will need to refer to one of the following clauses:

Clause (20.1) of the FIDIC Red Book, which provides that if the contractor considers itself to be entitled to any extension of the time for completion and/or any additional payment, under any Clause of the FIDIC Red Book, conditions or otherwise in connection with the contract, the contractor shall give notice to the engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstance. It follows that a contractor is entitled to submit an EOT claim under any clause of the contract.

Some of the related clauses in the FIDIC Red Book, on which the contractor may seek to rely in advancing a claim under Clause 20.1, include:

1. **Clause (8.4)** Extension of Time for Completion, paragraph (d), provides that *'the contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:*

   (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.'

2. **Clause (17.3)** Employer's Risks, paragraph (h), states that:

   'any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.'

   Clause (17.3) is linked to Clause (17.4) Consequences of Employer's Risks

   'If and to the extent that any of the risks listed in Sub-Clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer.

   If the Contractor suffers delay and/ or incurs cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

   a. *an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion]; and'*

2. **Clause (19.1)** Definition of Force Majeure, as a reason for the EOT claim

   'In this Clause, "Force Majeure" means an exceptional event or circumstance:

   a. which is beyond a Party's control,
   b. which such Party could not reasonably have provided against before entering into the Contract,
   c. which, having arisen, such Party could not reasonably have avoided or overcome, and
   d. which is not substantially attributable to the other Party.

   Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

   a. war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
   b. rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
   c. riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-contractors,
   d. munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
   e. natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.'

Employers' potential arguments

As noted above, the contractor has a contractual entitlement to submit a claim under any of the contractual clauses set out above. Nevertheless, will Coronavirus provide a valid basis on which to submit a claim for the purpose of these provisions?

Unless a governmental decree, instructions, or directions, are issued, the employers may reject the contractors' claim, as the WHO explicitly states that although for most people Coronavirus may make some people very ill, and in rare cases, it can be fatal, it leads to mild illness for the majority of those affected. Older people, and those with pre-existing medical conditions (such as high blood pressure, heart problems or diabetes) appear to be most vulnerable. The WHO further points out that, while they are still learning about how the Coronavirus affects people, older persons and persons with pre-existing medical conditions (as mentioned above) appear to develop serious illness more often than others.

Further, employers may argue that, at least according to the Worldometer, approximately, 83 per cent of Coronavirus' active cases involve a mild condition, while the remaining 17 per cent of those infected are in a serious or critical condition. In Coronavirus' closed cases, the approximate percentage of the patients who recovered is, thankfully, 94 per cent, while six per cent passed away (which, of course, no matter how low a percentage is still to be regretted).

> **The UAE local courts will have wide discretion to determine whether Coronavirus is considered a force majeure event, or not.**

As a result, as the Coronavirus, may not be considered as a valid reason to entitle contractors to make claims related to the EOT, and prolongation costs, (if applicable), unless a governmental decree, instructions, or directions, are issued.

It is pertinent to note that force majeure has been defined in the cassation judgement number (384&466 of 2014) issued by Abu Dhabi Cassation Court, in which it was highlighted, among other things, that the force majeure event must be an event that is impossible to avoid, and the criteria of what is constitutes force majeure or not, will fall to be decided according to the sole discretion of the court. This means that the local court will have a wide discretion to determine whether the Coronavirus is considered a valid reason for contractors to delay the work on site. The courts may be expected to take into account the WHO and the Worldometer reports mentioned above, and this may serve to undermine the basis of Coronavirus EOT claims as matters stand, unless new evidence emerges to cast doubt over those reports,

or a governmental decree, instructions, or directions, are issued, for example, which mandate the suspension of works on site in order to contain the virus or to counteract its spread, or a delay in material supply due to closing the relevant manufacturing industries.

Conclusion

1. contractors may seek to rely on the Coronavirus as a reason for their claims, according to clauses (8.4/d), (17.3/f), and (19.1) of FIDIC Red Book (1999 ed.).
2. in response employers may argue that Coronavirus is not a valid reason for contractors' claims, as the evidence to date suggests that the Coronavirus has serious consequences for older people, and those with pre-existing medical conditions who appear to be more vulnerable to its effects. These categories of persons are unlikely to feature in labour forces recruited for construction work in the UAE, thus potentially undermining arguments under clauses (8.4/d), (17.3/f), and (19.1) of FIDIC Red Book (1999 ed.); unless new evidence emerges to cast doubt over those reports, or a governmental decree, instructions, or directions, are issued, for example, which mandate the suspension of works on site in order to contain the virus or to counteract its spread, or a delay in material supply due to closing the relevant manufacturing industries; and
3. the UAE local court will have wide discretion to determine whether Coronavirus is considered a force majeure event, or not.

Al Tamimi & Company's Construction & Infrastructure team advises clients across the region involved in the construction and infrastructure industry. For further information, please contact Ahmad Ghoneim (a.ghoneim@tamimi.com).

Enactment of DMCC Regulations 2020

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Effective 2 January 2020, the new DMCC Company Regulations 2020 ('Regulations') were promulgated to replace the former DMCC Company Regulations 2003. This was the result of two years of continuous hard work and dedication, DMCC has successfully reformed its existing company regulations to match international legislation, the purpose of which was to simplify the interpretation of the Regulations and accommodate the growing needs and requirements of businesses.

The legislative changes are specifically aimed at:

1. easing the understanding of the Regulations;
2. the introduction of new corporate actions for ease of doing business operations; and
3. providing greater clarity on the role of company officers.

While there are broad changes introduced in the Regulations, the key highlights are as follows:

Classification of shares

Companies now have the option to structure their shareholdings in the way that best suits their requirements. Previously DMCC only allowed the option to subscribe to ordinary shares. Under the Regulations, a company may issue other share types as suggested by the guidance notes and these are:

1. **ordinary shares:** this class of shares does not carry any special rights or obligations;

2. **preference shares:** this category gives preferential treatment to the shareholders in respect of receiving dividends, along with voting rights;
3. **non-voting shares:** similar to ordinary shares, except that they carry no voting rights;
4. **bonus shares:** these are free additional shares offered to existing shareholders; and
5. **treasury shares:** these are shares purchased by the company.

We understand that the DMCC may be willing to allow the issuance of management shares which are not referenced in the guidance notes however, it cannot be assumed, unless a prior approval for this is obtained by DMCC. Also, the Company itself can determine the rights and obligations of each share type or class, as long as this is clearly set out in the company's articles of association ('Articles'). This is provided that at least 80 per cent of the total shares are ordinary while the remaining 20 per cent can be any other class of shares.

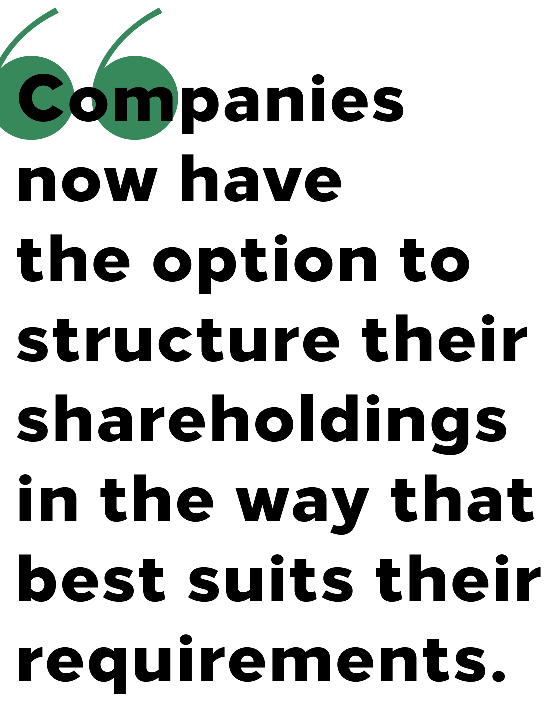
Each shareholder may choose to hold different types of shares as well opt for different modes of payment i.e. either in 'cash' or 'in kind'.

Share capital

DMCC has eliminated the general requirement of a minimum amount of share capital, and this is now only required in the case of certain approved activities which are yet to be specified by DMCC.

Increase of share capital

Earlier, an increase of share capital and the addition of a new shareholder had to be undertaken in two separate processes, but under the new Regulations this can be done in one single step. Also, the new Regulations set out provisions for the contribution to capital to be in 'cash' or 'in kind'. It is unclear if such a contribution will be applicable to initial capital or only in instances of increase in share capital.



It would appear that in case of a cash contribution, a deposit of such capital in the bank along with a bank confirmation letter in this regard continues to be a requirement.

In case of a contribution 'in kind', the Regulations prescribe that such a contribution be supported by an auditor's and director's confirmation. The auditor's confirmation letter shall confirm the valuation of non-cash consideration; and the directors' confirmation letter shall confirm the reasonableness and fairness of the non-cash consideration, as well as the fact that the cash value of the consideration is not less than the amount to be credited for the issuance of new shares.

Adoption of non-standard articles

The promulgation of the new Regulations requires existing DMCC companies to amend their articles of association in order to ensure they comply with the Regulations.

DMCC has also updated its existing draft articles and introduced new 'Standard Articles'. That said, DMCC provides flexibility to companies to adopt their own articles, provided that they do not contravene or are inconsistent with the Regulations and the DMCC's policies. This has been confirmed in a legal opinion issued by a Dubai based law firm.

Dormancy: voluntary suspension of licence

DMCC has introduced a new concept of voluntary suspension of a licence. Voluntary suspension allows a company to cease its operations for a minimum period of 12 months and a maximum (cumulative) period of 36 months, without the need to de-register. For the time being, this is applicable only to limited liability companies and not branches.

This measure addresses a long-standing expectation of companies wishing to discontinue business operations for a short term without the need to de-register in anticipation of recommencement of operation at an appropriate time. This avoids the potential cost and time associated with de-registration and then a re-incorporation of a new entity whilst, at the same time, maintaining the legacy of the company.

Conditions of Dormancy:

1. a company may apply for suspension of its licence on payment of the applicable DMCC fees (provided it has a valid licence for at least 12 months);
2. in case a company is holding more than one licence, suspension shall be applicable to all of its licenses;
3. during suspension the company must cancel existing visas and leases;
4. the manger can no longer continue his/her appointment; although director(s) and the company secretary shall be allowed continue as officers of the company; and
5. company bank accounts must be closed or suspended.

Registration of branches

Previously, the DMCC did not have comprehensive provisions for regulating branches and in particular, in the case of de-registration, which now requires the parent company to confirm that it will remain liable for the debts and liabilities of its branch on de-registration.

Further, in the past DMCC only issued a licence for the registration of a foreign branch. Under the new Regulations DMCC issues a certificate of establishment in addition to the licence. We understand from DMCC that for existing branches, a certificate of establishment will automatically be issued on the DMCC portal of the existing DMCC branches.

Roles and appointment of officers

The Regulations now have a separate section under 'Officer Rules' which separately addresses the roles and responsibilities of each director, manager and secretary. This has been introduced to ensure that the new rules will ensure high-quality corporate governance.

Unlike the old law, the Regulations do not stipulate a maximum number of directors but only a minimum which continues to be one. The appointment of a company secretary is now mandatory (but which was previously optional, except in the case of a branch, which will continue to be optional).

Also, in the case of a removal or change of any officeholder it is mandatory to notify the DMCC within 14 days.

Audited financials

The Regulations also provide for a more reasonable period for the submission of audited financial statements i.e. six months after the end of the financial year of the company as opposed to three months under the old regulations. A company must file a copy of the accounts and the auditor's report with the Registrar within five business days of a general meeting.

Migration of companies

Migration is a process by which a company may transfer its domicile from one jurisdiction to another and even though this changes the laws which will govern the company, whilst at the same time allowing the company to maintain its corporate legacy. Until recently DMCC only allowed migration of companies

'into' DMCC, but not 'out of' DMCC. Under the new Regulations, DMCC now allows for companies to migrate 'into' as well as 'out of' DMCC, provided that the laws of the other jurisdiction recognises and permits foreign entities to migrate to that jurisdiction (in addition to other requirements also being fulfilled). This will allow the legal continuation of the entity by maintaining its legal identity, operations, assets, and contractual relationships with third parties.

Maintaining company registers

A company is now required to maintain:

1. a Shareholder Register;
2. an Officer Register;
3. a Security Register; and
4. a Minutes Register in a form capable of being reproduced within a reasonable time.

Participation in shareholder meetings

The DMCC has made participation in shareholder meetings extremely flexible, to the extent that any means of communication can be used for conducting a meeting such as video call, telephone or any other means of communication provided a shareholder at the meeting can hear what is said by the other shareholders present.

Winding-up

DMCC has introduced different methods of winding up a company, such as:

1. **Solvent Winding-Up:** when the shareholders unanimously resolve, at a general meeting, to wind-up and the company is able to discharge its liabilities within 12 months of the commencement of the winding-up;
2. **Summary Winding-Up:** when the shareholders unanimously resolve, at a general meeting, to wind-up and the company is able to wind-up its affairs within six months of commencement of the summary winding-up;
3. **Insolvent Winding-Up:** when the shareholders unanimously resolve, at a general meeting, to wind-up followed by a meeting with the creditors to settle their dues; and
4. **Involuntary Winding-Up by The Courts:** when the company is wound-up by a court order.

Currently, the preferred modes of winding-up require an auditor's report confirming that there are no debts, liabilities or receivables due or payable, in order to proceed with the winding-up process. Although new events for insolvency have been introduced, the implementation of the same are yet to be tried and tested.

Next Steps

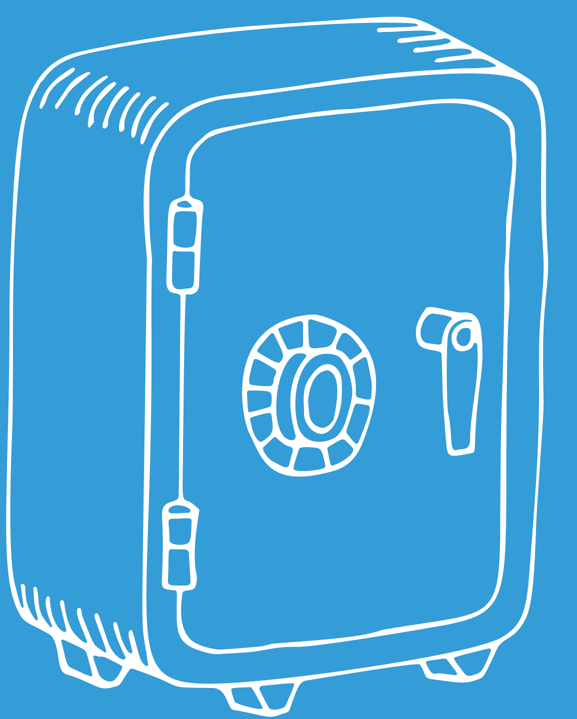
Companies have 24 months to comply with the new Regulations or amend their articles to be in line with the new the Regulations, appoint a secretary (as applicable), and maintain company registers to name a few; failure to comply with such requirements may attract penalties and/or sanctions.

Conclusion

The increased flexibility of conducting business under the new Regulations is certainly a positive step forward by DMCC, and well-timed with the much-anticipated Dubai Expo 2020; the Regulations could play a pivotal role in attracting new investors.

Al Tamimi & Company's Corporate structuring team regularly advises on how to comply with the new Regulations. For further information please contact Sherif Rahman (s.rahman@tamimi.com) or Khadija Hussain (k.hussain@tamimi.com).

The New DIFC Employee Workplace Savings Scheme: replacement of end of service gratuity



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Following a number of recent legislative developments, end of service gratuity ('ESG') was replaced with a new DIFC employee workplace savings scheme with effect from 1 February 2020.

The legislative changes have now been finalised and enacted by way of the Employment Law Amendment Law (DIFC Law No. 4 of 2020) which amends certain provisions of DIFC Law No. 2 of 2019, as amended (the 'DIFC Employment Law'). The DIFC has also introduced new Employment Regulations which set out additional details in relation to the new savings scheme requirements.

What is changing?

Previously, employees in the DIFC, with at least one year of employment, have been entitled to ESG. ESG accrued at the rate of 21 calendar days' basic salary for each of an employee's first five years of service, and at the higher rate of 30 calendar days' basic salary for each additional year of employment. An employee's accrued ESG entitlement is then payable to them as one lump sum when their employment terminates.

The new DIFC employee workplace savings scheme is more akin to pension arrangements which are typically found in the UK and elsewhere globally. In particular, DIFC employers are now required to pay a monthly contribution into a third-party savings scheme for each employee (subject to certain exceptions which are discussed further below).

The minimum contributions which DIFC employers are now required to pay into each eligible employee's savings fund are as follows:

1. a monthly contribution of 5.83 per cent of monthly basic salary during the first five years of employment (which largely mirrors the rate of ESG accrual under the current DIFC Employment Law during an employee's first five years of employment); and
2. a monthly contribution of 8.33 per cent of monthly basic salary after the first five years of employment (which largely mirrors the rate of ESG accrual under the current DIFC Employment Law, once an employee has at least five years of continuous employment).

Unless a statutory exemption applies (as discussed further below), any agreement between a DIFC company and an employee to circumvent the company's payment of the above minimum contributions into a savings scheme for the employee would be null and void.

Employees themselves are not legally required to make any contributions into their own savings scheme however, they are able to do so on a voluntary basis.

Why have these changes been introduced?

The new requirements are intended to provide security for employees' end of service benefits, as the benefits which an employee accrues during their employment will now be professionally managed and invested by a third party (with the savings scheme being underpinned by a fiduciary trust arrangement). This is in line with international best practice and the DIFC's aspirations to be a leading international financial centre.

The new requirements will also provide an opportunity for an employee's accrued benefits to increase in value over time. As the contributions made to each employee's savings scheme will be invested in funds it will therefore have the opportunity to grow in value during the period of employment.

Can DIFC companies decide which savings scheme to use?

Following a competitive tender process last year, the DIFC Authority has established a framework savings scheme which will be administered by Zurich and have asset management oversight from Mercer (the 'DEWS Plan'). The DEWS Plan will have fiduciary backing by DIFC-licensed trustee, Equiom.

Alternatively, if a DIFC employer does not wish to enrol its employees in the DEWS Plan, the employer can apply to the DIFC Authority for a 'Certificate of Compliance' for a different savings scheme. In order to obtain a Certificate of Compliance, the savings scheme will need to satisfy the requirements set out in the new Employment Regulations (enacted in January 2020) which accompany the DIFC Employment Law.

What will happen to an existing employee's accrued ESG?

As the new savings scheme requirements were effective from 1 February 2020, any ESG which an employee has accrued up to and including 31 January 2020 will not be affected. This amount can either be paid directly to the employee when their employment terminates, or alternatively it can be paid into the employee's savings fund by their employer. While the latter can be done without the employee's consent, the employer's potential financial liability will be lower if the employee's prior written consent is obtained. Otherwise, the company will be required to make up any shortfall between:

1. the ESG accrued up to 31 January 2020 (based on the employee's basic salary at that time) and what the employee's ESG would have been, had it been paid to the employee on termination of their employment (based on their final basic salary) rather than being paid into their savings scheme; and
2. the cumulative value of the savings in the employee's savings scheme when their employment terminates, and the ESG they accrued up to 31 January 2020.

> **The new requirements are intended to provide security for employees' end of service benefits, as the benefits which an employee accrues during their employment will now be professionally managed and invested by a third party.**

What will happen to an employee's savings when their employment terminates?

On termination of their employment with their DIFC employer, the employee can choose whether to receive a pay-out of the accrued benefits from their savings scheme or alternatively, leave the relevant amount in their savings scheme for continued investment. This choice can be made by each employee on an individual basis.

If the employee had accrued ESG prior to the new savings scheme requirements that came into effect on 1 February 2020, and unless their employer had paid their accrued ESG into their savings scheme during their employment, then the employee would also be entitled to their accrued ESG within 14 days of their employment terminating.

Are there any exceptions or exemptions available?

Yes, there are certain exemptions from the new DIFC savings scheme requirements, in particular:

1. where an employee is under probation, the employer may defer the payment of savings contributions to that employee for the duration of their probation period. If the employee successfully passes their probation period and their employment is confirmed, the employer would then need to make backdated contributions into a savings fund for the employee from the commencement of their employment (including their probation period). However, if the employee does not pass their probation period and their employment is terminated (either during or at the end of the probation period), then the employee would not be entitled to any savings scheme contributions. If the employer decides not to defer savings contributions during the employee's probation period, the employee would remain entitled to any contributions which the employer had paid into their savings fund during the probation period, regardless of whether or not they successfully pass probation and have their employment confirmed;
2. where an employee owns a partnership interest, membership interest or shares in the company, no savings contributions would be required in respect of that employee's drawings from a partnership, equity, capital or profit account of the company or any profit distributions or dividends they receive from the company;
3. where an employee is under notice of termination of their employment as of 1 February 2020, or is employed under a fixed term employment contract which will expire within three months of 1 February 2020, they do not need to be enrolled in a savings scheme and would instead continue to accrue ESG until their employment terminates; and

4. where the employer is under a statutory duty in another country to make pension, retirement or savings contributions into a scheme in any other country in respect of an employee, or where the employer is paying defined benefits to an employee under a pension or savings scheme where the defined benefits are in excess of the value of the minimum employer contributions under the DIFC savings scheme, the DIFC employer can apply to the DIFC Authority for an exemption in relation to that employee.

The following employees are also exempt from the new DIFC savings scheme requirements:

1. eligible UAE and other Gulf Cooperation Council nationals who are required to be registered for the state government pension;
2. employees who are employed in the DIFC pursuant to a Secondment Card issued by the DIFC Authority; and
3. employees who are employed in the DIFC by a local or federal government entity (except for those established pursuant to the DIFC Founding Law) or where the President of the DIFC has exempted their employer from being subject to the DIFC Employment Law.

What are the next steps for DIFC companies?

At the outset DIFC employers need to decide whether to adopt the DEWS Plan or alternatively seek a Certificate of Compliance from the DIFC Authority to enrol their employees in a different savings scheme. DIFC employers have until 31 March 2020 to obtain a Certificate of Compliance from the DIFC Authority if they wish to use a different scheme, otherwise they will be required to enrol their employees in the DEWS Plan.

While there is a grace period (until 31 March 2020) for DIFC employers to make the necessary administrative arrangements to enrol all eligible employees in an appropriate savings scheme, the mandatory employer contributions will need to be backdated to 1 February 2020.

If a DIFC company fails to adhere to the new savings scheme requirements, it could be subject to a fine of USD 2,000 per contravention.

In addition to making the necessary administrative arrangements, DIFC companies should take this opportunity to review their employment contracts, HR policies and employee handbooks to ensure they are up to date and compliant with the new legislative requirements. It may also be helpful for companies to arrange employee meetings and/or circulate internal communications to help explain the changes to employees.

Al Tamimi & Company's Employment & Incentives team regularly advises on all aspects of the employment relationship. For further information, please contact Anna Marshall (a.marshall@tamimi.com) or Gordon Barr (g.barr@tamimi.com).

Enforcement of UAE court judgments in India

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Overview

On 17 January 2020, the Indian Ministry of Law and Justice declared the UAE to be a 'reciprocating territory' for the purposes of section 44 of India's Code of Civil Procedure (Law No. 5 of 1908) (the 'CPC'), which addresses the enforcement of civil judgments in India (the 'Notification').

As a 'reciprocating territory', judgments of the following 'Superior Courts', listed in the Notification, can now be enforced in India as if they were local Indian Court judgments:

1. the UAE Federal Supreme Court;
2. the Federal, First Instance and Appeals Courts in the Emirates of Abu Dhabi, Sharjah, Ajman, Umm Al Quwain and Fujairah;
3. the Abu Dhabi Judicial Department;
4. the Dubai Courts;
5. the Ras Al Khaimah Judicial Department;
6. the Courts of Abu Dhabi Global Markets; and
7. the Courts of Dubai International Financial Centre.

Position prior to the Notification

In 1999, the UAE and India entered into a bilateral treaty for judicial cooperation and the mutual recognition and enforcement of judgments. The agreement on 'Juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions,

Execution of Judgments and Arbitral Awards' was an agreement to facilitate efficient and simplified legal processes, such as the service of judicial documents and summons and the enforcement of civil court judgments.

However, the simplified legal processes were never fully implemented and parties seeking to enforce an UAE Court judgment in India were generally required to commence fresh proceedings and obtain a new civil judgment from the Indian Courts. The process of enforcement of UAE Court judgments in India was therefore time-consuming and expensive.

Current position

Under the CPC, foreign judgments from courts of 'reciprocating territories' can be directly enforced as if they are Indian Court judgments. This means that an UAE Court judgment can now be immediately enforced in India without the need to obtain a new civil judgment from the Indian Courts.

The new process is not automatic and the enforcing party will be required to file execution proceedings in the competent Court in India (likely to be a district court) along with a certified copy of the UAE Court judgment and a certificate from the relevant UAE 'Superior Court' confirming whether any of the judgment has been satisfied. The judgment creditor will be given an opportunity to object to the enforcement.

Significantly, the applicable limitation period for the enforcement of an UAE Court judgment in India has been extended from three years, when the UAE was a non-reciprocating territory, to 12 years under the new regime (Indian Limitation Act 1963).

Importance of the Notification

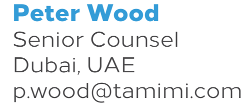
It was reported by the Khaleej Times that bilateral trade between the UAE and India grew from US$52 billion in 2017 to US$57 billion in late 2018 and that the two nations have set a US$100 billion trade target by 2020. On a less positive note, it was reported recently by the Gulf News that over the past five years, total defaults by Indian borrowers in the UAE was estimated to be in excess of AED 26 billion (US$7 billion).

Whilst the new regime is still in its infancy and is yet to be tested, this is a significant development and presents an exciting opportunity for creditors to pursue debtors located in India through the UAE Courts (including the Courts of the DIFC and the ADGM) and when considering dispute resolution provisions in contracts.

It is also of particular relevance to family law matters where UAE Court judgments relating to divorce or alimony need to be enforced against an Indian national and/or resident. Rather than commencing fresh proceedings in the relevant Indian Courts, which can often result in conflicting family law judgments, parties can now enforce UAE Court judgments in India as if they were judgments handed down by the Indian family Courts themselves, thereby significantly reducing the risk of lengthy, duplicated and expensive proceedings.

Al Tamimi & Company's International Litigation Team regularly advises on the enforcement of UAE and foreign court judgments and arbitral awards. For further information, please contact Rita Jaballah (r.jaballah@tamimi.com) or Peter Wood (p.wood@tamimi.com).

Introduction of Leasing Law in DIFC



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The Dubai International Financial Centre ('DIFC') free zone has, over the years, cemented itself as a leading international financial hub and continues to experience strong demand in the rental market.

In 2018, the governing authority of the DIFC, DIFC Authority ('DIFCA') overhauled the previous legislative framework in respect of real estate and introduced a new Real Property Law (DIFC Law No. 10 of 2018) and accompanying Real Property Regulations. The Real Property Law does not include detailed guidance on leasing in the DIFC, although it did foreshadow the introduction of a new leasing law.

The Leasing Law (DIFC Law No. 1 of 2020) and Leasing Regulations have now been issued by DIFCA and came into force on 14 January 2020. The Leasing Law supplements the existing Real Property Law but deals specifically with leasing matters. It provides clarification to lessors and lessees of properties in the DIFC on their respective rights and obligations and is intended to 'further align the DIFC with international best practice in this regard' (DIFC Consultation Paper).

What follows is an high level overview of the key aspects of the Leasing Law.

The Leasing Law provides clarification to lessors and lessees of properties in the DIFC on their respective rights and obligations.

Application

The Leasing Law applies to all residential, retail and commercial leases in the DIFC, with the exception of:

1. leases of premises that are primarily used for serviced apartments or hotel guest rooms; and
2. leases entered into by parties to a mortgage of the premises in accordance with the terms of the mortgage.

The Leasing Law applies to leases entered into prior to the enactment of the Leasing Law, except where particular provisions of the Leasing Law require compliance with time and notice periods that are incapable of being applied to such leases.

Statutory obligations on the lessee

The Leasing Law implies into leases the following statutory obligations on the lessee:

1. to not use the premises for any illegal purpose (Article 12(1));
2. to use the premises only for its permitted use (Article 12(2));
3. to not use the premises or common areas in a manner that causes nuisance or interference with other occupiers (Article 13);
4. to pay rent on the dates specified in the lease and, if not specified in the lease, rent is to be paid in advance in quarterly instalments (Article 15); and
5. to pay all taxes and fees in respect of the premises, except for the lease registration fee, amounts payable by virtue of the lessor's ownership and any amounts levied on the lessor by law (Article 16).

Statutory obligations on the lessor

The Leasing Law implies into leases the following statutory obligations on the lessor:

1. to ensure the lessee has quiet enjoyment of the premises (Article 14); and
2. a prohibition on the lessor disconnecting utility services to the premises (in which event the lessee may report the incidence to the police or file a case before the court) (Article 17).

These statutory obligations mean that such obligations no longer need to be explicitly stated in the lease itself.

Specific provisions for residential leases

Security deposit scheme

Security deposits are now not permitted to exceed 10 per cent of the annual rent of the lease.

The Leasing Law clarifies that a security deposit may only be used to compensate the lessor after the expiry or termination of a lease, and only for the following reasons:

1. non-payment of rent;
2. damage to residential premises, excluding fair wear and tear; and
3. damages for breach of contract.

The Leasing Law has introduced a new security deposit scheme whereby security deposits are to be paid to the DIFC Registrar of Real Property ('Registrar') within 30 days of receipt by the lessor. Please note that this does not apply to leases that were in place prior to the enactment of the Leasing Law.

The Registrar will hold the security deposit in an escrow account and administer the release and refund of security deposits. On the expiry or termination of a lease, the lessee and lessor may sign a release form confirming whether the lessee is entitled to a refund of all or part of the security deposit. If the parties do not agree on the refund of the security deposit, the dispute must be notified (by either party) to the Registrar to be resolved by the DIFC Courts or any specific tribunal that may be established (the DIFC Authority is considering the possibility of establishing a separate arm within the DIFC Courts' Small Claims Tribunal to deal with lower value disputes).

The law does not specify the timeframe in which the Registrar is required to release the security deposit. However, it is recommended that the release form or notification of dispute be lodged as soon as possible after the expiry or termination of a lease, as any security deposit which is unclaimed six months after the termination or expiry of a lease will be forfeited to DIFCA.

Condition reports

The Leasing Law has also introduced a (non mandatory) regime for the preparation of condition reports in order to prove the condition of the premises at the time of handover. Where a lessee is required to pay a security deposit, the lessor may, prior to handover of the premises to the lessee, prepare a condition report specifying the state of repair and condition of the premises. Where a condition report is provided by the lessor, the lessee must sign and return the condition report or provide details of its disagreement with the condition report within 20 days of receipt, otherwise the condition report is taken as evidence of the condition of the premises should any dispute arise between the lessor and the lessee relating to the state of repair and condition of the premises. Any disagreement in respect of a condition report is to be resolved by an independent expert. If a condition report is unsigned the DIFC Courts are entitled to draw their own inferences from the evidence provided at the time of the dispute.

Rent increases

The Leasing Law imposes an obligation on the lessor to give the lessee 90 days' written notice of any proposed rent increases . This corresponds with rent increases relating to renewals in mainland Dubai. However, it is interesting to note that the DIFC has not followed in the footsteps of mainland Dubai in legislating for automatic lease renewals where the lessee remains in the premises after the expiry of a lease.

Maintenance of residential premises

The Leasing Law clarifies the respective obligations of the lessee and the lessor in respect of maintenance of the residential premises:

1. the lessee's obligation is limited to taking reasonable care to avoid damaging the residential premises (and any common areas), keeping the premises reasonably clean and notifying the lessor, as soon as practicable, of any damage to the premises (Article 34(1) and (2));
2. the obligation to maintain the residential premises in good repair during the term is placed on the lessor (Article 38(1));
3. a lessee will not be liable for damage to the premises where the damage constitutes fair wear and tear, the lessee took reasonable care to avoid such damage, or the damage was caused by failure of the lessor to comply with its obligations under the lease or the law (Article 34(3));
4. the lessor may serve notice on the lessee in the event that the lessee has failed to comply with its maintenance obligations and the requirements for that notice are set out in Article 35(2). Where the lessee fails to comply with a repair notice, the lessor is entitled to repair the damage and recover the reasonable costs of repair from the lessee (Article 35(3)); and
5. a lessee who disputes a repair notice served by the lessor or the reasonableness of the cost of repair may commence a claim with the DIFC Courts within 20 days after receipt of either the repair notice or the invoice for the cost of repair (as applicable) (Article 35(4)).

Additional statutory obligations on the lessee and the lessor

Below we set out some additional statutory obligations applicable to residential leases:

1. the lessor must ensure that the premises are vacant and in a reasonably clean condition on the agreed handover date (Article 37(1));
2. except as otherwise agreed in the residential lease, a lessee is liable for charges in respect of the supply and use of utilities or a fair and equitable share of utility charges where the premises are not separately metered (Article 32);
3. the lessor is liable for all installation costs in respect of utilities, capacity charges, building service charges and master community service charges (Article 33);
4. a lessee must not install any fixtures in the premises or make any alterations to the premises without the lessor's consent (Article 36(1));
5. the lessee may make urgent repairs (which are the responsibility of the lessor) under certain circumstances and recover the reasonable costs of repair from the lessor (Articles 39-41);
6. Article 43 of the Leasing Law sets out the right of the lessor to enter the premises (in addition to those set out in Article 55 of the Real Property Law) and the lessee's obligation to permit entry under such circumstances. The lessor may enter the premises at a reasonable time and on giving the lessee at least two days' prior notice, or at any time in case of an emergency and where the lessee is not contactable (Articles 42-46); and
7. a lessee may apply to the DIFC Courts for compensation if the lessor causes damage to the lessee's property while exercising such right of entry, meaning that the lessor's usual release may not be enforceable (Article 47).

Specific provisions for retail leases

The Leasing Law prohibits the acceptance of key-money (i.e. payment by a lessee in order to secure the grant or renewal of a lease) or any consideration for the goodwill of any business in respect of retail leases.

Termination of leases

Generally, leases may be terminated before the expiry of the term by written agreement of the parties, or without agreement of the parties or DIFC Court order where:

1. any rent due under the lease is more than 30 days overdue (whether or not formal demand has been made);
2. any other term of the lease has been breached and the lessee fails to remedy such breach within 30 days of written notice from the lessor;
3. the rights of the lessee and lessor become vested in one person;
4. the lessee has died (for residential leases);
5. the lessee has abandoned the premises for a period of more than one month (except residential leases);
6. the premises have been destroyed; or
7. a party exercises its right to terminate the lease in accordance with the terms set out in the lease.

Notwithstanding the above, Article 54 provides that ***residential leases*** may only be terminated by the lessor and by an order of the DIFC Courts in the following circumstances, offering greater protection to lessees of residential leases:

1. where the lessee fails to pay rent by the due date and the remedy period stated in the lease has expired (or 30 days where no remedy period is stated);
2. the lessee fails to comply with any other material obligation under the residential lease and the lessee fails to remedy such failure within 30 days of a written notice from the lessor;
3. the lessee has abandoned the premises for a period of more than three months;
4. the lessee uses the premises for an illegal purpose; or
5. the lessee is declared insolvent;

The lessee also has a right to terminate a ***residential lease*** by order of the DIFC Courts in the event that the lessor has failed to comply with a material obligation under the lease and failed to remedy such failure within 30 days of written notice from the lessee or the residential premises are not fit for purpose or unsafe for occupation.

While it is common for leases to state that the lessor has a lien over the lessee's property left at the premises on expiry or termination of a lease, the Leasing Law now grants the lessor a statutory lien and a preferential claim over the proceeds of sale for payment of any arrears in rent. The process for selling such property depends on whether or not the lessee is insolvent.

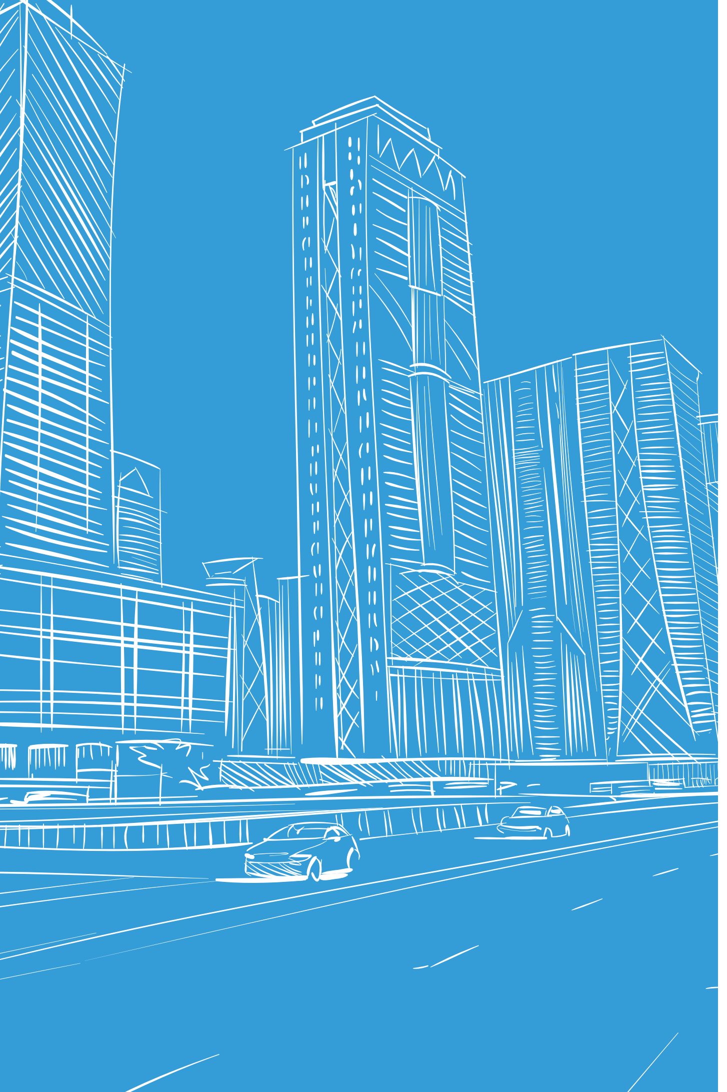
The introduction of the new Leasing Law is a welcome development to the rental market in DIFC.

Conclusion

The introduction of the new Leasing Law is a welcome development to the rental market in the DIFC. As is the case in any jurisdiction, lessors and lessees should always seek legal advice with respect to their rights and obligations under the law and the current practices adopted by the Registrar.

Al Tamimi & Company's Real Estate team and International Litigation Group regularly advise on leasing in the DIFC and disputes arising from DIFC leases. For further information, please contact Mohammed Kawasmi (m.kawasmi@tamimi.com), Shirley Zhang (s.zhang@tamimi.com), Rita Jaballah (r.jaballah@tamimi.com) and Peter Wood (p.wood@tamimi.com).

A new era for jointly owned property in Dubai



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In September 2019, Law No. (6) of 2019 Regulating Jointly Owned Property in the Emirate of Dubai (the 'New JOP Law') was introduced. The New JOP Law, which came into force on 18 November 2019, replaced Law No. (27) of 2007 (the 'Old JOP Law') and represents the first significant overhaul (in over 10 years) of the laws regulating jointly owned property.

What follows is an high level overview of some of the key elements of the New JOP Law, including key differences with the Old JOP Law.

Type of Projects

The New JOP Law recognises three different categories of jointly owned property, being a property that is subdivided into privately owned units (or components) and jointly owned common areas (a 'Project'), with different rules pertaining to the management of each category.

The three categories of Projects are:

1. large scale projects, which we understand will capture master communities;
2. hotel projects, which, while unclear at this point in time, we presume will relate to:
   - mixed use developments that include a hotel component; and
   - a hotel building or component that is subdivided to create units and common areas; and
3. simple/other real estate projects, being all other projects that do not fall within the first or second categories, such as simple standalone residential or office developments.

The directions to be issued by the Real Estate Regulatory Agency ('RERA') will provide further clarity regarding the criteria for determining how a Project will be categorised.

The role of owners – Owners Association vs. Owners Committee

A key difference between the New JOP Law and the Old JOP Law is the role that the owners of units in a Project will play in the administration, operation and management of the Project.

An 'Owners Association' will no longer be formed and a developer must appoint a RERA approved management company as managing agent for the Project (the 'Managing Agent'). The Managing Agent will carry out the functions of the now defunct Owners Association.

An Owners Committee will still play an advisory role in the day-to-day running of the Project (the 'Owners Committee'). The Owners Committee will consist of up to nine owners who will be selected by RERA and represent the collective body of all owners in the Project.

Service charges

Timely payment of service charges by unit owners is crucial to the Project being operated and maintained to the highest possible standard. This requires a balance of the rights between the Managing Agent/developer and the unit owners.

From a Managing Agent's/developer's perspective there needs to be clear mechanisms in place for dealing with defaulting unit owners. Unit owners will desire transparency in the calculation and expenditure of service charges.

The New JOP Law:

- clearly sets out the procedures for budgeting and subsequent levying and collection of service charges by the Managing Agent;
- expressly provides the execution judge of the Rent Disputes Settlement Centre (the 'RDSC') with the right to sell an owner's unit to recover unpaid service charges (subject to the process in the New JOP Law being strictly followed);
- reinforces RERA's supervisory role in the budgeting and approval of service charges; and
- requires levied service charges to be deposited by the Managing Agent into a dedicated Project account opened with a bank approved by RERA.

These processes complement the introduction of RERA's 'Mollak' system, which re-emphasises RERA's drive for a more transparent service charge system.

It is important to note that the Managing Agent cannot restrict an owner's right to use and benefit from the common areas of the Project due to non-payment of service charges (nor can a developer contractually restrict such access on this basis in the sale and purchase agreement), which we are aware has been a practice sometimes adopted by developers to incentivise payment. Notwithstanding this, the rights of the RDSC to force the sale of an owner's unit should assist in the collection of unpaid service charges.

Dispute resolution

Prior to the introduction of the New JOP Law, disputes regarding jointly owned property were handled by the Dubai Courts.

Moving forward, any disputes that are unable to be amicably resolved will now be referred to the RDSC, which has the exclusive jurisdiction to hear and settle all disputes in relation to matters arising from the New JOP Law.

Directions to be issued by RERA

The New JOP Law contemplates directions being issued to supplement the New JOP Law and provide further guidance on various matters, including:

- the criteria for Project classification;
- the role and functions of the Owners Committee;
- the role of the 'Hotel Management Company', which shall be appointed in lieu of a Managing Agent for hotel projects;
- the levying and collection of service charges and master community service charges; and
- to the extent that the master community facilities are used for commercial purposes, the percentage of net profits earned from the operation of these community facilities to be deposited in the account established by the master developer for the master community;
- (the 'Directions').

As at the time of writing, RERA was yet to issue the Directions but we understand that the Directions are in the process of being finalised. Until such time that the Directions are issued, the New JOP Law confirms that the directions, rules and regulations issued under the Old JOP Law will continue to apply, except to the extent that they are inconsistent with the New JOP Law.

Compliance with new JOP Law

All developers and other stakeholders must ensure that their Project(s) comply with the New JOP Law by no later than 18 May 2020 (the 'Compliance Date'), although the Director General has the authority to extend the Compliance Date.

Developers and other stakeholders will be in breach of their obligations under the New JOP Law should they fail to:

- regularise their Project by the Compliance Date; or
- fail to comply with the New JOP Law in general.

In the event of a breach of the New JOP Law, RERA is provided with a discretionary power to impose a fine of up to AED 1,000,000, (US$ 272,000) with the potential for this fine to be increased to AED 2,000,000 (US$ 550,000) in the event of a repeat offence within a twelve month period.

Moving forward

We strongly recommend that all developers and stakeholders undertake those steps currently available to ensure that their existing Project(s) and any future Project(s) comply with the New JOP Law – for example, appointing a Managing Agent that is licensed and approved by RERA, finalising registration of the Project on the 'Mollak' system and opening a designated account for the Project(s).

Al Tamimi & Company is in regular contact with RERA regarding the issuance of the Directions and matters generally pertaining to the New JOP Law and can assist developers and other stakeholders by:

- advising how the New JOP Law affects a Project's existing management documentation and the overall operation of the Project in general;
- supporting and representing stakeholders before RERA to discuss the implications of the New JOP Law on their Project; and
- once the Directions are issued, assisting in updating the Project's existing management documents (or prepare new management documents) to comply with the New JOP Law and the Directions.

Al Tamimi & Company's Real Estate team provides a comprehensive range of legal services across the Middle East including Dubai, covering all areas relevant to the property industry. For further information, please contact Tara Marlow (t.marlow@tamimi.com), Mohammad Kawasmi (m.kawasmi@tamimi.com), Andrew Balfe (a.balfe@tamimi.com) and Sebastian Roberts (s.roberts@tamimi.com).

Jurisdiction Update
Saudi Arabia

KSA Courts of Appeal: significant development in process for appeals

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Overview

The judicial framework of the Kingdom of Saudi Arabia is witnessing remarkable developments on many fronts. Commercial courts, previously under the umbrella of the administrative courts, now operate independently. Labour Courts have been established to consider labour disputes, previously heard by the Panels for Settlement of Labour Disputes. Steps have been taken to accelerate dispute resolution including the adoption of an electronic notification service. Development also extends to the form of judgments which are now required to be reasoned in all tiers of the system.

Perhaps most notable among the developments that have taken place in the judicial field are those in the process for pleadings before the Courts of Appeal. Previously the Courts of Appeal considered all objections, raised before them from the First Instance Courts, purely through written submissions with limited or no scope for verbal representations. There has been a recent paradigm shift in this process which we explain below. Consequently, this article will tackle the following:

1. old litigation process for appeals before the Courts of Appeal;
2. new legislative instruments, pursuant to which oral pleadings before Courts of Appeal can be advanced;
3. cases where verbal pleadings before the Courts of Appeal are allowed following regulatory developments; and
4. key gateway to securing an appeal hearing.

The old appeals process

Objecting to and appealing judgments issued by the Court of First Instance was previously done by way of submission of a statement of appeal by the appellant to the court in which the judgment originated. The Court of First Instance which issued the original judgment would then review the statement of appeal and determine whether to amend or affirm the judgment. Where the court affirms its original position, it would then refer that judgment to the Court of Appeal for consideration and approval. The process would be by means of written submission. The litigants were not allowed to plead before the Court of Appeal. However, following the recent changes in procedural practice, the parties to the lawsuit are now allowed to plead before the Court of Appeal, as further explained below.

The new process: oral pleadings before Courts of Appeal can be advanced

A suite of Ministerial Circulars has been issued to facilitate pleadings before the Courts of Appeal as well as the new Implementation Regulation of the Procedures of Appeal.

Ministerial circulars

The Circulars expand the authority of the Appeal Courts to include determination of appeals by way of oral hearings and written submissions pursuant to the provisions of the Civil Procedures Law and the Criminal Procedures Law.

The Circulars in question provide that the Courts of Appeal shall, in accordance with the Law of Civil Procedures and the Law of Criminal Procedures, start hearing the objections to appeals against decisions of the Courts of First Instance in commercial and criminal cases in order to expedite dispute resolution and enhance confidence in the judicial process.

Appellate procedures implementing regulation ('Regulation')

The appellate oral hearing stage is a development that requires its own set of procedures. To this end, the implementation of the new appellate procedure was adopted through the Minister of Justice Decision No. 5134 dated 21/9/1440H. The new Regulation provides clarification on:

1. the practical application of the relevant provisions of the Law of Civil Procedures;
2. a governing framework for appeals that takes into account existing statutory provisions, general principles and rules; and
3. describes the nature of the appeal process itself.

The Regulation also polices the process of objection on appeal, from filing a brief in support of the objection before the Court of First Instance through to the pronouncement of the Appeal Judgment.

Cases where verbal pleadings before the Courts of Appeal are allowed

Generally, Court of First Instance rulings are subject to appeal (by way of written submission or pleadings) with the exception of rulings on small claims of up to SAR 20,000 (US$ 5,333.33).

The new Circulars provide that the following categories of appeal can now be advanced through oral hearings:

1. Commercial Circuits: judgments issued by a single judge and judgments issued in commercial cases involving commercial disputes between merchants, as well as cases which are brought against merchants by reason of their business where the value of the claim exceeds SAR 1 million (US$ 266,666.66);
2. Civil Circuits: cases involving monetary claims, including the value of real estate, where the value of the claim exceeds SAR 10 million (US$ 2,666,666.66), claims of invalidity of the arbitral award, enforcement disputes challenging writs of execution involving more than SAR 100 million (US$ 26,666,666.66) and cases brought before the courts in respect of real estate investment;
3. Personal Status Circuits: cases involving affirmation and negation of paternity, estate division, accounting by a liquidator where the total value of assets exceeds SAR 100 million (US$ 26,666,666.66), claiming dues in Waqf or will or objection of dues therein, claims for termination of Waqf or a will, challenging the responsibilities of bailiffs, sponsors and trustees, objection of heirs determination writ and guardianship on minors, claim for rejection of marriage contract and cases of prevention of marriage by guardians;
4. Labour Circuits: cases filed for implementation of sanctions stipulated in the Labour Law and labour matters involving claims in excess of SAR 1 Million (US$ 266,666.66);
5. Criminal Circuits: cases seeking destruction by Hadd or as discretionary punishment, where no judgment of destruction has been issued, such as the enforcement of penalties under article 37 of the Anti-Drug and Mental Health Law or cases seeking death penalties or less, on which no judgment has been issued and cases heard at anti-corruption circuits.

In addition to the abovementioned cases, the Courts of Appeal have discretionary authority to hear objections and appeals by way of pleading in cases other than the abovementioned. This discretion includes the ability to intervene and require oral presentations where it is in the interests of efficiency and justice to do so.

It should also be noted that the Circulars advance a working assumption that where pleadings are advanced by way of written submission and orally in the same case, preference should be given to consolidating the oral pleadings process into written submissions.

Key gateway to securing an appeal hearing

It should be noted that the Court of Appeal will not consider the appeal by way of pleadings unless such request has been explicitly stated in the statement of appeal, as Article (2) of the Regulation, stipulates that if the appellant has not elected in his/her application for the appeal to be considered by oral pleadings or by way of written submission, the appeal shall be considered by way of the latter.

The statement of appeal to be filed at the Court of First Instance shall contain the information specified in article (2) of the Regulation. The Court, which issues the judgment, shall peruse the statement of appeal, after submission of a copy to the Court, upon expiry of the period of appeal. If the Court decides to reconsider the judgment, it will request the file of the case from the concerned department within five days from the end of the period of appeal. If the Court does not request the file within the requisite period, the concerned department shall refer the file to the Court of Appeal on the second day.

Conclusion

Oral pleadings before the Court of Appeal embody the essence of two-tier litigation and gives litigants an opportunity to present their arguments, claims and evidence before an entirely different judicial authority from the Court of First Instance that issued the contested judgment. Since the option allows for judicial review of the Court of First Instance decisions, the Courts of First Instance will be more inclined to give reasoned decisions with a sound legal underpinning.

This change will contribute to strengthening the trust of local and international investors in the Saudi Judicial System and the tools and mechanisms that protect their investment. This development is in line with the Kingdom's Vision 2030, which aims to facilitate and protect the flow of local and international investment and enhance the competitiveness of the Kingdom of Saudi Arabia.

Al Tamimi & Company's Litigation and Dispute Resolution team has the capability to provide advice to clients on all types of litigation matters. For further information, please contact Emad Salameh (e.salameh@tamimi.com) or Abubaker Jeeballah (a.jeeballah@tamimi.com)

Family Business and Private Wealth: from family trees to organisational structures

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In this special edition of Law Update we focus on issues relevant to family businesses and private wealth. Al Tamimi & Company, founded in 1989, has grown alongside many of the family businesses in the region and has seen first-hand the challenges and evolving dynamics which families and privately-owned businesses face.

As we enter a new decade in 2020, it is even more important for families and high-net-worth individuals to be agile, proactive rather than reactive, responsive to changing market dynamics, alive to disruptive tech transforming whole industries, creative in investing their wealth for the future and prepared for the millennials and Gen Z individuals entering the family business arena, whose new perspectives are altering the way the corporate world, in this region, operates.

Succession planning is a term that is bandied around by many, but what does it actually mean? In the context of family business in the Middle East, succession planning is key to ensuring that tomorrow's leaders are identified and groomed today, that systems are in place to enable the family business to operate and grow beyond the founder(s)' hands, and that proper estate planning is consciously considered and implemented.

In this edition of Law Update, we discuss a number of themes that are highly relevant to family business and private wealth, from succession planning, marriage contracts and alternative investments, to inheritance matters and family disputes.

A number of our family business and private clients hold sizeable real estate portfolios and succession planning in the context of family real estate assets is discussed by Mohammed Kawasmi & Abdulla Khaled on page 54. Ashleigh Bruce considers succession planning in the context of corporate governance in business on page 74.

Trust structures continue to play a key role in achieving optimal succession planning - Foutoun Hajjar and Layla Alalawi discuss Bahraini trusts as a solution for family businesses on page 50 and Richard Catling's article 'Trusts in succession planning' on page 44 provides further insight into the benefits of trust arrangements for the preservation of family assets across generations.

Intra-family disputes - whether due to generational gaps, a lack of succession planning, control being in one pair of hands, disagreements regarding financial distributions and so on have the capacity to paralyse families and family businesses, and so the experienced advisor will always recommend legal structures that reduce the likelihood of such disputes arising. On page 68, Peter Smith discusses forms of dispute resolution as well as choosing the right jurisdiction.

Another aspect of good succession planning is estate planning. Egypt has a number of laws that focus on inheritance matters and on page 64, Ahmed Zohny and Nada Abouelseoud provide a focus on inheritance issues facing Egyptian Coptic Christians, who comprise some 30 per cent of Egypt's population.

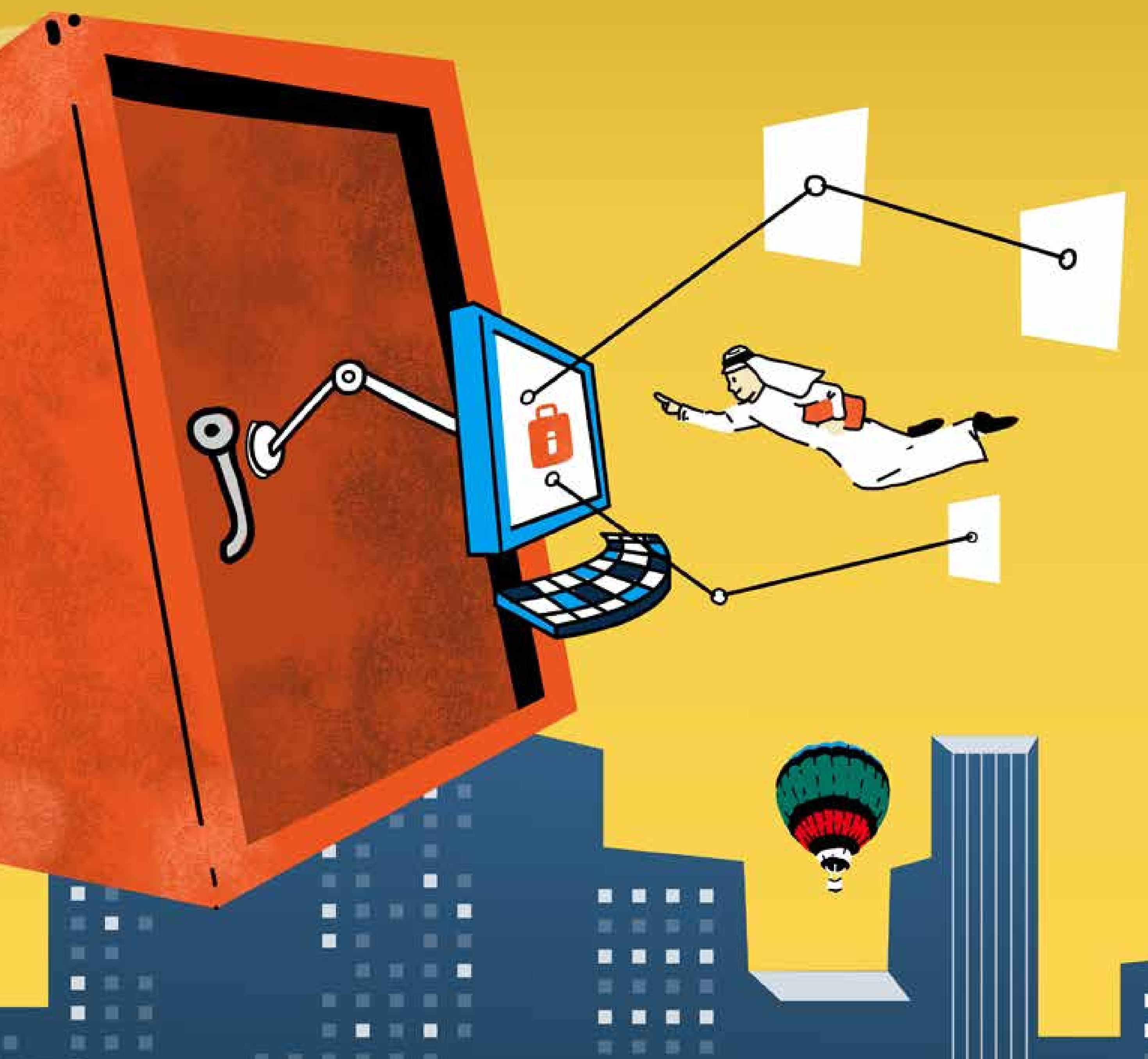
On page 48, Dipali Maldonado and Ruksana Ellahi consider the tax implications for both family businesses and private individuals who hold real estate in the UK via special purpose vehicles. Whilst Al Tamimi & Company does not advise on UK tax law, we work very closely with advisors in the UK to ensure that our clients are optimising their real estate asset holdings in light of changes to the UK tax regime.

For any founder concerned with protecting their legacy, the retention of wealth within the boundaries of the family is a key concern. When children of wealth marry it is common to give consideration to marriage contracts under Islamic Sharia, which ensures certainty and transparency from the outset. Ahmed Zohny considers this area on page 62.

If you have ever considered supporting the arts, accessing a high profile industry or just simply diversifying your investment portfolio, Fiona Robertson's article on Private Film Investment on page 58 is a must read.

Al Tamimi & Company's full service offering means, that across the board, we can assist by providing families and high-net-worth individuals, in both their complex business and personal affairs, with tailored advice and solutions to best meet their needs. We understand family and privately owned businesses in the region, having grown alongside them from the firm's inception, and are acutely sensitive to their challenges, values and goals.

Trusts: in succession planning



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The problem with Succession

In a recent Gulf Family Business Council report, in the next decade approximately US$1 trillion in family owned asserts is due to transition to the successive generations.

The central issue on which any person of advanced years and with substantial assets should focus, is the outcome of the emotional turbulence and practical upheaval that their passing may create. These issues are magnified in the Middle East due to the, often, substantial numbers of successors that founders of successful businesses in the region tend to have.

With more inheritors comes more interests for which the founder must have regard. Unfortunately, such circumstances may also lead to more opportunities for disputes to arise.

Primarily, anyone looking to pass substantial wealth to the next generation would, to any extent possible, be concerned to ensure that any succession happens as seamlessly as possible, so that their inheritors are cared for in the manner intended.

Therefore, any legal structure that makes it possible to plan in advance and to enshrine the wishes of a founder, prior to their passing, such that those wishes will be respected after their death, must remain the only real way of providing that individual with certainty for the future.

In family run and owned businesses, in particular, the founder will have been the guiding light and glue that the family will have relied upon for decades to provide guidance and direction. In such circumstances, such an individual's passing creates the propensity for seismic events to occur which could have profoundly negative consequences for wealth preservation and the continuing success of any family owned business.

Trusts – a Middle Eastern perspective

Historically in the western world, the primary means of securing an individual's legacy has been the trust. Quite apart from the tax advantages that trusts provide (which whilst may not currently be of primary importance to all residents in the region should be of concern with the future in mind) the inherent nature of a trust, and the disposition of assets into a structure which can exist for perpetuity, means it represents the optimal means of securing the future after an individual's passing.

In the GCC trusts law has been one of the most innovative and interesting developments in terms of jurisprudence in recent years. Together with Bahrain which has its own trust law, the Qatar Financial Centre, the Dubai International Financial Centre ('DIFC') and the Abu Dhabi Global Market have all ensured that trust legislation has enabled trusts to be established in these jurisdictions in line with best international practice.

In particular, the DIFC's enactment of the Trust Law No.4 of 2018 (which superseded the Trust Law No. 11 of 2005) is perhaps the clearest

example of a modern trust law which 'cherry-picks' particular elements of varying trust codes in order to provide a framework for founders of businesses to best plan for succession.

Whilst trusts are by no means the only way to provide for wealth management for successive generations (and the common law environments of the financial centres mentioned above means that shareholding structures can also be designed to capitalise on the best practice that modern common law can provide), they do offer a number of advantages over purely corporate structuring options. This is because of the intrinsic separation of the legal and beneficial interest in the underlying assets that the trust creates, which enables a stable asset holding structure as family members change over the years. Furthermore, the trust is an inherently flexible arrangement and, as such, is ideally suited to the needs of a family looking to create a framework for its own particular requirements.

In addition, given the location of the trusts within the respective countries' legal environments, the regulatory and legal issues which may prohibit the holding of onshore assets in an English law governed trust, for example, do not apply, meaning that a local domiciled trust may be particularly attractive for families with both onshore and offshore assets.

Creating stability for the long term

At its heart a trust constitutes the separation of the legal and beneficial interest in an asset, and it is this bifurcation of interests which creates the inherent attractiveness of trusts when it comes to succession planning. By placing the settlor's wealth in a legal structure which operates outside the direct legal estate of the settlor, the effect is that those assets are ring-fenced and separated from the direct legal estate of the settlor. Rather the assets are held legally by a trustee, who acts, on the basis of a trust instrument and the underlying requirements of a trustee under the trust law, in the furtherance of the settlor's wishes.

Whilst interested persons (i.e. family members) may not have a direct claim to the legal ownership of assets, they do, as beneficiaries enjoy a right, depending on the nature of a trust, to either enjoy a fixed share in the underlying assets, or a right to be considered by the trustee when it makes decisions regarding the disbursement of the capital and income of the trust. These decisions can be recorded in the trust instrument or a separate letter of wishes to ensure that the trustee is bound by them. In this way both the interests of the settlor and the beneficiary are served; on the one hand the settlor can be confident that following his passing the trustee will ensure the maintenance of the asset base without undue interference enabling the prudent payment of future income, whilst the beneficiaries know that they will receive the entitlement to share in the trust assets in accordance with the founder's wishes.

This separation of interests also lends itself to good corporate governance when housed in a holding structure for diverse business interests. By separating out the management and control of the assets (which in the context of a family business structure would be the shares held in various subsidiaries through holding companies) a corporate trustee with a board comprised of both key family members and independent directors can ensure the stewardship of a business without the competing demands of other family members whose own immediate interests may not align with those of the business.

The flexible nature of trust arrangements

Aside from the intrinsic characteristics of a trust, the requirement for a trustee, identifiable beneficiaries (or any class thereof) and identifiable assets, the attractiveness of a trust arrangement is its inherent flexibility. Not constrained by maintenance of capital rules or shareholder rights, a trust can be designed to accommodate any variety of family arrangements. Usefully they can be used to give legal backing to the usual model of family arrangement, i.e. the family constitution (which is rarely enforceable in the courts due to its non-binding nature and reliance only on moral force).

The flexible nature of a trust lends itself to family business arrangements where family members' interests may not be aligned with those of the business. Whereas in a shareholder/company arrangement the shareholders retain the direct ability to exert direct influence on the officers of the company, a trust can ensure the clear separation of those interests.

At the same time a trust can also have regard to the need and requirements of individual beneficiaries in a way that a company cannot, constrained as it is by restrictions imposed by company law. In practice this can mean that the ability to provide liquidity and the ability for inheritors to exit can be facilitated, whilst at the same time ensuring that these events do not threaten the stability of the trust. This 'escape valve' can be a key tool in enabling beneficiaries to leave the family business over time without having to resort to contentious proceedings to extricate themselves, with the potential for irreparable damage that may ensue.

Sharia compliance

To Middle Eastern ears, trusts may seem to be a western concept and therefore incongruous in the context of inheritance laws reflecting the principles of Islamic Sharia. However, it is entirely possible to align those principles with a trust to ensure that the fixed proportions to which inheritors become entitled are applied by the trustee on the passing of the settlor, whilst at the same time ring-fencing the underlying assets in a trust. In the case of assets being shares in businesses, this protects the businesses from the almost inevitable disruption caused by a sudden change from one founder to multiple stakeholders.

"….the advent of trust regulations and the arrival of trust advisors and fiduciary service providers means that the complete solution now exists to ensure family owned businesses remain the mainstay of the regional economy for decades to come.

A key component of modern estate planning and wealth management

Whilst trusts may have a long pedigree, they remain a key structuring solution for wealth preservation and stewardship of family businesses. For many years the Middle East has benefitted from private bankers and wealth managers with the skill set necessary to provide investment solutions to ensure the growth of privately held assets. However, in recent years, it is the advent of trust regulations and the arrival of trust advisors and fiduciary service providers that means that the complete solution now exists to ensure that family owned businesses remain the mainstay of the regional economy for decades to come.

Al Tamimi & Company's Family Business practice regularly advises on trust arrangements and other related matters. For further information, please contact Richard Catling (r.catling@tamimi.com).

Recent developments for UK real estate holding companies

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There have been a number of significant developments in the UK tax regime, which affect non-residents who hold UK real estate via a corporate structure. It is important to understand these changes and what they mean for non-UK residents. Below is a summary note for non-residents holding real estate in the UK through holding companies:

Annual tax on enveloped dwellings ('ATED')

In order to make corporate structures, through which non-resident individuals own high value residential property unappealing, AETD was introduced as an annual tax payable on properties valued at more than £500,000 (US$ 650,000).

The annual tax amount increases with the increasing value of the property and tax returns must be filed to reflect this. Certain reliefs and exemptions are available where the property is let on a commercial basis.

With the Finance Act 2019, more favourable options for 'de-enveloping' and owning the property outright in an individual's personal name were introduced, without the payment of AETD on an annual basis.

The two new regimes for non-residents who hold UK investment property to consider are as follows:

Capital Gains Tax ('CGT')

This regime applies to non-resident individuals, in respect of their residential property gains on the sale of property in the UK. Individuals can benefit from:

1. basic rate of 18 per cent of the entire capital gains, if their overall annual income is below £50,000 (US$ 65,000); and a
2. higher rate of 28 per cent of the entire capital gains, if their overall annual income is above the £50,000 (US$ 65,000) threshold.

Corporate Tax

This regime applies to non-resident companies which are currently subject to corporate tax at a rate of 19 per cent on the disposal of their UK property.

From April 2020, any rental income generated by non-UK resident companies will also be subject to corporate tax, which is considerably lower than personal UK income tax rates and therefore more attractive.

Inheritance rax

UK Inheritance Tax is applicable on all chargeable estates above £325,000 (US$ 425,000) at a rate of 40 per cent. Following tax changes in April 2017, the value of the shares of a property holding company will now be included in an individual's estate (on death) for inheritance tax purposes, irrespective of the fact that the individual is a non-domiciled individual. Previously, this was not the case and a non-domiciled individual would not be subject to inheritance tax on UK residential property held via an offshore company, as long as they were still non-UK domiciled at the time of their passing.

Overseas entities register

In 2021, it is anticipated that the UK will introduce a register to detail the ultimate beneficial owners of some property holding companies, which will be easily accessible to the public on the UK Companies House website. With this newly proposed register, onerous filing requirements will also be introduced, thus making it more undesirable to hold UK property through such structures.

This is a complex area of taxation and it is important to understand the impact of the recent developments. Al Tamimi & Company is the first law firm to establish an international tax practice focused on the Middle East region. We can offer advice and assistance, in collaboration with our expert lawyers in the UK.

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

Bahrain family business: a solution in trusts

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Unlike in the United Arab Emirates, Bahrain's personal status law is uncodified, and the Sharia courts are responsible for applying the Islamic principles of inheritance on a case by case basis. This means that when a senior member of a family business passes away, family members who disagree on matters of succession, find themselves embroiled in lengthy and costly court proceedings.

According to a recent family business survey , 53 per cent of family businesses believe that succession planning is a key challenge for them over the following two years of growth. Families face a myriad of issues and complications by not having a succession plan in place including: the gradual dilution of the founding fathers' visions for their business from one generation to the next; and a stagnation of business whilst family members dispute inheritance issues. This, in turn, may heavily impact the prosperity of the business. Whilst inheritance laws do provide for certainty to some extent, they may detrimentally affect the smooth transition, and more importantly the long-term continuity of the business.

The transition phase from one generation to the next is complex, particularly when this results in the division of a company's shareholding between siblings or other family members, making it difficult to reach common decisions and hindering the day to day running of the business. One way of circumventing these issues is by having a trust in place. Trusts in Bahrain are regulated under Decree Law No.23 of 2016 on Trusts (the 'Trusts Law').

The Trusts Law defines a trust as a legal relationship created by a settlor, in his lifetime or upon his death, whereby business and/or personal assets are placed under the control of a trustee (or in the name of a third party on behalf of the trustee) either for the benefit of a beneficiary (or group of beneficiaries), or for a specified charitable/non-charitable purpose. A trust instrument must:

1. be in writing (trust deed);
2. identify the settlor and the trustee(s);
3. identify the purpose of the trust or the beneficiary;
4. identify the trust property;
5. specify the duration of the trust, the maximum term being 100 years; and
6. identify duties and powers of trustee.

An essential characteristic of a trust is that it allows for the separation between legal ownership and beneficial interest. A trustee is appointed to manage the trust's property and/or assets on behalf of the beneficiaries (i.e. the specified family members). Further, a trust enables the ring-fencing of family assets, in that they are separated from any other assets that the trustee holds, and are not part of the trustee's estate. The powers that can be given to trustees include managing, employing or disposing the assets in accordance with the terms of the trust.

In fact, the settlor has a substantial amount of flexibility in deciding on the terms and conditions of the trust deed including (without limitation): the extent of the beneficiaries' interests (for example entitlement of income and capital from the business); provisions relating to governance; and restrictions on the sale, transfer or encumbrance of assets, all of which may be tailored in line with the particular needs of each separate family business. Where families are conscious of, and want to uphold the religious aspects of succession, the trust may be structured in accordance with religious principles under Sharia.

Additionally, the settlor may specify certain powers which are to be reserved to himself (such as the power to remove or appoint a trustee or beneficiary). However, this reservation must not jeopardise the independence of the trustee or state that the trustee's powers are conditional upon the settlor's prior approval. Alternatively, the trust instrument could provide for the appointment of a 'protector' instead, whose consent must be obtained by the trustee in specified circumstances. Significantly, the Trusts Law allows foreign participation, whereby the settlor and beneficiaries may be foreign nationals and trust creators have the option to choose the jurisdiction in which the trust will be governed, allowing for further flexibility and freedom of contracting.

Trustees are licensed and regulated by the Central Bank of Bahrain ('CBB') and must notify the settlor, the protector (if any) and the beneficiaries, of any matter that has a tangible effect on the value of the trust property or on investing the trust property. Any one of the settlor, the protector (if any), the beneficiaries or the CBB has the right to question the trustee and the trustee must permit the foregoing to have access to the accounts, documents and records of the trust. This should be of comfort for family businesses that may be hesitant to leave the running of the business to a third party. Furthermore, a register of trusts is maintained by the CBB which records the identity of the settlor, the trustee(s), the beneficiaries and any protector and contains a summary of the terms of the trust instrument. Information is provided on a confidential basis and only the settlor, the trustee(s), the beneficiaries and the protector have access to it.

To conclude, the establishment of a trust instrument as a long-standing holding structure contributes to providing stability and mitigating risks as well as providing a solution to ensure the longevity of local family businesses from one generation to the next, and the protection of their assets.

Al Tamimi & Company's Corporate Commercial and Corporate Structuring team regularly advises on Family Business Structuring and Trusts. For further information please contact Foutoun Hajjar (f.hajjar@tamimi.com) or Rad El Treki (r.eltreki@tamimi.com) or Layla Alalawi (l.alalawi@tamimi.com).

Update on succession planning for family real estate assets

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In the United Arab Emirates, large commercial enterprises and family businesses have usually adopted relatively simple corporate structures. More often than not, the founding individuals would retain ownership of the business and their real estate assets in their personal capacity.

However, these assets held by individuals may potentially be at risk in the following circumstances:

1. in the event of a legal claim against the individuals as their assets will be subject to execution proceedings for recovery of debts; and/or
2. on the death of the owner, the heirs cannot deal with the property until transferring the title to their names and this will take some time.

As the legal and policy framework in Dubai has developed, it is now far more common for business operators to adopt more complex corporate structures for their businesses and in respect of the ownership of their real estate assets in order to minimise the potential risks set out above.

This article sets out a number of key strategies that can mitigate against the risks associated with succession issues, and provides an high level overview of the legal requirements that may be considered in respect of such issues.

Mitigating legal risks

Often, the simplest approach is for an individual to ensure that their business-related real estate assets are owned through a corporate entity. The corporate entity has a separate legal personality and thereby relieves the individual founders of liability. Consequently, the risk that a particular real estate asset would be subject to a claim in respect of the personal liabilities of the individual founder is mitigated.

Mitigating succession issues

In the event of the death of an individual in the UAE, that individual's estate (including any real estate assets) will be distributed in accordance with Sharia law and, pursuant to UAE law. Dealing with the estate of the deceased is restricted until the Court issues its final judgment on the inheritance by settling all debts from the estate, and determining the respective entitlements of the heirs.

In practice, the time and potential issues involved in inheritance matters can pose a significant risk to the efficient, continued operation of any business enterprise that is reliant upon or conducted using real estate assets that are the subject of inheritance proceedings.

Using a corporate entity to own critical real estate assets provides some degree of protection against the risk that inheritance issues would impact upon the business itself.

Families in Dubai should consider carefully their current real estate ownership structure and explore the best legal options to protect their wealth and ensure smooth transition of their assets to their heirs.

Corporate ownership of real estate properties in Dubai

Law No. 7 of 2006 Concerning Real Property Registration in the Emirate of Dubai ('Property Law') provides that companies that are:

1. wholly owned by UAE or GCC nationals may own any real estate in Dubai; and
2. owned by foreign nationals may own freehold title, a long lease or a usufruct right up to 99 years in any area in Dubai that has been designated for foreign ownership ('Designated Areas').

Notwithstanding the general position set out in the Property Law, the Dubai Land Department's ('DLD') current policy imposes restrictions on foreign companies preventing direct ownership of real estate rights in Dubai, but allows such foreign companies to own real estate rights in Dubai through Dubai free zone companies.

Corporate entities allowed to own properties in Dubai

For UAE and GCC nationals, using a Limited Liability Company registered at the Department of Economic Development to own the relevant real estate assets anywhere in Dubai would be appropriate.

For foreign nationals, there are several options available, such as a Jebel Ali Free Zone Offshore Company or Dubai Multi Commodities Centre Offshore Company to own properties in Designated Areas.

Furthermore, the DLD signed a memorandum of understanding with Abu Dhabi Global Market Authority ('ADGM') and the Dubai International Financial Centre ('DIFC') to permit companies incorporated in these jurisdictions to own land in the Designated Areas.

DLD is currently reviewing its policy in relation to allowing trusts to own properties in Dubai, and we expect a by-law to be issued by DLD to regulate this issue soon.

Certified real estate lawyer

On 13 July 2019, the DLD announced the launch of a new real estate initiative known as 'Certified Real Estate Lawyer' in partnership with Al Tamimi & Company. This real estate initiative by the DLD is designed to increase transparency, streamline real estate transaction processes, reduce transaction time, and facilitate strategic partnerships between public and private sectors.

Through this initiative, we confirm that the launch of this initiative enables us to offer additional services for property owners and investors in Dubai. In particular, the initiative is designed to:

1. **facilitate property due diligence:** licensed law firms are able to remotely access the DLD's registers online, and access information relevant to an investment or transaction. This helps to provide greater certainty and transparency when advising on real estate investments.
2. **simplify the documentation and reporting process:** many corporate investors have complex ownership structures and as a result, complex corporate documentation, which is difficult to attest and translate into Arabic and this can often be viewed as a time-consuming process. However, producing such detailed corporate ownership documentation is a prerequisite for the completion of any real estate transaction in Dubai in accordance with the requirements of the DLD. Licensed law firms, are able to fast-track this process by preparing a report that certifies the ownership structure of a company in a form that is acceptable to the DLD.
3. **Escrow agent services:** certified law firms are able to provide and act as an escrow agent, administering the escrow account for the payment of deposits or purchase funds.

This initiative will help investors to restructure their real estate assets faster, and in more cost-effective manner.

DLD gifting policy

The current DLD policy allows the transfer of real estate assets from individuals to a corporate entity owned by them (or by their first degree relatives) on a reduced transfer fee known as 'gifting fees'. Subject to the approval of the DLD, the gifting fees for real estate assets amount to 0.125 per cent of the current market value as determined by the DLD.

Registration of wills

Non-Muslim foreign nationals may also register a will in the DIFC. Following the death of the individual with a registered will, their estate would be administered in accordance with the registered will, rather than pursuant to Sharia principles.

Currently, the DIFC Wills Centre offers the following four types of Wills for non-Muslims: 1. Guardianship Will; 2. Property Will; 3. Full Will; or 4. Free Zone Company Will.

It is recommended that not only such a will be registered, but that it also clearly describe how the shares in the real estate holding company are to be dealt with. By doing so, a further layer of risk mitigation is added to ensure the trouble-free transition of ownership.

Granted lands

Lands that are granted by the Ruler of Dubai for residential purposes are restricted from any real estate dispositions. However, in cases of lands that are granted for commercial or industrial purposes, the beneficiary is allowed to dispose of the land by converting the ownership right over the land from grant to private.

In this regard, Article 4 of Decree No. 4 of 2010 Regulating the Ownership of Land Granted for Industrial and Commercial Purposes in the Emirate of Dubai provides that a payment to the DLD of 30 per cent of the current market value of the land as determined by the DLD is required to convert the ownership right over the land from grant to private.

Additional considerations

When considering which corporate structure options to adopt, it is important that business and real estate owners seek professional advice relating to their individual circumstances considering their business and personal objectives.

Al Tamimi & Company's Real Estate team regularly advises family businesses in dispute. For further information, or updates on the report publication timetable, please contact Mohammed Kawasmi (m.kawasmi@tamimi.com) or Abdulla Khaled (a.khaled@tamimi.com).

Golden Globes and Silver Linings: an introduction to film investment for private investors

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People decide to invest in film for many reasons, and few of those reasons are related to the certainty of a return. Many people are seeking to diversify and support the arts community, some people are hoping for an invitation to a red carpet and a few are just after a meeting with a star. Film continues to have a reputation for unpredictability for private investors, but that does not mean it should not be considered at all. There are several things however, that a private investor must consider if they are considering investing in the production of a film.

What does private investment in film look like?

Unsurprisingly, investing in film can look and feel a lot like investing in a company. The investor can take an active role, or be a passive contributor, as they see as appropriate. The end goal is to have the film seen by as wide an audience as possible, so that it turns a profit which is then returned to the investors. Whilst this sounds simple, the complexity of film as a 'collaborative work' and the subjective taste of film audiences does mean that investment in film can be tricky and more than a little intimidating.

Choosing a film project

In the same way that a private investor will undertake a large amount of due diligence when choosing whether or not to invest in a start-up company, it is imperative that one undertakes thorough research on the creative team to see if they are capable of undertaking the production on time, in quality, and within budget.

The creative team will comprise one or more of the following people: a writer, a producer and possibly a director. In the early days, it is unusual to have on-screen talent attached to the project – the investment funds will be needed to get any A list (and even B list) stars to even read and consider the script before they agree to sign on. Investors are often keen to attach themselves only after talent is agreed, for obvious reasons. Known actors can generate revenue, even if a film is a turkey! So one needs to assess the team that does exist. What have they done previously? In this region, there are a few real producers that have a long list of feature films to present, but they should have made content, and you can certainly view it. Asking to speak to previous investors in other projects is extremely prudent.

Assessing the creativity and audience appeal of a project is hard even for the experts. Ultimately you need to consider who will actually want to watch the film. The film industry itself releases very little information that can be used to gauge a film's potential success or otherwise. For this reason investors tend to invest in projects that they themselves would like to watch. With little information to guide you, you may indeed feel that this can be as good a reason as any.

It can be helpful also to invest in a project that already has interested distributors signed up to 'buy' the film before the production starts. In

the past, pre-sales of film were a way to secure most of the production budget but, these days, with such heavy diversification of media outlets for consumers, pre-sales are more rare and so can be viewed as a positive sign that someone, at least, believes in the film's potential. Whilst even the largest players very often get it wrong, a choice by a North American distributor to pick up theatrical rights, or for an OTT operator to get global rights might reasonably be considered a healthy sign. Otherwise, it pays to be ruthless in analysing any potential spreadsheets with projected return on investment figures. If there is no contract with an advance or a minimum guarantee, then the figures are likely to be no more than an educated guess, at best. Carefully scrutinise claims about YouTube revenue or iTunes fees; in reality these are invariably low. A film without a sales agent or distributor on board may sink without a trace. It is worth noting that a good sales agent can assist in estimating the returns for a film project before it is produced. An experienced producer will be likely to be working with one early in the development of the film. Do remember that each film genre will have different potential for returns. For example, comedy can be very regional and may not translate well to international audiences. But everyone, globally, can understand horror.

Budgets and other myths?

Producers have to produce budgets as well as films. Budgets will, in the early stages, be rough because the talent and possibly the director are not yet confirmed and these two items will comprise a substantial part of the budget and can vary widely depending on the pedigree of the people involved. As it is with all investment, it is important for an investor to understand the offer that is being made to you on a percentage basis. If you are putting up 20 per cent of the initial budget, do you expect to retain a 20 per cent stake in the backend? Surprisingly, film revenue sharing does not always work out to be so mathematically clean, as we touch on below.

One pitfall in budgeting can be the marketing spend – film rarely makes money if the general public do not know about it, so a well-crafted media plan is essential, but that can come at considerable cost. Do check to see what the producer is budgeting for this vital expense.

Do also carefully assess the fees that are being paid to the producers and other core production team members. Budgets have been spotted with one person filling, and being paid for, half a dozen different roles and taking over 25 per cent of the total budget. Look for people who might be siblings or spouses taking key budgeted roles. Consider whether the producer should, in fact, be granted a share of revenue at all if they are being well paid so well within the budget.

Passive or active investment?

Passive investment is as easy as it sounds. The money is handed over for a percentage of the profits of the project. No decisions are made by the investor, leaving the (hopefully experienced) production team to do the job they are hired to do.

Active investment can be more difficult, not only to obtain but to put into effect. Remembering that film is a collaborative process and a creative one at that, adding extra people to the approval and production process can add a burden that not all producers are happy to accept. Similarly, film is a lengthy process and signing up to active involvement will mean taking time to be involved for a few years.

How many films?

With so many new and hungry content outlets now available globally (think Netflix, Apple TV, Amazon Prime, Starz Play and Disney+ for a start), there are now more entities seeking to obtain finance for a slate of films. A slate comprises several films that will be paid for out of a common fund and, importantly, will recoup investment by cross collateralising against each other's revenue streams. The main appeal for this is that, if one film becomes a break-out hit, it will likely pay for itself and the other films, allowing a return on investment for all investors. There are commercial film funds being established globally (and in the region) that can assist investors with finding the correct fit for their goals and budgets.

Investing in a slate through a film fund can also increase an investor's chances of investing in a film with top talent. These films, if produced independently, will be more likely to seek revenue from an established fund than by waiting for a single production company to secure the revenue itself.

Production accounts and collection accounts?

Film production companies will often run two separate bank accounts – one for investors to deposit their investment funds into and one that is exclusively for collecting revenue from the exploitation of the film. This wisely separates the money from the budget from any revenue that should be split, but smaller producers may not always be able to do this or may not wish to do so. An investor does have the right to help the money (or place it in escrow) until certain steps are taken in the film's progress. For example, some money may be provided before pre-production, then another tranche on the first day of filming, with the final amount provided on first day of post-production.

Tax breaks?

Private investors often seek film projects that will assist them with tax relief – there are incentives across many countries that are available for investors. These vary from country to country and, to access these benefits, it is crucial to work with a producer that is experienced (or working with professional advisers that are experienced) so one can be sure that the tax credit or incentive can in fact be claimed. Governments granting such benefits do require the producer to comply with all requirements and prerequisites, and they expect all the paperwork to be completed on time. Any failure by the producer to do so may lose the benefit for all stakeholders. Do make sure to consult with trusted advisers if this element is important for you!

What is waterfall?

Film investment is complex, often involving several partners who are providing money on different terms and from different sources. There may be private investors, a government investor, pre-sales and a distribution advance. Given each has different priorities, they will be treated differently within the waterfall.

Investors generally share in the first returns on a pro-rata basis. Once that is recouped, then the second returns are split among different parties (perhaps actors who have deferred compensation as part of their fees) and so on, until everyone is accounted for. But as an investor, be sure you understand your position within the waterfall. Contingent compensation can be tricky – whilst it is a nice problem to have, your position in the waterfall will alter if the film makes a certain amount at the global box office, or perhaps wins an award as these people will be likely to be paid ahead of you if you have already recouped your investment.

Remember that a waterfall can change over time. You may be the only private investor at the start and so have priority on recoupment from 100 per cent of the first returns, but gap finance might be needed to pay for that marketing plan that they under budgeted six months back. Gap finance will usually alter your position in the waterfall. Make sure you understand that because the project may fail if you refuse to alter your position and agree to the gap finance. A pre-sale, whilst an excellent sign for the success of the project, will likely mean that the revenue secured from that territory will now no longer be available to the general pool of investors. Actors may come in and demand a percentage of the film – they often demand a share of the gross revenue rather than the backend, and this is often agreed if the name is enough to warrant the sacrifice.

Whatever is agreed, it is imperative to have the waterfall checked thoroughly by an experienced lawyer.

Timing

Film investment requires patience. Funds can take a few years to collect; the film production process itself grinds along at snail's pace, the editing process can take months and then finally, once the film hits the screen, it can take anywhere up to two years to get a return, if one is going to come. It is not for the faint hearted investor however, the upside of being involved in the production of a creative work and being close to an industry that has such a public profile can be enough of a reward for some investors.

Al Tamimi & Company's Technology, Media & Telecommunications team advises on content finance issues for film and other media.
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The validity of a marriage contract under Islamic Sharia

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A recent judgment of the Dubai Court of Cassation established the threshold required in respect of the issue of proving the occurrence of a marriage and its legal and Sharia prerequisites.

Article 19 of the Personal Status Law ('PSL') No. 28 of 2005 defines marriage as a 'contract entitling one spouse to have legal enjoyment with the other in order to protect his/her chastity and build a stable family under the husband's care on grounds that enable them to muster its burdens in affinity and mercy'.

While Article 27, paragraph 1 of the PSL further goes on to stipulate that 'Marriages shall be officially legalised and may be established by legal proof for a specific fact'.

Background facts

The case relates to the issue of amending a succession order by the Dubai Personal Status Court, in respect of the distribution of inheritance, by including an additional heir. A claim was brought before the Courts by the Claimant, who alleged that the deceased had married her in secret over 37 years ago. It was contended that if this had indeed been the case, then according to Islamic Sharia rules, the Claimant would be entitled to a share of the deceased's inheritance and in particular, the share of a wife, which would be divided between the Claimant and the deceased's other wife.

The Claimant produced a marriage certificate officially legalised by a judge at the Dubai Personal Status Court and presented several witnesses who testified that she was married to the deceased. Her claim was successful before the Dubai Personal Status Court at First Instance and before the Court of Appeal. The succession order was amended to include her amongst the remaining legal heirs of the deceased.

The legal heirs of the deceased appealed the Dubai Personal Status Court Appeal judgment before the Dubai Court of Cassation, which overturned the Appeal Court's decision with the Court of Cassation ruling on the merits of the case and ultimately denying the claims of the Claimant.

Court of Cassation judgment

The Court of Cassation stated that the core legal issue of this case was to determine whether the deceased had been married to the Claimant and to reinforce that a valid legal marriage contract is of grave importance and brought with it profound ramifications as to lineage and inheritance. Therefore, a higher threshold of proof as to its existence was required, to protect the sanctity of marriage.

The Dubai Court of Cassation determined that the legalisation of the marriage certificate was not sufficient to prove the occurrence of the marriage, since the marriage was concluded in another Emirate and the marriage certificate later legalised before the Dubai Personal Status Court. Moreover, the judge who legalised the marriage certificate neither performed the marriage ceremony nor witnessed its occurrence and hence the protection afforded by law to a legalised document and its contents, did not apply in this case. Furthermore, the marriage certificate was neither signed by the deceased nor the Claimant nor her father, therefore it could

As per the Maliki school of Islamic Sharia jurisprudence that prevails in the UAE, although hearsay testimony is allowed in personal status matters given the private nature of the issues that occur between spouses, it is not sufficient in providing proof of the occurrence of a marriage contract. The witnesses for this purpose would be required to give direct testimony in relation to the parties concluding the marriage contract.

not be considered as proof that the deceased had indeed married the Claimant. Upon further inspection, it was discovered that the wording of the marriage certificate did not include the offer of the marriage and the acceptance nor the respective phrases required for a marriage certificate to be legal.

Additionally, the Dubai Court of Cassation declared that the testimony of the witnesses put forward by the Claimant did not satisfy Islamic Sharia requirements. As per the Maliki school of Islamic Sharia jurisprudence that prevails in the UAE, although hearsay testimony is allowed in personal status matters given the private nature of the issues that occur between spouses, it is not sufficient in providing proof of the occurrence of a marriage contract. The witnesses for this purpose would be required to give direct testimony in relation to the parties concluding the marriage contract i.e. they would have to testify that they had directly seen or heard the contracting parties conclude the marriage and that they were present on that occasion. Since neither of the witnesses put forward by the Claimant attended the wedding ceremony, nor had any direct contact with the contracting parties and the source of their testimonies was based upon what they had heard from others, it was concluded that the threshold of the testimony accepted by Islamic Sharia to prove a marriage was not satisfied.

Conclusion

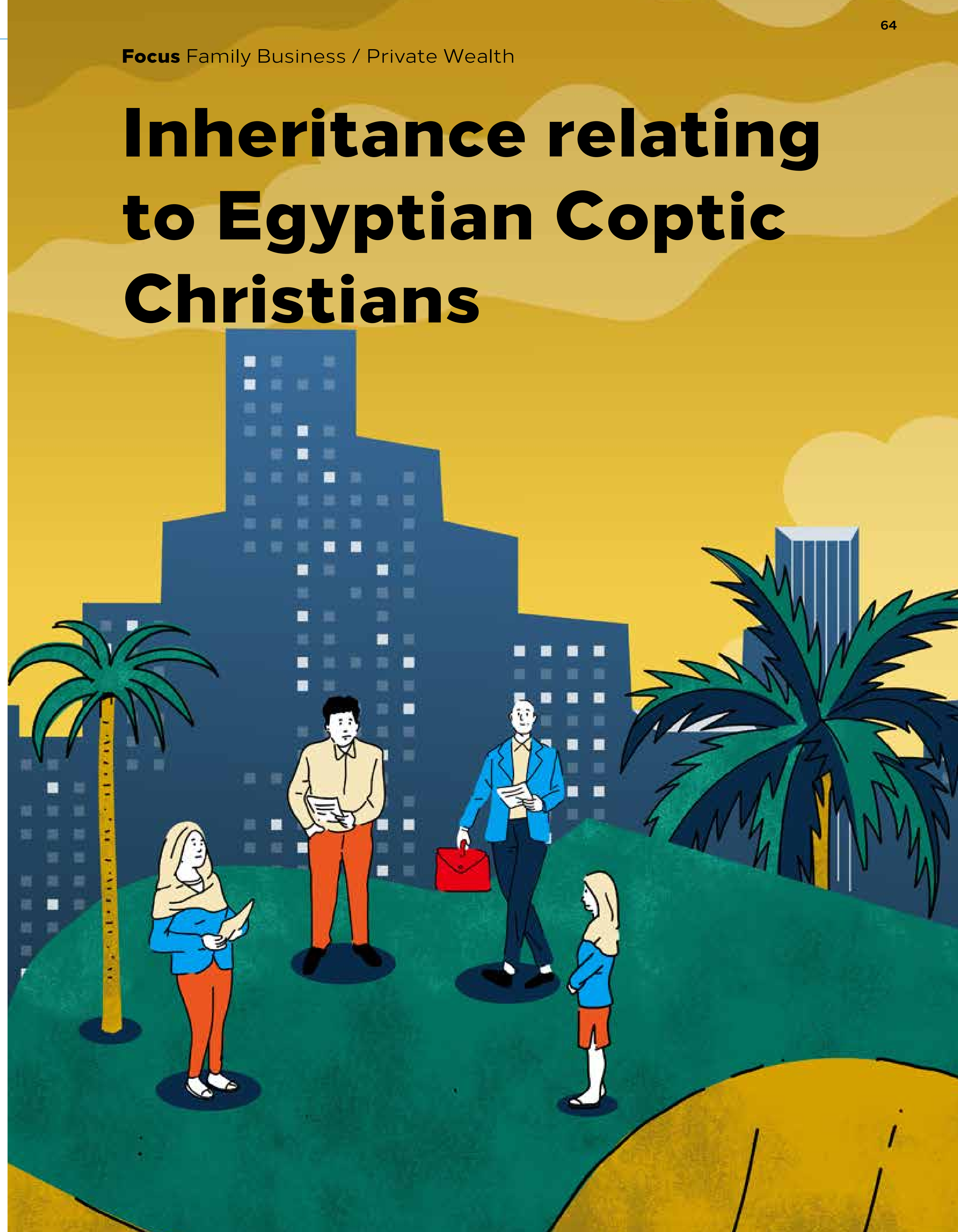
The judgment strengthens the safeguards and sets a higher burden of proof regarding the determination of the legality of a marriage, particularly in times where false claims are often utilised in order to bring about financial gains in matters of inheritance.

The judgment further highlights the importance of precise and accurate data being completed in a marriage certificate; that is, it must include full names, signatures of the parties, offer and acceptance phrases and follow the correct legalisation process.

The case serves as a reminder to ensure seamless, effective succession and estate planning and accurate record keeping are implemented and maintained so that the risk of heirs being burdened in their time of mourning a loved one is minimised as much as possible.

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

Inheritance relating to Egyptian Coptic Christians



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It is well established that all Egyptian nationals, regardless of their faith are bound by inheritance laws founded on Sharia principles, including Coptic Christians who make up more than 10 per cent of the Egyptian population. This is the reason behind the long-awaited 'Christian Unified Law', being a law that would govern all personal status matters relating to non-Muslims in Egypt. This law has been in the pipeline for decades; indeed the three major Christian communities in Egypt (Orthodox, Catholic, and Evangelical) first met in 1979 and agreed a first draft. However, despite the strong desire and intent for the Christian Unified Law to be finalised and enacted, it remains waiting in the wings (the current situation is that all Christian communities have completed their submissions except for the Orthodox) and that is what delaying the law and so judgments such as the recent Nasrallah judgment which this article discusses below are critical to ensure faith-based rights are upheld in the interim period.

Monday 25 November 2019 marked a historical moment for Coptic Christians since it was on this day that the Helwan Family Court (South Cairo) rendered a landmark judgment praised by many defenders of Coptic rights and in particular Coptic women's rights in Egypt.

The judgment lays down the principle that an Egyptian Family Court may apply Coptic Christian Canonical principles, as opposed to Islamic Sharia principles, and determine the shares of the heirs accordingly. Coptic Christian principles do not distinguish between male and female heirs and therefore allow for equal distribution of the deceased's inheritance amongst all of the surviving children. Contrast this with Islamic Sharia rules which stipulate that male sons get double the inheritance to that of their sisters when it comes to inheriting their parents' estate. In order to understand how the judgment deviates from the ordinary course, it is important to understand what the ordinary course entails:

What procedures are usually followed when distributing inheritance in Egypt?

All Egyptian nationals, regardless of their faith, are bound by the Egyptian Laws, including Family Law and all Personal Status Laws that are based on Islamic Sharia principles. Therefore, Coptic Egyptians and all non-Muslim Egyptians, in general, are subject to the application of Islamic Sharia inheritance principles enshrined in the law rather than their own faith-based inheritance principles

Articles 24 and 25 of the Law No. 1 of 2000 concerning personal matters, stipulates the steps to be taken following the passing of an individual, regardless of their faith, and these include:

1. an heir submitting a request to the competent Family Court that includes the full name of the deceased, the date of his death, the full names of all of the other heirs, the death certificate and a request to the court to issue a succession order that establishes the rightful heirs and their respective shares in the deceased's estate;
2. once all of the heirs have been notified, a court hearing is held, during which two witnesses attend to testify to the court that there are no heirs other than the ones mentioned in the request submitted to the court;
3. thereafter, the judge issues a succession order confirming the death and determining the rightful heirs and their respective shares.

Is this process acceptable to Coptic Egyptians?

The above process is generally acceptable to Coptic Egyptians, save for the determination of the shares enshrined in the inheritance law, which renders Coptic Egyptians subject to Islamic Sharia principles.

The succession orders issued by family courts for a Coptic Egyptian are issued (as with all other Egyptians) in accordance with Law no. 77 of 1943 regulating inheritances ('Inheritance Law') which provides for male children heirs to receive twice the share of the female children heirs.

The Inheritance Law is applied to all Egyptians irrespective of their faith. This notion is further affirmed by the Civil Law that stipulates explicitly that in matters of inheritance, the provisions of Islamic Sharia inheritance principles shall apply to the determination of the heirs and their respective shares of a deceased's estate. Hence, as per the prevailing legal framework, Coptic Egyptians are bound by the Islamic Sharia inheritance principles.

The Court of Cassation affirmed this perspective, by stating that the interpretation of Article 875 of the Egyptian Civil Law and Articles 1, 4 and 6 of the Inheritance Law indicate that Islamic Sharia principles related to inheritance apply to all Egyptians, whether they are Muslims or non-Muslims, when determining the heirs and their respective shares.

How do Coptic Egyptians deal with the application of the Islamic Sharia in practice?

In practice, Coptic heirs receive the succession order but employ a widely accepted practice of dividing, by mutual consent, the deceased's estate in equal shares.

There are two traditional forms used in order to determine the division of the inheritance in accordance with Coptic inheritance principles: the principles of Equality and Equity.

The Equality principle stipulates the division of the inheritance equally between the heirs, whereas the Equity principle stipulates the division of the inheritance according to the needs of the heirs.

This Equity tradition find its roots in the Apostolic Age, where Christians sold their properties and donated the sale proceeds to their spiritual leaders. Other Christians would take from these monies only according to their needs, based on the principles of love as well as the fear of greed.

Why is the 25 November 2019 judgment such a landmark moment?

In short, because an Egyptian family judge applied Coptic Christian principles to an inheritance case rather than Islamic Sharia principles.

Huda Nasrallah, a Coptic Egyptian Human Rights Lawyer, was the driving force behind this recent judgment. After the passing of her father, Nasrallah received a succession order, issued in accordance with the principles of Islamic Sharia, awarding her, as one of the two heirs, the equivalent of half the value of the share her brother received from her deceased father's estate. She decided to challenge the status quo, and requested the court to issue a succession order in accordance with the Coptic inheritance principles, and therefore award her a share equal to that of her brother.

In Nasrallah's case, after her father's death, the heirs filed a request before the Family Court, explicitly requesting the application of Coptic principles when determining the heirs and their respective shares. It was argued that the heirs mutually agreed on the equal division of the inheritance.

However, the succession order was issued in accordance with Islamic Sharia inheritance principles. As previously mentioned, the heirs would have been prepared to disregard the law and mutually consent to divide the inheritance. However, Huda Nasrallah refused to accept the prevailing legal status quo, which did not support this intention. This became a matter of principle for Nasrallah, and therefore she requested the Court to explicitly apply the Coptic principles when issuing a succession order.

Upon receiving the succession order which followed Sharia law, she filed a lawsuit requesting the annulment of the already issued succession order on the grounds that it contradicted the Constitution of 2014.

She based her arguments on two pillars: firstly, Article 3 of the Constitution giving the right to Coptic Egyptians to apply Canonic Laws as the main source of legislation for regulating, amongst others their personal status matters.; and secondly Article 1 of the Law no.25 /1944 concerning the applicable principles in inheritance matters which states that if the deceased is non-Muslim, the heirs have the right to opt for the application of their own Canonic Laws instead of Islamic Sharia.

Finally, Nasrallah requested that the inheritance should be distributed equally between male and female heirs, without any discriminatory division, according to the 1938's Coptic's Charter.

After a lengthy process, on Monday 25, November 2019, the Appeal Circuit of the Helwan Family Court, handed down its long waited Judgment. The Court decided to firstly: to nullify the succession order issued in accordance with Islamic Sharia; and secondly to apply the Coptic principles and distribute the inheritance equally between male and female heirs.

Does this Judgment establish a new principle?

This judgment is an important development in the area of succession law in Egypt which explains why it essentially went viral and became the subject of strong public opinion in a very short space of time, despite the fact that this was not the first precedent of its kind.

The judgment has brought to the fore increased dissent with respect to the application of Islamic Sharia principles to Coptic Christians' inheritance cases and could have a direct impact on the much delayed issuance of the long awaited Christian's Unified Law.

The Nasrallah case has proven to be a controversial decision; it brought discussions on a sensitive topic to the fore. From a legal perspective, Nasrallah's arguments had a strong legal basis and rationale which led the Court to adopt her views granting equal legal rights to women in matters of inheritance, in keeping with Coptic principles of inheritance. From a social perspective, this precedent introduces a new chapter of Coptic Women's rights in Egypt and might add further impetus for the issuance of the Christian's Unified Law.

Al Tamimi & Company's Private Client Services team regularly advises on inheritance matters. For further information, please contact Ahmed Zohny (a.zohny@tamimi.com) or Nada Abouelseoud (n.abouelseoud@tamimi.com).

Family disputes in the common law courts of the GCC

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Family businesses fall into dispute for a large number of reasons, from quarrels over succession, the assignment of management or control rights, to arguments around the generation, preservation and distribution of assets and income, and personal animosities and competition.

When disputes arise, it is in the family business' best interests to have a pre-selected form of dispute resolution. For many family businesses, several viable options are offered by the GCC's three common law courts: the Courts of the Dubai International Financial Centre ('DIFC'), the Abu Dhabi Global Market ('ADGM') and the Qatar Financial Centre ('QFC'; also known as the Qatar International Court and Dispute Resolution Centre).

Features of the common law courts beneficial to family businesses

There are a large number of general features common to all of the GCC's common law courts which may be beneficial to family businesses entering disputes. These include:

1. **Applicable law:** The applicable law in each court is modelled on the common law. In the DIFC and QFC, DIFC and QFC law is a distinct body of rules based on common law principles; in the ADGM, the applicable law is a modified form of English law. Many families actively want their affairs to be governed by laws that respect their freedom to contract and to make legal arrangements (including testamentary freedom). All three courts are also familiar with handling disputes governed by other laws, such as UAE or Qatari law applicable outside of the financial free zones, and with Sharia law. The common law courts therefore provide flexibility and adaptability by entertaining disputes governed by external or foreign laws yet having recourse to a developed body of internal laws.
2. **Privacy of proceedings:** As a general rule, disputes are managed openly. This means that, unlike in the national courts outside of the financial free zones, hearings are open to the public (and sometimes available on the internet), and listing dates, judgments, orders and other documents are easily accessible online. Yet parties to family disputes are unlikely to want to resolve their disputes under the glare of publicity. As a solution, the common law courts have the ability to restrict public access to information by holding hearings privately and redacting or omitting to publish sensitive documents, so as to protect the privacy and confidentiality of families involved in a dispute.
3. **Default language:** Disputes are conducted in English as the dominant language in the common law courts. Hearings are usually held in English and documents are published in that language. This may suit families who have members based overseas, where English may be their first language, or where a number of different languages are spoken by family members. However, translation services are available for use in each court and many judges in the common law courts are fluent in languages other than English, in particular Arabic.
4. **Court organisation:** The personnel, processes and use of technology in the common law courts may provide appropriate expertise, flexibility and convenience to family businesses and particularly families and businesses spanning multiple jurisdictions. All three courts are analogous to the English Courts, with a court of first instance similar to the English High Court and a final Court of Appeal that superintends its work. They are staffed by very experienced judges and officials drawn from around the common law world, as well as Qatari and Emirati nations with backgrounds in both civil and common law. Small claims processes are available, mainly for employment and low-value claims, as are specialist divisions such as for technology and construction disputes. The rules and procedure of the common law courts are modelled on the English Civil Procedure Rules, and the courts have embraced modern information technology such as 'e-bundling' (filing documents online), paperless hearings and trials, and advocates, witnesses and even judges appearing remotely via video conferencing software.
5. **International connectivity:** Each court will enforce judgments rendered by other foreign and domestic courts and arbitral tribunals, although the precise grounds on which they will so do varies. Equally, judgments and orders rendered by the DIFC, ADGM and QFC Courts may be enforced in other jurisdictions around the world, depending on the rules applicable in those jurisdictions.

Jurisdiction

It is important to bear in mind that family business disputes can only be captured by a formal process if that process has jurisdiction to deal with the dispute in question. The DIFC, ADGM and QFC Courts have similar jurisdictional gateways which, in overview, are as follows.

1. disputes can be brought before the courts if one or both parties have a connection to the jurisdiction, e.g. because they are incorporated, registered or regulated within the jurisdiction or geographically based within the territory of the jurisdiction;
2. if the dispute involves a contract or an incident related to the jurisdiction, e.g. because the contract was in part or wholly concluded or performed, or a tort was committed in part or in whole, within the jurisdiction;
3. if the parties opt into the jurisdiction without having any other connection to it, e.g. by agreeing that a specific dispute, or by making any disputes arising from a contract, should be subject to a court's jurisdiction. Note that parties may usually agree that any disputes which otherwise may satisfy the party or subject matter gateways be removed from a court's jurisdiction too; and
4. laws and rules may bring a form of dispute within a court's jurisdiction, e.g. any dispute involving financial service regulations applicable within the jurisdiction. This gateway usually overlaps with one or more of the other gateways.

The question of jurisdiction is not only one for formal litigation processes, but may also affect: (a) whether parties can access formal court-annexed mediation or other alternative dispute resolution processes; and (b) whether and how a court may provide support for any arbitrational processes. Families are therefore advised to consider, with their trusted advisors, whether to opt into the jurisdiction of one of the common law courts, preferably by way of an express term to that effect on the family business' foundational or constitutional documents (such as its corporate memorandum and articles of association).

Alternative dispute resolution facilitated by the common law courts

It is proportionate for families to select and engage a dispute resolution process appropriate to the dispute at hand. Many family disputes may start with a small disagreement that may possibly escalate into a larger one over time. The common law courts generally provide access to a tiered dispute resolution processes and they place alternative dispute resolution ('ADR') at the front of their offerings.

For example, the QFC Court Regulations expressly mandate ADR in a rule that comes at the start of the applicable court rules: 'the Court will encourage the parties, whenever it is appropriate to do so, to resolve their disputes by resorting to arbitration or mediation or any other method of alternative dispute resolution' (Article 5). Part 27 of the Rules of the DIFC Courts expressly notes the benefits of settling disputes by means of ADR, which:

1. significantly helps parties to save costs;
2. saves parties the delay of litigation in reaching finality in their disputes;
3. enables parties to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation;
4. provides parties with a wider range of solutions than those offered by litigation; and
5. is likely to make a substantial contribution to the more efficient use of judicial resources.

The common law courts can facilitate family mediation in one of two ways. The first follows from the courts' own rules: once litigation has started, the courts may switch the litigation onto an ADR track at any point. In the DIFC Courts, for instance, parties may apply, at any stage in the proceedings, for directions for ADR. The judge may adjourn a case for a specified period of time for ADR, including extending the time for compliance by any party of any order of the Court, and the judge may even order the parties to engage in ADR (including orders as to costs).

Second, before litigation has commenced, the disputing parties can agree to host a mediation process or other form of ADR such as conciliation or expert determination in the court facilities, which are usually of very high quality (including main meeting rooms and individual party rooms for break-out sessions). Holding ADR in the courts has a number of benefits: it is a neutral ground, away from the public forums of a hotel or conference centre, and competitively priced.

There are a large number of general features common to all of the GCC's common law courts which may be beneficial to family businesses entering disputes.

By way of an example of the common law courts' ADR capabilities - in the ADGM Courts, parties may voluntarily refer their dispute to the Court-annexed mediation service prior to or after the commencement of proceedings, as well as by an order of the Court. The Court Registry will appoint a mediator within seven days of any referral; he or she is obliged by the relevant practice direction to facilitate discussions between parties, assist them in identifying underlying issues, clarify priorities and explore areas of compromise and generate options in an attempt to resolve the dispute. Further rules govern the Court's assistance in the mediation, and the processes of hearings, settlement and costs.

Arbitration

Mediation is usually a voluntary process that does not require findings of fact by an umpire. An escalation in family business dispute resolution may take the parties to arbitration, if they agree. The benefits of arbitration are well known. They include flexibility over the pace of the process, a choice of arbitrator (allowing the choice of a technical subject matter expert rather than a law), a high degree of privacy, and the rendering of a binding award that is highly portable through the New York Convention, allowing enforcement in jurisdictions around the world where the award debtor has assets. All of these aspects may be beneficial to family businesses in dispute. The common law courts provide additional advantages. Firstly, the common law courts may also act as the legal or curial seat of an arbitration. The common law courts have a range of tools which can be deployed in support of arbitral proceedings, some of which the non-common law courts of the UAE and Qatar lack. These include remedies such as injunctive relief and substantial orders as to costs. Second, arbitrations can take place under either institutional or ad hoc rules, and the common law courts have experience of all forms of arbitration. Each of the common law jurisdictions has its own arbitral centres and rules (such as the LCIA in the DIFC) but parties are generally free to choose any rules they so wish, and that choice will be respected by the common law courts provided they accord with principles of natural justice.

Litigation

In the context of almost every family business dispute, litigation remains the 'nuclear option'. The compulsory nature of litigation may force a recalcitrant, unwilling or uncooperative family member to engage with the process, given the ultimate sanctions of costs orders, damning judgments and orders available to the public, and contempt of court applications that may lead to fines or even imprisonment. Litigation does not require the cooperation of the defendant or their good faith in proceedings. The process provides procedural certainty and fixed rules of evidence without any selection process for the judge (unlike arbitration and mediation). There is much less scope for challenging jurisdiction. However, litigation can be: inflexible; unnecessarily adversarial in a way that drives family members further apart without accounting for the non-legal side of the dispute, such as emotional relations between the parties; very costly (although unlike in the civil law courts, the common law courts allow the recovery of the bulk of a winning party's incurred legal costs); and there is a greater right to appeal.

Conclusion

Lots of options are available to families in commercial disputes who wish to access the common law courts of the GCC. Family businesses and their professional advisors should consider accessing the DIFC, ADGM and QFC dispute resolution offerings now, before any disputes arise, so that exclusive jurisdictions can be selected and stepped, incremental dispute resolution clauses drafted and agreed. It is far easier to plan how to deal with potential disputes in advance, rather than deciding how to do so once a dispute has crystallised, when each party will use the choice of dispute resolution to its advantage and no agreement on process is guaranteed.

Al Tamimi & Company's Litigation, International Litigation and Arbitration teams regularly advise on family business disputes. For further information, please contact Rita Jaballah (r.jaballah@tamimi.com), Peter Wood (p.wood@tamimi.com) or Peter Smith (p.smith@tamimi.com).

Back to the future: put success into your succession planning

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Family businesses are at the core of the business community in the UAE and play a significant part in the UAE's economy. Yet there continues to be a real challenge in the transition of family businesses through the generations, particularly after the second generation.

Succession planning and adopting appropriate governance are key to helping family businesses thrive and succeed through those transition periods, retain wealth within the family and avoid conflict and disruption to the business, particularly in the challenging economic climate with which we are currently faced. For a family business to survive, it is inevitable that its management and control must pass from one generation to the next, so why are so many family businesses failing to plan for the inevitable?

Historically, many family businesses have failed to do so for a number of reasons, including a desire for privacy; the ability to retain control; reluctance to involve outside parties in their business; unwillingness to incur the cost; viewing it as a sensitive topic which is difficult to discuss; and/or it may be seen as unnecessary due to a misguided belief that the principles of Sharia law will ultimately resolve matters. However, the consequences of not having a succession plan in place can be as profound as a leadership void and the discord that can often follow from this can have serious implications for the business' performance going forward, not to mention the impact on family relations.

Most of these challenges and concerns apply to all businesses, but a family business has an added dimension to navigate - the family itself. The family brings family politics which are, by nature, more personal and complex than the politics in a non-family business. Every family is unique and has its own challenges, so there is no one-size-fits-all model when it comes to advising families on their succession planning and governance. However, there are some common principles that they must all consider:

1. Time is of the essence

It is never too early to start discussing a succession plan. The earlier the process starts, the less daunting a task it will be. Although things may change along the way, a good succession plan should allow for outcomes that will work for various foreseeable scenarios that may evolve over time. The most successful transitions will happen during the founder(s)' (or the current generation owner(s)' lifetime, to provide stability during the period of change and allow the next generation to experience running the business while they are still around. Many families do not invest in succession planning until it is too late and if the founder/current owner passes away, succession will likely be determined by the law of the deceased person's habitual residence or domicile. In the UAE, the distribution of an estate may depend on the application of Sharia law. Sharia law

Planning for the inevitable now will not only help with a smooth transition of the family business to the next generation but will also help to ensure that the business continues to be a success for many years and generations to come.

was not designed for modern companies and will not necessarily provide an end result that is in the best interests of the business. Not to mention the fact that the business could come to a complete standstill if the founder who passes away had exclusive authority, for example. to operate bank accounts.

2. Family values

Before a succession plan can be decided on for the business, the family must be clear on its identity, culture, traditions and core values, as well as the short and long-term vision for the business. These guiding principles together with a shared family vision will provide the framework for the succession plan, as well as help to stabilise and support a smooth transition. As part of this process, it is also important to understand the aspirations of individual family members to ensure that the right succession process is selected. For instance, those family members who do not embrace the family values or support the vision, should not be considered for a leadership role either presently or in the future.

3. An objective view

The reality of what is best for the business may often differ from what a family member wants for the family or him/herself. Family emotions can influence strategic decision-making, particularly when it comes to succession. For that reason, it is also important to think about the company's future (including succession) from a business perspective, which will usually require an objective view from an external advisor. It is typical that, initially, the founder will control all aspects of the running of the business, but as a company grows it must start to distinguish the ownership from the management of the business. Bringing in outside expertise can assist with this, as outsiders add an objective perspective and give opinions or ideas that family members may not feel comfortable proposing, or may not have even considered.

It can also be useful to ask non-family member employees for their input on the business, as they will usually have a good sense of what is working and what can be improved on the ground. This will also show the employees that they are valued which, in turn, can help ensure that they remain loyal and committed to the business for the longer term.

4. Embrace the next generation

Never underestimate what the next generation can bring to the table. Often they will have been educated abroad and may also have gained experience working outside of the family business so they can bring a fresh perspective and new ideas. They should be exposed to the business, delegated tasks and involved in key conversations and decision-making processes as early as possible so that they understand the business inside-out when the time comes for them to take the reins. In particular, it is important to involve them in the succession planning and any restructuring process, otherwise they may challenge it in the future and the foundations of the business will not be as strong as they could have been.

Today, digital disruption and innovation are (or should be) high on the agenda of all businesses because it is essential to many elements of any business, including customer engagement, e-commerce, marketing, social media and cyber-security. The next generation is growing up in a new, digital aged world, seeing the world through a digital lens and can bring that vision and those skills to the business in a way that the elder generation may not be able to.

5. The legal framework

A succession plan must be supported by a robust legal structure. There are many forms that the structure may take and there are different considerations for each family based on (amongst other things) their family values and vision, the activities and geographic location of their business and assets and whether or not the structure must be Sharia compliant. In all cases, the structure will involve putting in place legally binding agreements which may include articles of association, a family constitution, a shareholders' agreement and/or trust arrangements, all of which will give peace of mind that a framework is in place with a view to resolving any issues that may arise, and reduce the risk of conflict and uncertainty, whilst limiting the damage and disruption to family life and all the while ensuring higher chances of the business prospering well into the future. The agreements should include a corporate governance framework that clearly determines, amongst other things, the roles of each family member, stewardship, eligibility criteria for the board and ownership, how decisions are made and who is accountable/responsible for what.

Planning for the inevitable now will not only help with a smooth transition of the family business to the next generation but will also help to ensure that the business continues to be a success for many years and generations to come.

Al Tamimi & Company's Private Client Services team regularly advises on family business matters, including succession planning, together with our Family Business Practice. For further information, please contact Dipali Maldonado (d.maldonado@tamimi.com) or Richard Catling (r.catling@tamimi.com).

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 670
20 Jumada al-Awwal 1441H
15 January 2020

FEDERAL DECREES

146 of 2019	Ratifying the UAE-South Sudan Bilateral Investment Treaty.
147 of 2019	Ratifying the UAE-Brazil Agreement on Cooperation and Facilitation of Investment.
148 of 2019	Ratifying the UAE-South Sudan Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income.
149 of 2019	Ratifying the UAE-San Marino Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income.
150 of 2019	Ratifying the UAE-Chad Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income.
151 of 2019	Ratifying the UAE-Brazil Agreement for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance.
152 of 2019	Ratifying the UAE-Costa Rica Agreement for the Elimination of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
153 of 2019	Ratifying the UAE-Angola Agreement for the Elimination of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
154 of 2019	Ratifying the UAE-Saint Vincent and the Grenadines Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.
155 of 2019	Ratifying the UAE-Uzbekistan Agreement on Mutual Administrative Cooperation in Customs Matters.
156 of 2019	Ratifying the UAE-Global Green Growth Institute (GGGI) Host Country Agreement to Open a Regional Office for GGGI in the UAE.
157 of 2019	Ratifying the UAE-Peru Agreement on Mutual Exemption of Tourist Visa Requirements for Holders of Ordinary Passports.
158 of 2019	Ratifying the UAE-Uzbekistan Agreement to Grant a Plot of Land for Construction of the Uzbekistan Embassy in the UAE.
159 of 2019	Ratifying the UAE-Asian Paralympic Committee Agreement to Host the Asian Paralympic Committee in the UAE.
160 of 2019	Ratifying the UAE-Colombia Agreement on Mutual Exemption of Visa Requirements for Holders of Ordinary Passports.

REGULATORY DECISIONS OF THE CABINET

1 of 2020	On the refund of VAT paid on goods and services connected with Expo 2020 Dubai.
2 of 2020	Approving the Standardized Tables for Classification of Goods for the GCC according to the HS 2017 (as revised).
3 of 2020	On the implementation of mandatory standards for the UAE electricity sector.
4 of 2020	On the implementation of mandatory standards for the UAE food sector.
6 of 2020	Approving the operating rules of stem cell and cord blood storage centres.

ADMINISTRATIVE DECISIONS

- From the Telecommunications Regulatory Authority

77 of 2019 — Approving the Frequency Spectrum Fees Regulations - Version 4.0

- From the Securities and Commodities Authority (SCA)

  - Certificate of approval of amendment of the Articles of Association of National General Insurance Company PJSC.
  - Certificate of approval of amendment of the Articles of Association of Abu Dhabi Aviation Company PSC.

Bahrain

Foutoun Hajjar is appointed Vice Chair of the Law Firm Management Committee, Knowledge Management and IT Subcommittee of the International Bar Association (IBA)

Foutoun Hajjar, Partner and Head of the Bahrain Office was appointed as Vice Chair to the Law Firm Management Committee to serve from 01 January 2020 to 31 December 2021.

The Committee is a part of the Section on Public and Professional Interest ('SPPI') group which promotes an interchange of information and views among its members about the public and professional interest activities of the legal profession throughout the world; to support and promote those activities; to facilitate communication among its members and to be active in the Section through its committees and other groupings; and to undertake such related projects as may be approved from time to time by the SPPI's Council.

The SPPI pursues its mission through a number of activities including the annual IBA conference at which the Committee regularly offers a wide range of sessions addressing current top-of-mind issues; regional conferences, generally in coordination with the IBA's regional fora, which address current law firm management issues of regional interest; webinar programs; e-bulletins; and our publications and other material accessible to members via the IBA website. As an Officer Foutoun will be required to join the SPPI regular Open Forum Meetings that take place twice a year, in May at the IBA mid0year meeting and Annual IBA Conference. The next Mid-Year meetings will be taking place in Vilnius, Lithuania on 20-23 May 2020.

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Kuwait

15th
JAN

2nd ICC Kuwaiti Arbitration Day: Oil and Gas Edition

The Regency Hotel, Kuwait City

On 15 January 2020, the International Chamber of Commerce ('ICC'), in sponsorship with Al Tamimi & Company, held the Second ICC Arbitration Day dedicated to Oil and Gas Disputes.

The conference was held in Kuwait and attracted eminent speakers and guests from across the MENA region and beyond. The featured panel discussions addressed salient topics in international arbitration and more specifically in disputes relating to Oil and Gas.

Essam Al Tamimi, Chairman, welcomed the distinguished guests and panelists and shed light on the progress that Kuwait has made as an arbitration-friendly jurisdiction and the steps it needs to take to further attract parties to consider Kuwait as a dispute resolution hub. Tom Snider, Partner and Head of Arbitration, participated in a panel discussion on the topic "*Recent Trends in Energy Disputes*" and focused on Bilateral Investment Treaties and the new trends in dispute resolution schemes thereunder and what lessons could be useful for Kuwait.

United Arab Emirates

27-30
JAN

Another busy and successful Arab Health Week

The last week in January each year marks Arab Health Week in the UAE. Arab Health 2020 was busy for Al Tamimi & Company, as our Healthcare team attended various speaking engagements, meetings and receptions covering hot topics such as GCC healthcare workforce shortages; investment opportunities; integrated care; and digital health.

Engagement highlights include Senior Associate James McMillan's presentation on UAE health data legislation to the Scottish UAE Digital Health Mission 2020 at the British Centre for Business; Senior Associate Christina Sochacki's presentation to the New Zealand Trade & Enterprise on the challenges and factors for success in doing business in the GCC; and Partner and Head of Healthcare, Andrea Tithecott's address to the British Embassy Healthcare UK reception.

Al Tamimi & Company hosted our annual Arab Health Breakfast Briefing, where participants from regulatory, provider, investor, academic, and tech organisations discussed the unique factors that contribute to healthcare workforce shortages in the GCC, the future outlook, and proposed solutions. The session was moderated by Steve Gardner, Publishing Director, World Healthcare Journal and our panel of expert speakers included; Frank McKenna, Global Managing Director, Healthcare & Academia, Harvey Nash, Professor Derek Bell, President of the Royal College of Physicians of Edinburgh, Jenny Scott, Head of Christie International, The Christie NHS Foundation Trust, Professor Ged Byrne, Director of Global Engagement, Health Education England, Jodie Sinclair, Partner, Head of Employment, Immigration and Pensions, Bevan Brittan and Christina Sochacki,Senior Associate, Healthcare, Al Tamimi & Company.

We also had the opportunity to co-host two evening receptions, with Bevan Brittan and McDermott Will & Emery, which are always a welcomed opportunity to network with clients and best friend firms.

The dust is still settling after a whirl-wind week; key takeaways and things to watch in 2020 include:

1. Technology, technology, technology;
2. Continued shifts from curative to preventive care and mental health services;
3. Value-based care models - Fee for quality rather than fee for service; and
4. Under capacity and lack of specialisation vs overcapacity in certain areas.

29th JAN

MENA Venture Investment Report & Predictions for 2020

On 29th January, Al Tamimi & Company were delighted to host the Middle East Venture Capital Association and MAGNiTT for the launch of MAGNiTT's 2019 MENA Venture Investment Report. Philip Bahoshy, Founder of MAGNiTT, delivered a fascinating presentation and a lively discussion expertly MC'd by Basil Moftah, Partner of Global Ventures.

Keeping in theme with the launch, Partner and Head of Corporate Commercial, Abdullah Mutawi also took the opportunity to introduce our Venture Capital practice, which will formally launch later this year in tandem with the publication of our "Venture Capital & Emerging Companies" Law Review. The addition of this practice will continue to differentiate Al Tamimi & Company as one of the most multi-faceted legal services providers in the MENA region.

Other Events

Thursday, 23rd January

Technology Transfer Roundtable

DIFC Office, Dubai, UAE

Speaker:

Ahmad Saleh
Partner, Head of Patents & Designs (R&D and Innovations)

Monday, 27th January

Dispute Resolution in India: Cross Border Disputes

DIFC Office, Dubai, UAE

Speakers:

Michael Black QC
Barrister, XXIV Old Buildings

Tejas Karia
Partner, Shardul Amarchand Mangaldas & Co.

Neeti Sachdeva
Secretary-General and Registrar, Mumbai Centre for International Arbitration

Rohit Singhal
Chief Executive Officer, Masin Projects

Thomas R. Snider
Partner, Head of Arbitration, Al Tamimi & Company

Al Tamimi & Company leads the way across MENA in Chambers Global 2020

Chambers Global 2020 was published on 13 February and it was once again a success for Al Tamimi & Company across MENA. The firm either improved or retained its rankings in almost every category with Band 1 rankings in 10 separate practice areas across the region.

32 of our lawyers have been recognised by Chambers including our leadership team: Chairman, Essam Al Tamimi; Senior Partner, Husam Hourani; and Managing Partner, Samer Qudah.

Our status as the largest full service law firm in MENA has been recognised by Chambers with rankings in the Middle East-wide Corporate M&A, Capital Markets and Islamic Finance categories, with particular acknowledgment of our Dispute Resolution capabilities achieving a Band 1 ranking for the third year in a row.

We have achieved particular success in the inaugural Tax category, achieving a Band 1 ranking – a reflection of our prominence in this relatively new practice area for the firm. Our Regional Financial Crime team was also highly ranked in the inaugural Corporate Investigations category.

We would like to thank all our clients and friends for their continued trust and support.

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 Offices

9 Countries

75 Partners

360 Lawyers

50+ 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

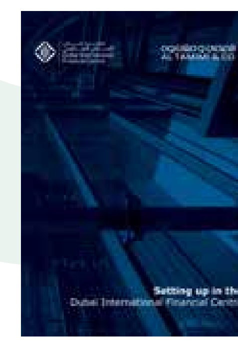
Automotive • Aviation • Education • Expo 2020 • FMCG • Healthcare • Hotels & Leisure • Projects • Rail • Shipping • Sports & Events Management • Transport & Logistics •

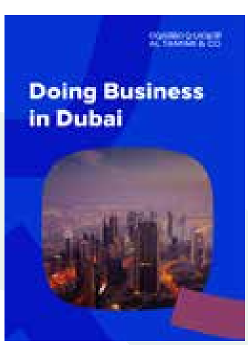
Country Groups

China • India • Korea • Russia & CIS • Turkey •

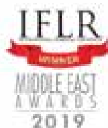
Publications

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
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