Issue 329 | May 2020

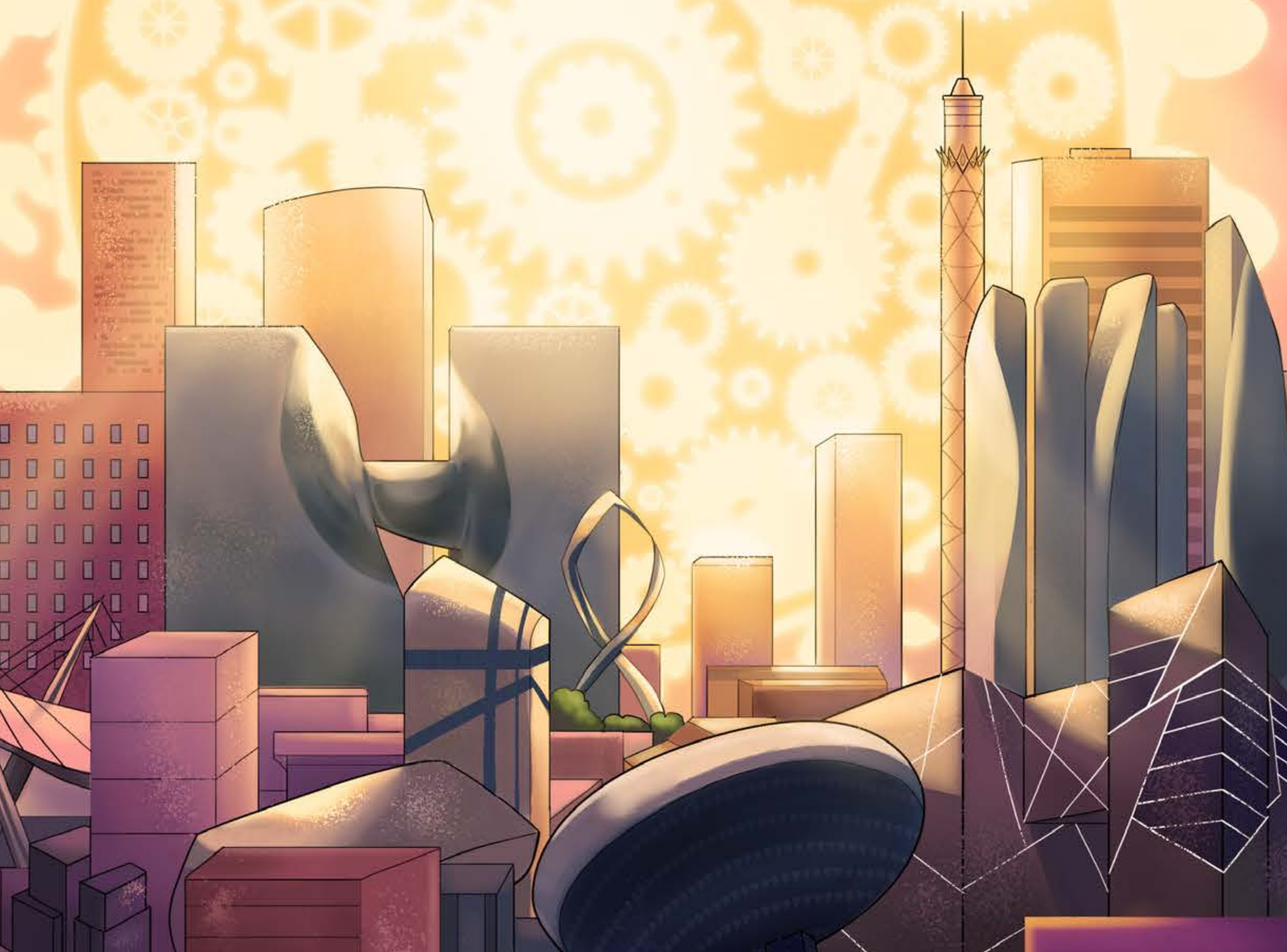
التميمي و مشاركوه
AL TAMIMI & CO.

LAW

Latest Legal News and Developments from the MENA Region

UPDATE

PREPARING FOR THE NEW 'NORM'



LAW UPDATE *Online*

Download the My Tamimi App

Available on the App Store
GET IT ON Google Play

@AlTamimiCompany

Al Tamimi & Company

For more information on Law Update
info@tamimi.com

www.tamimi.com

In this Issue

Welcome to the May 2020 issue of Law Update!

This month we focus on Corporate Structuring. Al Tamimi & Company has one of the largest Corporate Structuring practices in the Middle East and North Africa ('MENA') region. Our wealth of practical experience is consistently recognised by business and legal directories alike. We are the only law firm in the region that has a dedicated corporate structuring team in each of its offices in the GCC countries, Egypt, Jordan and Iraq. Our presence across the region and robust working relationships with relevant regulators provide our regional structuring teams direct access to the latest regulations and procedures enabling us to offer legal and practical advice to our clients. Having led the regional structuring practice for many years prior to assuming the firm's Managing Partner role, it remains a practice area in which I continue to be actively involved.

Our corporate structuring teams regularly advise clients on matters regarding optimal corporate structures to achieve regional commercial, operational and strategic objectives such as conducting business activities, holding company structures, corporate acquisitions, trading hubs, carve out of business streams, scaling down business operations, e-commerce, public listing, government contracting etc. Our vast regional experience also places us very well to advise on the common concerns traversed by businesses in the wake of COVID-19.

MENA jurisdictions have consistently evolved and implemented regulatory regimes to sustain their competitive edge over others to attract foreign investment.

In recent years Egyptian authorities have made governmental services accessible digitally through the internet and cellular phone applications in order to facilitate a user friendly offering to investors (page 82).

The Kingdom of Bahrain has recently taken positive steps to stimulate economic activity. These steps underline the government's continued support of the private sector's role in the local economy and its commitment to minimise legal and/or financial burdens experienced by businesses (page 72).

The pace of legislative and regulatory change in the Kingdom of Saudi Arabia has accelerated in recent years. One of the latest legislative changes, the new Professional Companies Law of 2020, represents a positive shift in how professionals can now establish their businesses. All government authorities in the Kingdom have been tasked to work in tandem to create an ecosystem that secures the goals set by Vision 2030. This law will have a significant impact on the foreign investment climate and competitiveness in the market (page 52).

In UAE, our lawyers weigh up the advantages and disadvantages of individuals corporatising ownership of assets (such as business interests, company shares and property investments), as opposed to holding such assets in a personal capacity (page 78). They also review the Dubai International Financial Centre's ('DIFC') recent initiatives aimed at maintaining DIFC's pre-eminent position as an international financial hub (page 60). The team goes on to highlight the importance (now, more than ever) of the UAE's 2018 foreign direct investment law as part of its efforts to diversify the economy (page 68).

The Jurisdiction Update section considers a number of current topics including whether, in Oman, the pandemic can be considered to be covered by the doctrine of Force Majeure in order to legally relieve a party of its contractual obligations (page 32) whilst in Iraq our Banking experts examine various tools used to secure transactions and offer some practical insights into the circumstances in which these respective tools are most effective (page 30).

In a recent decision by the Attorney General Office in Abu Dhabi, criminal sanction for issuing a cheque which is dishonoured has been removed where the value of the cheque is less than AED 500,000 (US$136,000). Our banking team examines this decision whilst setting out the current financial penalties payable in such circumstances at (page 16).

I hope you enjoy this information filled issue. Should you have any queries on any of the matters addressed in this issue please feel free to reach out.

Best regards,

Samer Qudah

Managing Partner
s.qudah@tamimi.com

CONTENTS

Supreme Court Judgment 7 of 2019: petition to review a criminal judgment

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.

Zafer Sheikh Oghli
Partner, Head of Office - Sharjah
Litigation
Sharjah, UAE
z.oghli@tamimi.com

Sara Omer Ali
Associate
Litigation
Sharjah, UAE
s.omerali@tamimi.com

Introduction

In circumstances where certain conditions are satisfied, the UAE Law permits a further review of judgments that become final. If the requisite conditions are met, the final judgment could potentially be reversed. However, in practice, such conditions are usually never satisfied.

Generally speaking, cases are considered to be finalised once a judgment is issued by the highest court in a conclusive manner or when a judgment issued by a lower court is issued against which an appeal has not been filed. In such situations, the judgment is deemed to be final with no further recourse available. The exception to the foregoing is a petition for review which is rarely invoked.

This article will discuss how a final criminal judgment may be reviewed by way of a 'petition for review' based on Article 257 of the Criminal Procedures Law. In recent criminal proceedings, a final criminal judgment issued by the Court of Cassation (which had convicted a defendant of the crime of issuing a dishonoured cheque) was overturned and a new judgment was issued by the Union Supreme Court which deemed the defendant innocent.

Background

In that case, the Defendant (owner of six plots of land in Ajman) entered into a brokerage agreement with the Claimant to find a buyer for all six plots. The Defendant agreed to pay the Claimant AED 500,000 (approximately US$1.8 million) for each plot for which he finds a buyer.

"....a final criminal judgment issued by the Court of Cassation (which had convicted a defendant of the crime of issuing a dishonoured cheque) was overturned and a new judgment was issued by the Union Supreme Court which deemed the defendant innocent.

The Claimant found one buyer for all six plots and in return, the Defendant gave him two cheques, one for AED 1,000,000 (approximately US$3.7 million) and the second for AED 2,000,000 (approximately US$7.3 million). After the agreement, the buyer changed his mind and informed the Claimant and the Defendant that he only wanted to purchase two of the plots and not all six. Accordingly, they entered into a new contract for the two plots of land and mentioned therein that the previous agreement for six plots was to be revoked. The new contract was signed by the Claimant, the Defendant and the buyer. However, the deal fell through as the buyer decided that he no longer wanted to purchase any of the plots.

The Claimant, acting in bad faith, encashed the cheque for AED 1,000,000. The Defendant immediately contacted the bank and requested it not to make the payment for the second cheque (AED 2,000,000) as the Claimant, the drawer, was not entitled to this amount. When the Claimant attempted to encash the cheque and was unsuccessful, he filed a criminal case regarding the bounced cheque pursuant to Article 401 of the Criminal Law (Federal Law No. 3 of 1987).

The Court of First Instance sentenced the Defendant, who did not appear in court, to a two-year jail sentence. The Defendant filed an objection with the same court and a new judgment was issued by the Court of First Instance which ordered the payment of a AED 30,000 (approximately US$110,000) fine (instead of a two-year jail sentence) and a payment of AED 21,000 (approximately US$77,000) to the Claimant.

The Defendant filed an appeal with the Court of Appeal. The Court of Appeal upheld the conviction and ordered the Defendant to pay a AED 20,000 (approximately US$74,000) fine instead of AED 30,000.

The Defendant appealed the Court of Appeal judgment, however, the Court of Cassation dismissed the appeal.

During the criminal proceedings, the Claimant filed a civil case requesting the court to confirm that he was entitled to the AED 2 million representing his commission. The Defendant filed a counterclaim and argued that the agreement between the parties had been terminated with the Claimant's knowledge and approval. The Court of Cassation issued its judgment in favour of the Defendant.

The Civil case judgment issued by the Court of Cassation was issued after the judgment issued by the Criminal Court of Cassation. Thus, the Civil case judgment overturned or contradicted the finding of the criminal case judgment.

Petition for review

After the court issued its judgment on the criminal case, the Defendant submitted a request to the Attorney General to review the criminal judgment following the issuance of the civil judgment. Article 257 of the Criminal Procedure Law (Federal Law No. 35 of 1992) permits the Attorney General, on his own motion or upon request of an interested party, to file a petition for review of any final ruling imposing a sentence or measure in the following circumstances:

"Final judgments inflicting a penalty or a measure may be subject to review in the following instances:

1. *if the accused is condemned in a crime of murder and the victim was found alive;*
2. *if a person was condemned for an act then another person was condemned for the same act and the two judgments were contradictory resulting in that one of the condemned is innocent;*
3. *where one of the witnesses or experts is condemned to the penalty of perjury or of forging a paper produced as an exhibit during the examination of the case, if the testimony, the report or the paper has a bearing on the judgment;*
4. *in case the judgment is based on another judgment, rendered by one of the civil or personal status division, which was cancelled; or*
5. *should facts occur or be revealed after judgment or if papers were submitted that were unknown to the court during trial and these facts or papers establish the innocence of the condemned."*

The Attorney General, upon review of the request, referred the matter to the Union Supreme Court (in accordance with article 258 of the Criminal Procedures Law) for review by the Criminal Court of Cassation judgment.

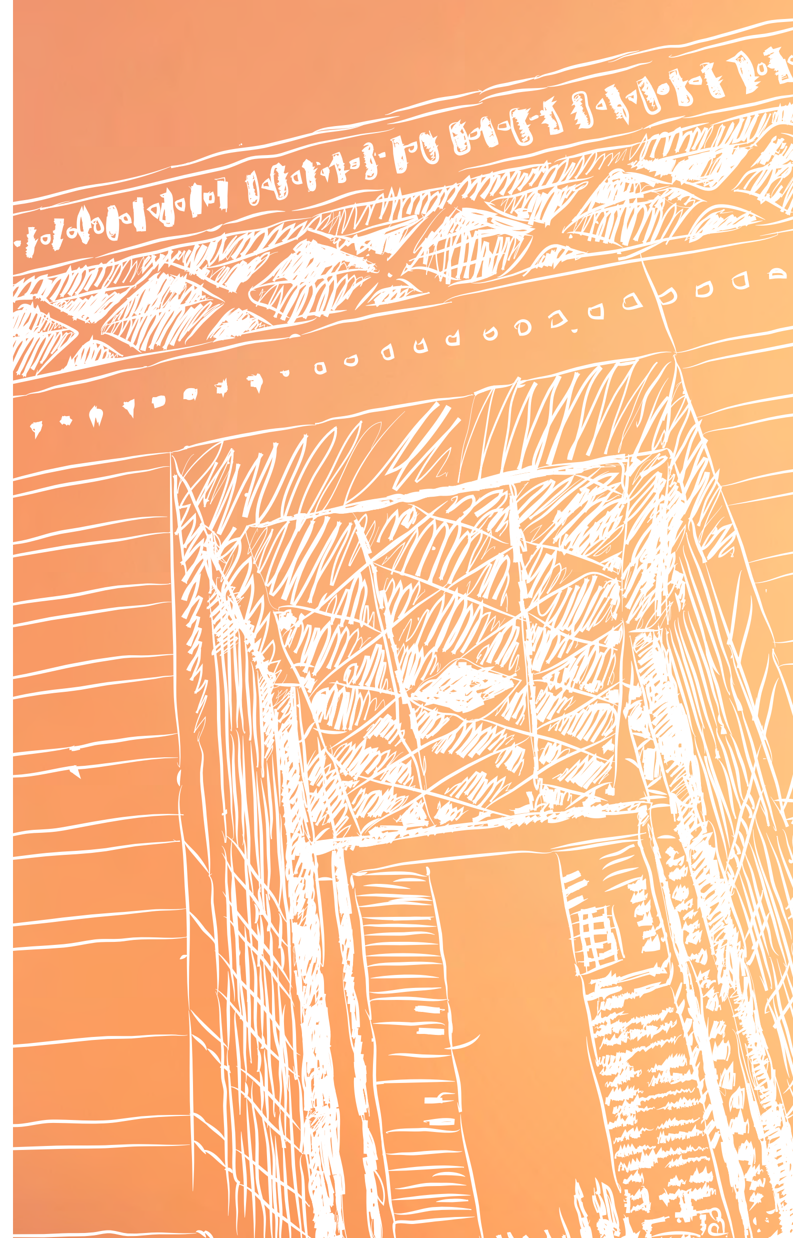
The Union Supreme Court reviewed the case and decided that, in light of the ruling in the Civil Cassation Court, the Defendant was not guilty of the crime of issuing a bad cheque when the circumstances surrounding the issue of the cheque were taken into account. Therefore, the elements of the petition for review (sub-paragraph 4) had been satisfied and the Union Supreme Court reversed the ruling under review (the Criminal Court of Appeal judgment) and acquitted the Defendant.

This is a unique decision as the practice shows that final criminal judgments are rarely sent for review, especially judgments related to bounced cheques. It is also worth mentioning that a UAE Criminal Court will not investigate the underlying reasons for issuing a dishonoured cheque. Looking into the underlying reasons would occur in a substantive civil claim before a civil court. Nevertheless, a civil court is still bound by a judgment issued in a criminal case in matters decided in the criminal judgment and which are common to both the criminal and civil proceedings. In this case however, the civil court ordered the Defendant to return the cheque and money to the Defendant as he acted in bad faith by encashing the cheques after the cancellation of the agreement which, in turn, changed the underlying circumstances of the criminal case. The Defendant no longer has a criminal record.

In conclusion, whilst the practice may show that a petition for review is rarely invoked, it can still operate successfully upon careful consideration of the facts and evidence at hand. As such, legal advice should be sought beforehand to assess whether the requisite conditions apply to a given case so as to exhaust all possible avenues, depending on the circumstances.

For further information, please contact Zafer Sheikh Oghli (z.oghli@tamimi.com) or Sara Omer Ali (s.omerali@tamimi.com).

DIFC Court of Appeal considers ‘good faith’ in employment contracts



Peter Smith
Senior Associate
International Litigation Group
Dubai, UAE
p.smith@tamimi.com

In a claim brought against a financial services group operating from the DIFC by its former CEO, the DIFC Courts have again considered the concept of good faith in the context of an employment contract.

John Vitalo vs Atlas Mara Management Services Limited [2018] DIFC CFI 018 (5 September 2018), H.E. Justice Ali Al Madhani;

John Vitalo v Atlas Mara Management Services Limited [2019] DIFC CA 012(23 March 2020), Justice Sir Jeremy Cooke, Justice Wayne Martin, H.E. Justice Shamlan Al Sawalehi.

Background to the dispute

The claimant was employed by the defendant as its group CEO, initially under an employment contract dated 1 April 2014 and then by a contract dated 1 August 2015 under which he sued (‘Employment Contract’). He claimed that he was enticed to take the role after various representations and assurances were given to him by the defendant, particularly about the level of health insurance coverage he and his family would receive.

In mid-February 2017, the claimant was given six months’ notice of the termination of his employment. The defendant offered a settlement agreement at that time, which the claimant rejected. He subsequently brought proceedings in the DIFC Courts, alleging that the defendant had breached relevant terms of his contract in that it had failed to offer him the opportunity to purchase continuation of medical insurance coverage (‘The Health Insurance Claim’) and it had failed to increase his allowance by an amount that should have been adjusted annually ('The Indexation Claim'). He also brought a claim under statute, alleging that the defendant had failed to pay him an amount equating to unused holiday leave in breach of DIFC employment law then in force (DIFC Law No.4 of 2005 as amended; 'the 2005 DIFC Employment Law') ('The Holiday Allowance Claim').

In total, the claimant sought over AED 13,000 (US$3,500), AED 341,000 (US$93,000) and AED 496,000 (US$135,000) for the three heads of claim respectively, to a total of over AED 850,000 (US$232,000).

Additionally, on the basis of the three claims, he sought a penalty payment pursuant to Article 18(2) of the 2005 DIFC Employment Law, equivalent to his last daily wage from 14 days after the date of his termination. This was calculated at AED 16,544 (US$4,500) per day, to a total amount of over AED 6,104,000 (US$1.6 million) by the time of trial in September 2019.

The defendant denied the claim in its entirety, in summary, asserting that: (i) the employment contract did not provide for the extra-contractual and post-termination medical cover claimed; (ii) the defendant had lawfully exercised a contractual discretion not to uprate the allowance payments, which the contract provided for and which the claimant was notified of; (iii) the claimant had taken all accrued vacation leave prior to termination, which was mutually agreed between the parties; and (iv) the claimant was not entitled to any statutory penalty under Article 18(2), nor any kind of interest.

The defendant also brought a counterclaim alleging that, first, the claimant had unlawfully withheld AED 451,410 (US$123,000) plus interest of fees paid to the defendant by virtue of his appointment as a director of an affiliate of the defendant in Nigeria, a position he only held on behalf of his employer, the bank, and the fees for which should, said the bank, have been remitted to his employer; and second, the bank claimed a set-off for 41 days of holiday that the defendant alleged the claimant had taken without entitlement.

Proceedings in the DIFC Court of First Instance

The claimant initially sought immediate judgment on the Holiday Allowance and Indexation Claims, which was denied by H.E. Justice Ali Al Madhani following a hearing on 20 June 2018. The Judge ordered a trial of the whole claim and counterclaim, which took place in September 2018 in front of him. The Judge found against the claimant on all grounds and the defendant was successful on one of the two limbs of its counterclaim.

The Health Insurance Claim failed on various grounds, including the finding that, although Article 51(a) of the DIFC Contract Law (DIFC Law No. 6 of 2004 as amended) permitted pre-contractual negotiations to be taken into account when interpreting the meaning of an agreement and the parties' common intention, an 'entire agreement' clause in the employment contract precluded the Judge from taking them into account. In any event, he did not find that the pre-contractual negotiations constituted an offer by the defendant, nor the existence of any collateral contract.

The Holiday Allowance Claim also failed. The claimant had a long-planned holiday booked for a period coinciding with his garden leave, which he said should not be counted towards his holiday entitlement. He accepted that had he not been on garden leave, he would have taken that period as acknowledged holiday leave. Upon the proper construction of the employment contract and in light of the applicable DIFC Employment Law, the Judge found that it was 'convenient' for the claimant to take his unused holiday entitlement during his notice period and garden leave in accordance with the defendant's instructions, which satisfied the contractual obligation that holiday be taken at a 'mutually acceptable' time for both parties. He therefore had no unused holiday allowance. As a result, the second ground of the counterclaim also failed, because the days in which the claimant was not working during his garden leave could not be counted as excess holiday.

Nothing in the current DIFC Employment Law will reduce the likelihood of this area of jurisprudence expanding, particularly as the types and forms of agreements recognised by the DIFC Courts as relational contracts increases.

In respect of the Indexation Claim, the Judge considered the term in the employment contract under which the claimant's allowance for housing, car, education costs, utilities and other items *"will be adjusted annually for local (Dubai) inflation (as determined by the [defendant]) based on education, housing and utilities cost indexes"*. The defendant had declined to apply an inflation-linked uplift at all.

The claimant argued that there was a clear, positive obligation on the defendant to adjust his allowance, and that the adjustment should have been carried out with regard to relevant indices in accordance with Article 53 of the DIFC Contract Law, which stated that *"Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect"*. Specific indices for education, housing and utilities were available from the Government of Dubai, which the claimant submitted the Court should apply in the defendant's stead. The inclusion of other, non-specified, indices in the calculation of indexation was to deprive the words used (particularly the reference to specific allowance items) of their specific intent, meaning and effect. The Court was, he said, obliged to interpret the contract according to the parties' common intent, with relevant background, including a request by the claimant's legal representative during negotiations that salary and allowances or benefits *"shall be adjusted annually for inflation as reported by the UAE Ministry of Finance"*. The indexation of allowances was to be treated differently to other terms, including rights to bonuses, pay in lieu of notice, and his duties as CEO. The wording did not, said the claimant, entitle the defendant not to apply an inflation uplift at all, nor to take into account indices extraneous to those mentioned in the contract in determining the uplift. The claimant cited the uplifts given to other employees, who had received indexed uplifts of four per cent significantly higher than the headline inflation rate.

The defendant's central response was to submit that the wording of the clause meant that the allowance 'will be adjusted' but only if the defendant had 'determined' or exercised a contractual discretion in favour of the company. The words 'as determined by the company' were selected and inserted deliberately, giving, said the defendant, an important discretion expressly in its hands, without any right to increase the living allowance. The claimant was well aware of this discretion, which the defendant said was common practice prior to his termination as the claimant had himself been the discretionary decision-maker in other instances. If the Court did find a positive obligation to apply an uplift, the defendant submitted the choice of uplift was at its discretion, including a deflationary uplift based on previous Dubai economic fluctuations. The operation of the indexation would have an important bearing on damages.

The Judge was unpersuaded that the natural and ordinary meaning of the relevant clause meant anything other than the defendant possessed a discretion as to whether there would be any increase. The claimant had not taken issue with previous decisions by the defendant not to exercise the discretion and award any uplift throughout the duration of his employment, and there was no evidence of other employees receiving an uplift.

Because the claimant's three claims failed, the claim for a statutory penalty also failed.

The Judge found in the defendant's favour on the second counterclaim, for fees paid to the claimant as a director but not subsequently transferred to the defendant. However, on the evidence, the disparity between the sums paid by the claimant by way of an interim payment on account on the one hand, and the actual sums the Court found were due to be paid on the other, was only US$1, which the Court ordered to be paid.

As a result, because the defendant had defeated all three claims against it, and was 50 per cent successful on its counterclaim (with its unsuccessful counterclaim only 'a very small amount' of the overall issues in the trial), the claimant was ordered to pay the defendant's costs of the proceedings on the standard basis.

Proceedings in the DIFC Court of Appeal

The Judge gave the claimant permission to appeal in respect of his findings on the Indexation Claim, the Holiday Allowance Claim, the claim for a statutory penalty and on costs. Justice Sir Jeremy Cooke gave the only judgment of the Court, with which Justice Wayne Martin and H.E. Justice Shamlan Al Sawalehi concurred. The Court of Appeal began with guidance on the interpretation of contracts under DIFC law with reference to English common law jurisprudence:

> *"Whilst the parties also sought to rely on pre contract negotiations and post contract conduct, the fact remains that the form of words was negotiated as between lawyers and no common intention can be found in the preceding exchanges beyond an ultimate agreement to the form of words used. Furthermore, post contract conduct is often explicable on more than one basis, which does not help much in construing the words used. We refer to the latter later in this context, but the focus must be on the words used in accordance with the principle set out in Article 49(2) of the Contract Law, No 6 of 2004. We were referred also to this Court's decision in Damac Park Towers v Youssef Issa Ward [2015] DIFC CA 006 at paragraphs 79-85 and the trio of decisions of the Supreme Court in England, culminating in Wood v Capita [2017] UKSC 24 and particularly the approach to construction set out in paragraphs 8-15 with the iterative process and the balancing there referred to between the textual and contextual approach with reference to the commercial objectives and a construction which accords with business common sense. We accept that those principles are of application."*

The Court of Appeal rejected all four grounds of appeal, finding that the Judge at First Instance had not erred in respect of any of the grounds.

The Court's treatment of the Indexation Claim is of note to DIFC practitioners. After considering the evidence before Justice Al Madhani and his reasoning, Justice Cooke referred to the English High Court decision of Brogden v Investment Bank [2014] EWHC 2785 (Comm) as authority for the proposition that:

> *"where a contract gives responsibility to one party to make an assessment or exercise a judgment, on a matter which materially affects the other party's interests and about which there is ample scope for reasonable differences of view, the decision is properly regarded as a discretion which is subject to the implied constraints that it must be taken in good faith for proper purposes and not in an arbitrary, capricious or irrational manner."*

The Employment Contract was such a contract and a determination of the material clause on indexation fell to be *"made without a formula which governs that determination and leads only to one objective result."* There was *"inevitably, an inbuilt discretion in the decision maker"*. The defendant was therefore under a *"duty to make a determination as to any adjustment to be made and that such determination had to be made rationally and in good faith - not arbitrarily, capriciously or perversely"*.

The Court allowed the defendant a margin of appreciation to *"take into account factors outside and beyond the specific indices relied on by the Appellant which could play a part in a rational good faith decision, including the particular personal circumstances of the Appellant or the educational needs of his family"* as nothing in the Employment Contract barred this. The wording of the term *"gave a freedom"* to the defendant *"in applying the elements that are referred to, rather than tying it to a straight application of them, even if that were theoretically possible"*.

The claimant had claimed that he was entitled to a fair determinative procedure to be carried out by the defendant on his behalf. The Court agreed: *"As a matter of analysis, if there was a failure to consider specifically the appropriate adjustment to be made to the living allowance and there was a duty to make a rational, good faith determination of what that adjustment should be, which appears to be the position on the evidence, that would amount to a breach of contract. That breach would sound in damages which would reflect what that decision ought to have been"*.

However, the Court did not agree with the logical supplement that, on the facts, the application of a rational, good faith determination would necessarily have led to an uplift of his allowances. The claimant's remuneration and benefits package had been considered in the round each year, and the defendant's remuneration committee had come to a decision which reflected the totality of awards to the claimant, not just in the allowances subject to the Indexation Claim. The claimant could not show that he would have received an overall different package of benefits each year even if the 'appropriate' indices had been applied.

Analysis

The idea of good faith in contractual terms is an evolving area of English law, described by Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 as a connotation of *"'playing fair', 'coming clean' or 'putting one's cards fact upwards on the table'"*, and *"in essence a principle of fair open dealing"*. English law does not view it as a doctrine per se, unlike civilian laws such as the UAE Civil Code, Article 246 of which obliges that *"the contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith"*. DIFC law recognises implied obligations that *"arise from good faith and fair dealing"* (Article 57, DIFC Contract Law), although that Article was described as *"say[ing] nothing about the implication and application of terms in particular contracts and particular situations"* in *Hana Al Herz v DIFCA* [2013] DIFC CA 004 (27 November 2014) at [121].

The English development of good faith requirements has come as part of the development of principles of contractual interpretation. In *Yam Seng v International Trade Corp* [2013] 1 All ER (Comm) 1321, Leggatt J found that the *"basis of the duty of good faith"* lay in the *"presumed intention of the parties and meaning of their contract"*. He gave some content to the duty, acknowledging its sensitivity to context, but considered a *"core value"* of honesty (the absence of deceit), and behaviour that was not improper, commercially unacceptable or unconscionable.

The duty of good faith is implied, in English law, in contracts that are described as 'relational', meaning agreements characterised, inter alia, by a mutual intention for a long-term relationship, an intention

Both Papadopoulos and Vitalo have established good faith as a proper consideration in the exercise of discretion in employment contracts in the DIFC.

for the parties' roles to be performed with integrity and fidelity, trust and confidence, an exclusivity of relationship, and a common collaborative purpose. By their nature, employment contracts are relational contracts, and employment disputes have provided fertile ground for the advancement of the concept of good faith in the DIFC.

The Court of Appeal in Vitalo referred to the previous decision of the then-Deputy Chief Justice, Sir David Steel, in granting the defendant's application for summary judgment in *Papadopoulos v Standard Chartered Bank* [2017] DIFC CFI 004 (27 February 2018), a claim by an employee against his employing bank arising from a failure to pay him a bonus, the payment of which was, in the material term, at the bank's *"absolute discretion"*. The Deputy Chief Justice was *"unable to accept"* that the contractual discretion to pay was unfettered, and considered it *"clearly arguable"* that there was an implied term that any decision should be rational and accordingly not arbitrary, capricious or perverse (so-called Braganza rationality: *Braganza v BP Shipping Ltd* [2015] UKSC 17). However, on the facts, he found that there had been no grounds to raise an arguable case that the discretion had been exercised irrationally, and he dismissed the action.

Both *Papadopoulos* and *Vitalo* have established good faith as a proper consideration in the exercise of discretion in employment contracts in the DIFC. Both cases were decided under the 2005 DIFC Employment Law, but nothing in the current DIFC Employment Law, Law No.2 of 2019 as amended, will reduce the likelihood of this area of jurisprudence expanding, particularly as the types and forms of agreements recognised by the DIFC Courts as relational contracts increases.

For further information, please contact Rita Jaballah (r.jaballah@tamimi.com), Gordon Barr (g.barr@tamimi.com), Peter Wood (p.wood@tamimi.com) or Peter Smith (p.smith@tamimi.com).

Changes to criminal liability for cheques with insufficient funds

Ahmed Zaki
Senior Associate
Banking & Finance
Dubai, UAE
a.zaki@tamimi.com

In this article we share a recent decision issued by the Attorney General Office in Abu Dhabi concerning the fines imposed regarding certain criminal offences, including in relation to bounced cheques.

Decision No. 14 of 2020 ('Abu Dhabi PP Decision') was issued by the Attorney General Office in Abu Dhabi which included provisions related to the imposition of fines for bounced cheques of a certain amount. The Abu Dhabi PP Decision is effective from 16 March 2020.

The Abu Dhabi PP Decision imposes fines based on the value of the bounced cheque as follows*:

Cheque Amount / AED	Imposed Fine / AED
50,000	1,000
50,001 up to 100,000	3,000
100,001 up to 200,000	5,000
200,001 up to 300,000	10,000
300,001 up to 500,000	20,000

The Abu Dhabi PP Decision effectively removes the criminal sanction attaching to cheques having a value less than AED 500,000: there will be no arrest order issued against the drawer (or signatory).

In Abu Dhabi, no arrest order is issued against a drawer who provides a beneficiary with a cheque having insufficient funds where the cheque is in the amount of AED 500,000 or less.

The Attorney General also gave the authority to certain members of the Abu Dhabi Public Prosecution to cancel or amend the imposed fine within seven days of issuing such decision.

The Abu Dhabi Decision is similar to a decision issued by the Attorney General Office in Dubai ('Dubai PP Decision') and is effective from 4 December 2017.

The Dubai PP Decision imposed fines based on the cheque value as follows:

Cheque Amount / AED	Imposed Fine / AED
50,000	2,000
50,001 up to 100,000	5,000
100,001 up to 200,000	10,000

Conclusion

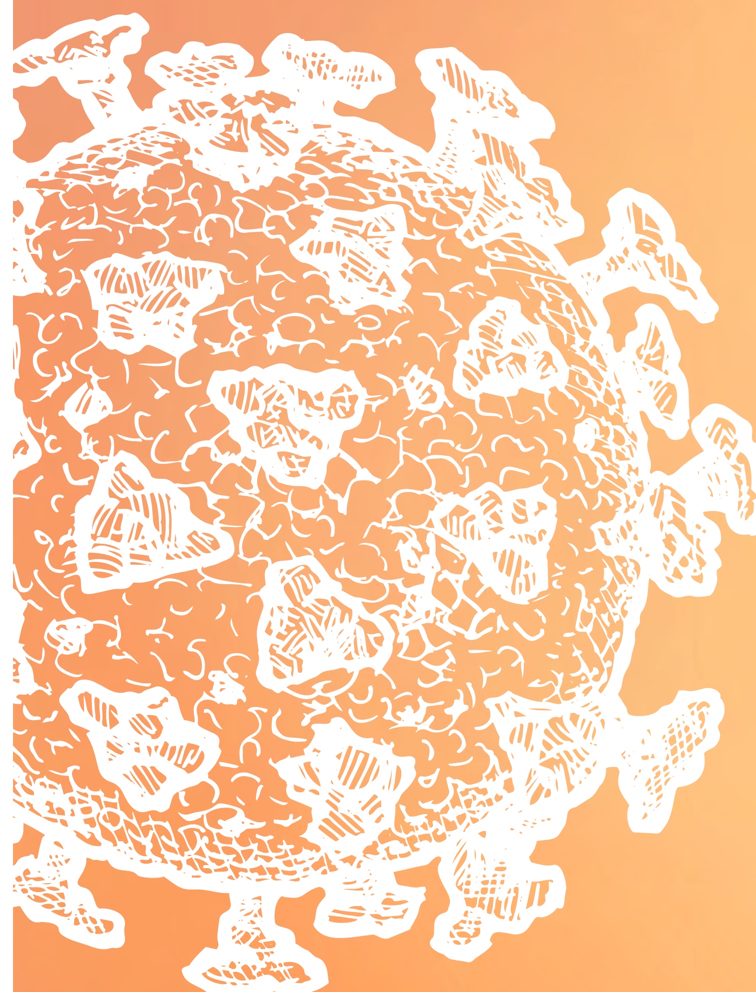
Banks, financial institutions and any beneficiaries located in Abu Dhabi, which receive cheques from a drawer as security should take into consideration that cheques below AED 500,000 no longer attract the same penalty as before. In other words, no arrest order (i.e. fine only) will be issued against drawers providing cheques with insufficient funds for cheques in the amount of AED 500,000 or less. Beneficiaries should consider obtaining other types of security wherever possible.

In Dubai, no arrest order (i.e. fine only) will be issued against a drawer who provides a beneficiary with a cheque having insufficient funds where the cheque is in the amount of AED 200,000 or less.

**Conversion rate (xe.com) US$1 = AED 3.67*

For further information, please contact Jody Waugh (j.waugh@tamimi.com) or Ahmed Zaki (a.zaki@tamimi.com).

The impact of new Ministerial Resolutions introducing COVID-19 measures



Alaa Momtaz
Senior Associate
Employment & Incentives
Dubai, UAE
a.momtaz@tamimi.com

By the end of March 2020, the Ministry of Human Resources and Emiratization 'MOHRE') issued a series of ministerial resolutions in response to the outbreak of the novel coronavirus ('COVID-19'). This article considers the impact of each resolution, all of which were effective as of 26 March 2020.

Ministerial Resolution No. (279) of 2020 Concerning the Employment Stability in Establishments of the Private Sector During the Application of Precautionary Measures to Control Novel Coronavirus Outbreak ('Resolution')

The Resolution aims to protect the position of non-UAE national employees by private sector employers (who operate under the remit of the MOHRE and those in free zones that follow MOHRE resolutions) during the application of the precautionary COVID-19 measures by the UAE government.

The Resolution confirms existing measures and provisions which are currently applicable under the Federal Law No 8 of 1980 ('UAE Labour Law') and, importantly, introduced new measures that may be taken by employers who are affected by the precautionary COVID-19 measures and the associated economic crisis.

The following options are open to employers to explore:

1. working from home,
2. leave with pay,
3. unpaid leave,
4. temporary reduction of salaries,
5. permanent reduction of salaries; and
6. redundancy.

The Resolution gives the employer the right to take the above listed measures (steps 3-5 require written employee consent) and provides that those measures should be taken 'gradually'. It remains to be seen how this will be applied in practice as many employers will not be in a position to take such steps on a gradual basis and are likely to have to take drastic measures on an expedited basis. Below we consider some of these measures in further detail:

Leave with pay

The Resolution confirms the employer's entitlement to ask employees to utilise their annual leave in accordance with the provisions of UAE Labour Law. The Resolution states that this measure should only be taken with the consent of the employee however, this contradicts the UAE Labour Law provision which gives the employer the right to determine the date of commencement of any leave based on business needs.

It is established practice that in the event of a contradiction between an applicable law and a resolution, the provisions of the law supersede the resolution. On this basis we believe that businesses can continue to rely upon the provisions within the UAE Labour Law.

Unpaid leave

Subject to the employer obtaining the written consent of the employee, the Resolution allows the employer to place employees on unpaid leave. This is a newly introduced measure as the concept of unpaid leaves is not specified in UAE Labour Law.

The Resolution does not refer to a maximum duration of unpaid leave which would give the employer the right to specify the required period of unpaid leave according to its requirements.

Temporary salary reduction

The Resolution sets out the following requirements when the parties agree that the employer will temporarily reduce salary:

1. prepare a 'temporary additional supplement' to the MOHRE labour contract between the two parties (in a form provided by MOHRE) with the reduction in salary being valid until the period stipulated in the supplement or until the end of the validity of the decision (essentially when the Resolution is later repealed), whichever comes first;
2. prepare two copies of the supplement, one for each party, to enable the employer to disclose its copy upon request by the MOHRE; and
3. if required, renew the supplement referred to above with the approval of both parties.

Permanent salary reduction

The Resolution allows the employer and the employee to agree on a permanent reduction of salary. Where the salary is to be permanently reduced, the employer must apply to the MOHRE for the MOHRE labour contract to be amended. This is reflective of the required practice prior to the Resolution being issued.

Redundancies

Most importantly the Resolution makes provision for redundancy. The concept of redundancy is not recognised by either the UAE Labour Law or the local courts. The Resolution provides procedural guidance to protect employees in circumstances where the employer identifies a surplus of non-national workers.

Significantly, the Resolution provides that the employer must continue to provide the outgoing employees' housing and all of their entitlements (save for their basic salary) until the earlier of the individual exiting the UAE or obtaining the necessary authorisation to work for another establishment (or the repeal of the Resolution upon the precautionary COVID-19 measures being removed). This is a material development and will act as a disincentive for employers when considering whether to reduce headcount.

In such circumstances the employer is required to offer outgoing employees the option of registering their details on the MOHRE's portal for jobseekers known as the 'Virtual Labour Market System'. Accordingly, these employees can be rotated and utilised by other establishments seeking to hire candidates within the UAE given the suspension of foreign recruitment. These employees can then be hired and authorisation obtained electronically for the necessary work permits (work transfer permit to new employer, temporary work permit or part-time work permit).

The Resolution does not explicitly provide that employers can dismiss employees by reason of redundancy without compensation being payable. However, the recognition of the concept of redundancy within the Resolution (given the lack of recognition of this concept by the UAE authorities to date) may be an indication that the UAE Labour Courts may be more sympathetic to employers implementing redundancy dismissals (during the crisis) than it has previously. This will be reviewed by the courts on a case-by-case basis and the employer's compliance (or otherwise) with the terms of the Resolution may also be a factor that the courts take into consideration.

Wage Protection System

One of the concerns around reducing salaries or placing employees on unpaid leave has been the resultant impact from a Wage Protection System ('WPS') and the fear that the MOHRE may impose a block on an employer's establishment card. With the introduction of the Resolution, it is stipulated that employers follow the procedural steps outlined therein, and we anticipate that the employer should not face any such issues via WPS given that it is a scheme administered by MOHRE.

In summary, the Resolution places a significant burden on employers who choose to reduce headcount during the current COVID-19 crisis. In the alternative, it sets out procedural guidance and affords some flexibility for employers in terms of other steps that may be taken to alleviate cash flow pressure in the current climate.

A. Ministerial Resolution No. (280) of 2020 concerning the creation of a committee for considering the stabilization of citizen conditions in the private sector ('Resolution No 280')

In brief, the Resolution No 280 aims to protect the position of UAE nationals working in the private sector. By virtue of this Resolution No 280 a committee will be formed and assigned with the following mandate:

1. develop support packages to ensure UAE nationals' presence in the labour market;
2. supervise and ensure the implementation of the provisions of the Ministerial Resolution No 212 of 2017 regulating the work of citizens in the private sector;
3. review the termination cases as provided by Tawteen; and
4. provide recommendations for termination cases and submit them to the Minister (of MOHRE) and carry out any task as assigned by the Minister.

B. Ministerial Resolution No. (281) of 2020 Concerning the temporary guide regulating the remote work in private establishments ('Resolution No 281')

As noted above, Resolution No 279 gives the employer the right to implement home working. Furthermore, MOHRE issued Resolution No. 281 offering guidance and regulating remote work in private sector establishments affected by the precautionary measures taken by the government to fight the spread of COVID-19. Resolution No 281 sets out the obligations of the employee and the employer to facilitate remote working arrangements.

For example, employees have certain obligations including that they:

1. perform tasks according to specified timeframes;
2. return/report to work upon request;
3. maintain confidentiality of information, documents and papers; and
4. be contactable on phone or email.

In addition, the employer's obligations include providing the technical equipment necessary for the employee to perform their work facilitating remote workers' communication with their colleagues.

Resolution No 281 requires private sector employers to reduce their workforce physically present at business premises to the minimum necessary for business operations, setting a maximum limit of 30 per cent of total workforce being in attendance. The Resolution also requires that the private sector employers must reduce the number of customers visiting their premises to a maximum amount of 30 per cent of the premises' seating capacity.

Resolution No 281 gives priority to certain individuals who should work such as:

1. pregnant women;
2. employees aged 55 and above;
3. employees with disabilities, respiratory or chronic diseases; and
4. female employees who are mothers of children in grade 9 and below.

Notwithstanding, there are some vital and critical sectors that Resolution No 281 excludes from the remote working requirement, those sectors are as follows:

- financial sector establishments, including banks, exchange centres and money transfer outlets;
- companies in the food industry, including those that manufacture and distribute food;
- establishments in the hospitality sector, including hotels, restaurants and catering companies;
- companies and factories that produce sterilisation and cleaning materials and medical equipment, as well as those that offer cleaning services;
- healthcare facilities, including hospital pharmacies, pharmaceutical factories, clinics and other medical services; and
- infrastructure sector companies, including those that are involved in road and bridge works, water services, sanitation resources, electricity and communication networks, building and construction sites, contracting and construction firms, engineering consultants, catering companies, energy companies (oil companies, oil refineries, power plants, gas stations, fuel sales and distribution).

Conclusion

The scale of the crisis has merited legislative changes at a pace we have not seen before. The steps taken by the MOHRE in respect of the aforementioned Resolutions are part of the wider measures the UAE government is taking to help support businesses in the private sector that are affected by the precautionary measures. We can anticipate further measures, particularly in some of the free zones that are exempt from the application of these Resolutions and we will continue to provide updates as changes occur.

For further information, please contact Alaa Momtaz (a.momtaz@tamimi.com).

Walking the tightrope: delineating the inherent conflict between intellectual property rights and competition law in trademark licensing arrangements

Elias Nassif
Associate
Intellectual Property, Competition
Dubai, UAE
e.nassif@tamimi.com

Intellectual property law and competition law share identical underlying aims of incentivising innovation, furthering dynamic competition and ensuring consumer welfare. Nonetheless, both areas of law seek to realise such aims through divergent, and apparently conflicting, means. Underpinned by such objectives, intellectual property law accords rights' holders' exclusive rights over their intellectual property assets and the ensuing right to limit or exclude others from using or largely reproducing those assets. On the other hand, in a bid to ensure such aims, competition law ultimately undermines the extent of such rights by outlawing anti-competitive conduct; including, abuses of dominant positions; and restrictive agreements. The result is an inherent conflict between the exclusive rights accorded under intellectual property laws and, on the other hand, the competition law. This conflict largely comes to the forefront in trademark licensing arrangements, which require particular consideration on the part of rights' holders.

Restrictive agreements and abuses of dominant positions

Article 3 of the Federal Law No. 4/2012 Concerning Regulating Competition ('Competition Law') expressly cites the *"exploitation of intellectual property rights in the State and abroad"* as something the Competition Law is directly concerned with and governs. Of particular significance in this respect are the restrictive agreement and dominant position provisions under Articles 5 and 6, respectively, of the Competition Law.

Restrictive Agreements are agreements which have as their subject or objective the abuse, restriction or prevention of competition. In accordance with Article 5 of the Competition Law, some of these agreements include, amongst others, agreements involving:

- direct or indirect price fixing;
- setting conditions on the sale and purchase of goods or performance of services;
- colluding to refuse to buy from certain establishments or to sell or supply to certain establishments and to obstruct them from the practice of their activities; and
- market or client allocation based on geographic areas, distribution centers, quality of clients, seasons and time periods or any other basis that may negatively affect competition.

Moreover, under Article 6 of the Competition Law, parties to an agreement or transaction who are in a dominant position in the relevant market concerned, or in a substantial or influential part thereof, are prohibited from carrying out acts constituting an abuse of their dominant position in order to undermine competition. Article 3 of the Cabinet Resolution No. 13 of 2016 on the Ratios and Controls Related to the Application of the Competition Law, defines a dominant position as arising when the share of any of the parties exceeds 40 per cent of the total transactions in the relevant market in question. To this extent, some of the conduct that the Competition Law expressly outlaws, amongst others, are:

- directly or indirectly imposing prices or conditions on the resale of goods and services;
- selling goods or providing services at below cost price with the aim of obstructing the entry of competitive organisations to the relevant market in question, excluding them, or exposing them to losses that make it hard for them to continue their business;
- forcing a client not to deal with a competitive establishment; and
- increasing or decreasing the available quantities of the product, thereby creating a forced deficit or oversupply of the goods in question.

Delineating the inherent conflict in trademark licensing arrangements

The core issue giving rise to this apparent inherent conflict between intellectual property and competition law, is that many of these, otherwise, prohibited practices under the restrictive agreement and abuse of dominant position clauses of the Competition Law are in fact commonly perceived as rights arising from the concept of exclusive intellectual property rights accorded under intellectual property laws. Some of these practices are in fact even expressly provided for under the Federal Law No. 37/1992, as amended by Federal Law No. 8/2002, Concerning Trademarks ('Trademarks Law').

Specifically, Article 34 of the Trademarks Law expressly allows for trademark licence agreements to limit the marketing of goods or services, bearing the licensed trademark, to geographical territories. Additionally, Article 34 of the Trademark Law also expressly allows for, amongst others, the licensor to impose an obligation on the licensee relating to quality control of the product or services in question bearing the trademark.

Noting the provisions relating to the Competition Law and save for the applicable exceptions therein, such practices, otherwise allowed for under the Trademarks Law and forming a central part of some trademark licence agreements, do run the risk of being in violation of the Competition Law; particularly, if they have the purpose or effect of undermining competition in the market in question in the UAE. Some examples of problematic provisions commonly found to contravene the Competition Law may include:

- directly or indirectly fixing prices on the sale of goods and services bearing the licensed trademark;
- restricting or limiting the sale or supply of other goods and services not bearing the licensed trademark;
- restricting or limiting the supply of goods or services bearing the licensed trademark to certain geographical locations or time periods; and
- obliging a licensee not to license, sell, distribute or use other goods or services.

Exceptions

Of course, as abovementioned, many intellectual property licensing arrangements would be exempt from the application of the Competition Law, for multiple reasons; including the following:

- if the parties involved are considered small or medium-sized enterprises, in accordance with Article 4 of Cabinet Resolution No. 22 of 2016 on Unified Definition of Small and Medium Enterprises, which covers enterprises of, depending on the industry in question, up to 199 to 249 employees or enterprises that make up AED200 to AED250 million (approximately, US$54,458,815 to US$68,073,519) in annual revenue; or
- if the licensing arrangement involves certain sectors exempt from the provisions of the Competition Law, under Annex 1 thereof; including, but not limited to, the following sectors: telecommunications, financial, cultural activities, gas and petrol, pharmaceuticals, postal, electricity and water, transport, drainage and sanitation activities and transport; or
- if the arrangement is registered as a commercial agency under Federal Law No. 18 of 1981 Concerning Organizing Trade Agencies, then the arrangement is exempt from the provisions pertaining to restrictive agreements; or
- if the arrangement is deemed a weak-impact agreement, such that the share of the parties to the agreement does not exceed ten per cent of the total transactions of the relevant market in question, then these arrangements, save for directly or indirectly fixing prices and conditions on products or services and dividing markets, are also exempt from the restrictive agreement provisions of the Competition Law.

Moreover, if the arrangement does not fall within such exceptions, then the concerned parties can apply beforehand for an exemption through the Ministry, which may be granted provided it is established that such, otherwise, prohibited practices would result in the enhancement of economic development, improvement in the performance of the parties to the arrangements and their competitive ability, development of production or distribution systems or the realisation of certain benefits to consumers.

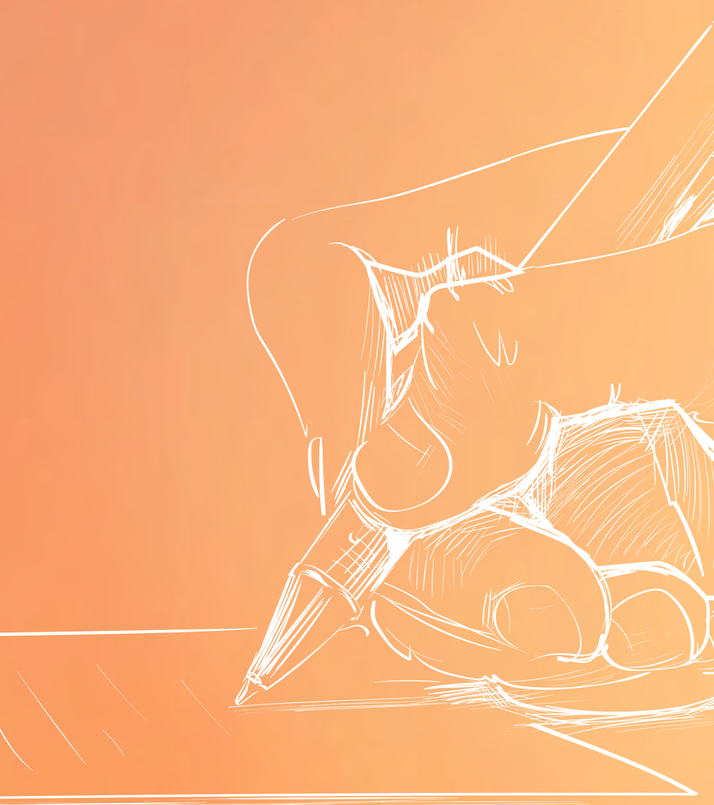
Conclusion

The right to limit or exclude others from using or largely reproducing intellectual property assets is central to applicable intellectual property laws alike in the UAE. However, this right is conditional and not absolute. Despite having a shared goal, with the Competition Law, of advancing innovation, dynamic competition and consumer welfare, unbounded intellectual property rights could result in anti-competitive conduct and thereby serve to undermine those very aims they set out to further. As such, trademark licence agreements, and intellectual property licensing arrangements in general, should be scrutinised having regard to the Competition Law, by licensor and licensee alike. In essence, trademark or intellectual property licensing arrangements, should not, in actuality, have the effect of hindering competition in the market in question. Otherwise, the shared common goals emanating from both areas of law would be undermined and such intellectual property licensing arrangements would violate the Competition Law and be exposed to the array of sanctions therein; including, substantial fines of up to AED5 million (approximately US$1,361,470) and closure of business premises for a period of between three to six months.

For further information, please contact Elias Nassif (e.nassif@tamimi.com).

Litigation

How to fix ambiguities in legislative texts: a case study



Hassan El Tahir
Senior Counsel
Litigation
Abu Dhabi, UAE
h.eltahir@tamimi.com

Dr. Omar Al Azawe
Senior Associate
Litigation
Abu Dhabi, UAE
o.alazawe@tamimi.com

Introduction

Legislative drafting is considered one of the most important specialisations in the legal field, as it concerns the external form of the legal rule from which the legislation or codification will be formed. Legislative drafting specialists should use technical tools and practices which enable them to transform a general legislative goal into a legal text which can then be consistently applied to the facts of a case or a set of circumstances. Therefore, proper legislative drafting should aim to eliminate ambiguity and make legal obligations and responsibilities clear to the public. This would help facilitate the application of the law in practice.

Laws should reflect the legislature's direction and their legislative philosophy. Generally speaking, the aim of legislation is to organise a specific matter, activity or regulate societal and/or business behaviour. Therefore, legislative drafting requires comprehensive experience and a clear understanding of the legislature's objectives, the environment in which the legislation is born, and full knowledge of the relevant legislation.

A cardinal principle of legislative drafting is to deliver accuracy and clarity through the use of correct linguistic and legal terminology. This would essentially revolve around the following:

1. eliminating ambiguity and uncertainty in the text;
2. understanding the legislative text or codification and how it impacts those who are subject to it; and
3. ease of application of the law and, in turn, speedy disposal of cases before judicial bodies.

Basic requirements for effective legislative drafting

The basic requirements for effective legislative drafting can be summarised in the following points:

- a thorough understanding of grammar and syntax;
- knowledge of the legal rules and judicial principles;
- practical experience in the field of drafting legislation and regulations; and
- knowledge of comparative legislation.

Thus, when a statute is clear, the legislature's real intention can be ascertained without having to resort to in depth analysis and interpretation. The UAE Ministry of Justice's Fatwa and Legislation Department has expressed this as follows: *"If the words of the text are clear, they cannot be departed from through further interpretation, because Interpretation must be carried out within the limits of the general rules of interpretation."*

Given the above, various factors can be identified as contributing to the clarity of legislation, most notably:

- determining the scope of application of the legislative text in reference to its addressees, as mentioned in the legislative text;
- drafting legal responsibilities and obligations that represent the purpose of the general legislative goals;
- providing an accurate description of the facts under which the legal assumptions would apply; and
- clearly defining the requirements and conditions of the legal

When the language of a law is ambiguous, the rules of statutory interpretation must be applied in order to remove such ambiguity so as to uncover the true meaning of the text. If this is not possible, the statute is consequently considered defective. It is then the responsibility of the legislature to intervene and take the necessary measures to amend, repeal, or replace the legislative text. Any other approach would create an overlap between the interpretation of the legislation with the enactment of the same. In other words, the role of the practitioner who interprets the legal text might change. Instead of clarifying the intended meaning of statutory provisions, the adjudicator might end up enacting a new provision, which is impermissible as it conflicts with the Separation of Powers Doctrine.

To clarify the principles above, we refer below to a practical case study in the UAE. The case study concerned blood money, (which is known as 'Diya'), that may be paid in the event of wrongful death, as set in accordance with Sharia (Islamic law).

Federal Law No. (17) of 1991, as amended by Federal Law No. (9) 2003, concerning blood money contained vague language that was the subject of controversy in a judicial application. It was not possible to remove the ambiguity by applying the rules of interpretation, and consequently the legislature was forced to intervene to cancel it and enact new text that removed the ambiguity, uncertainty and lack of clarity of the original text.

The old legislative text provided

Article 1 of Law No. (17) of 1991 provides that:

> *"The diya for a wrongful death victim is fixed at AED 200,000 across the courts of the Emirates of the UAE."*

The UAE Courts had different views on the interpretation of the victim and whether it includes man and woman or only a man. Whereas the Dubai Court of Cassation held that women should be awarded the full diya payable to their male counterparts. The Abu Dhabi Court of Cassation, taking its cue from the Federal Supreme Court, prefers to award women half a diya. Divergent judgments have arisen due to imprecise drafting of the legislative provision regarding the determination of the rate of diya as exemplified by the following:

Court of Cassation - Abu Dhabi

Rulings issued by the Court of Cassation in Abu Dhabi regarding the application of the Diya rulings in accordance with the said Law No. (17) 1991, stated that women would receive half the blood money awarded to men. The court maintained that the purpose of the said law is to determine the scale of the blood money payable; however, the specific payment would be determined in accordance with the principles of Sharia law. In particular, the term 'deceased' (in the legislative text) was general and for the purpose of stating that the compensation for blood money amounted to AED200,000 (approximately US$54,348)). Accordingly, the Court of Cassation in Abu Dhabi ruled the following:

> *"1- The specification contained in law is intended, not as a positive intervention by the legislature to fix the amount of diya as a penalty, but rather as a monetary denomination of diya, 2- The term "victim," as used in law (i.e. Federal Law No. 17 of 1991) does not denote gender neutrality in diya but is intended to define the principal amount of full diya. The diya would still be payable to its beneficiaries, in whole or in part, as appropriate, based on Sharia rules pursuant to Article 1 of the Penal Code which subjects had (fixed), qisas (retributive) and diya punishments to Sharia law as well as Article 1 of Law No. (3) of 1996 concerning Sharia Court jurisdiction over crimes."* (Cassation Court of Abu Dhabi - Cassation No. 429, 24.07.13, JY 25 (2012) Principle (71), (Federal Supreme Court - Cassation No. 370, 25.09.04, JY 25 (2004).

The Dubai Court of Cassation

The Dubai Court of Cassation offered a different interpretation of that law, by interpreting the term 'victim' contained in Article (1) as a mutual term that applies to men and women without discrimination. The Dubai Court of Cassation stated the following:

Whereas the article no. (1) of Law No. 17 of 1991 amended by Law No. 9 of 2003 stated that *"The diya for a wrongful death victim is fixed at AED200,000 (UAE Dirhams Two Hundred Thousand) across the courts of the Emirates of the UAE". The term "victim" mentioned in the text means general term and includes all members of its gender and takes them all, which means the legislature aimed in this text to determine the amount of diya for a wrongful death victim without distinction between a man and a woman. Furthermore, the text was general without any evidence to allocate. Therefore, it must be applied generally and must apply equally to all individuals".* (Dubai Court of Cassation – Cassation No. 71- 10.02.2008).

Variation in judicial rulings regarding the amount of diya

It became clear that the basis for the difference in the rulings issued by the courts of the Emirates of Abu Dhabi and Dubai is the inaccuracy of drafting. The legislative text related to the provisions of the diya, as the term 'victim' was general and did not have a specific definition. As a result, the door had been opened to interpret the article as applying to male or female, especially since the text mentioned persons and did not mention men exclusively or explicitly. Furthermore, there was an absence of any reference in Article (299) of the UAE Civil Transactions Law which relates to compensation (*diya* or blood money) payable for any harm caused to a person, which would have resolved this matter and contributed to removing ambiguity in Article (1) of Law No. 17 of 1991.

> **When the language of a law is ambiguous, the rules of statutory interpretation must be applied in order to remove such ambiguity in order to uncover the true meaning of the text.**

The new legislative text

Based on the above, the Emirati legislature recently responded to calls from jurists, and decided to repeal Law No. (17) of 1991 and consequently enacted a Law by Decree- No. (1) of 2019 fixing the diya payable for wrongful death. The new Law provides that:

> *"The diya for the deceased, whether male or female, is fixed at AED200,000 (UAE Dirhams Two Hundred Thousand).*
>
> *The amount of diya specified in the preceding paragraph may be adjusted upward or downward by decision of the Cabinet taken on a proposal of the Minister of Justice."*

The new text avoided the wording defects which appeared in the previous laws, thus the accuracy of the new legislative text ended the extended dispute between the courts. The new text of Federal Law No. (1) of 2019 removed the ambiguity in the legislative text and resolved the discrepancy in the judicial rulings which has persisted for several years.

Conclusion

The above case study drives home the importance of precision and the use of clear language in drafting effective legislation. The imprecision of the legislative provisions on diya written into Law No. (17) of 1991 (repealed) resulted in variations in judicial rulings. Law No. (1) of 2019 has now clarified the matter by making a woman's diya equal to that of a man's, thereby settling the question and eliminating inconsistencies in court decisions across the UAE.

For further information, please contact Hassan Eltahir (h.eltahir@tamimi.com) and Dr. Omar Al Azawe (o.alazawe@tamimi.com).

Secured transactions: an Iraqi perspective

Ali Al Dabbagh
Associate
Litigation
Baghdad, Iraq
a.aldabbagh@tamimi.com

In this Article, we will examine various tools available to secure a transaction in Iraq. We will start with property securities, then move to personal securities, and finally examine a number of arrangements that benefit creditors. This Article aims to illustrate the advantages and disadvantages of each type of security and provide some practical comments on the use of each in Iraq.

Property securities

Property securities are securities that attach to specific property and allow the secured creditor to satisfy its debts from the burdened property. We will divide property securities into two categories: retention of title; and pledges or mortgages. Retention of title operates by transferring the title to the secured creditor or through the secured creditor retaining title, for example in the case of credit sales. Iraqi law expressly allows retention of title arrangements in the context of credit sales and retention of title can be achieved by contract terms in the credit sale contract. If the secured creditor is not the seller, or holder of title to the property, then adequate contractual arrangements need to be entered into to enable the secured creditor to retain title, for example, sale and leaseback arrangements. Iraqi law does not impose special requirements on the creation of retention of title securities.

The main advantage of retention of title is that where the creditor is solvent, at the time of the transaction and no fraud has been perpetrated on other creditors, the asset to which the secured creditor retains title does not form part of the bankruptcy estate of the debtor and the secured creditor is not affected by third party claims. The disadvantage of retention of title is that the secured creditor cannot take benefit of the security enforcement procedures, i.e. judicial sale and enforceable deficiency instruments, and must take possession of the asset and dispose of it themselves. A secured creditor who is unable to fully collect through disposal of the title-retained assets does not lose their contractual claim for the deficiency, but must bring fresh proceedings separate from those to reclaim possession if it is not relinquished voluntarily.

Moving away from retention of title, the other form of property security available in Iraq includes mortgages and pledges. For our purposes, mortgages are security interests in real estate and pledges are security interests in everything other than real estate. Like all other interests in real property, mortgages have to be registered to become valid in Iraq. Registration of a mortgage at the land registry is not a mere perfection requirement for it to become binding on third parties; it is a validity requirement even against the owner of said property if they were the debtor. Properly registered mortgages can be possessory or non-possessory. Registered mortgages are enforceable without the need for a judicial decision. Judicial intervention is only necessary if a dispute arises that cannot be conclusively settled before the public executor and the debtor initiates judicial proceedings to stop enforcement; registered mortgages cannot be denied and generally do not include complicated conditions that have to be satisfied before enforcement, therefore, litigation can be avoided with careful drafting.

Pledges in movables, including tangibles and intangibles, must be possessory and the debtor must part with possession in favour of the secured creditor or a third party. A commercial pledge is enforceable through expedited judicial procedures that are determined by the court. Pledges are commercial if the underlying transaction giving rise to the pledge is commercial for either the debtor or the secured creditor. Therefore, most pledges can satisfy this requirement.

Secured creditors taking advantage of mortgages and pledges need to be aware of privileged rights, which take precedence over a secured creditor's right to collect from the proceeds of the secured property. Common privileges are listed below in their order of priority:

- the costs of legal proceedings incurred in the common interest of all creditors for the preservation, sale and distribution of the property;
- amounts due to the (State) Treasury for taxes and other duties;
- expenses incurred for the preservation of, and repairs of a nature necessary to a movable of the type in question;
- the following debts are, to the extent due in the last six months:
  i. amounts due to servants, clerks, workmen and every other wage-earner for wages and salaries of whatever kind;
  ii. amounts due for foodstuffs, clothes and medicines supplied to the debtor and his dependents; and
  iii. alimony due to the debtor to those to whom he must pay it.
- amounts disbursed for seeds, manure and other fertilisers and insecticides, and amounts disbursed for cultivation and harvesting are secured by a privilege over the crop for the production of which they have been spent;
- rents of buildings and agricultural land for three years or for the term of the lease if less than three years, as well as any other right to the lessor pursuant to the lease, are all secured by a privilege over all attachable movables and agricultural produce in the leased property and belonging to the lessee;
- amounts due to hotel proprietors by a traveller for accommodation, food and expenses incurred for the traveller's account are secured by a privilege over the effects brought by the traveller to the hotel or its annexes; and
- the price and associated costs which accrue to the vendor of a movable so long as the movable sold retains its identity, without prejudice to the rights acquired by a bona fide third party and subject to commercial rules.

One of the more notorious and first in priority privileges that can deplete the sale proceeds or slow down recovery by the secured creditors is amounts due to the state. Lenders, in particular, are advised to obtain proof of tax clearance from their borrowers and an obligation to keep their tax records updated to avoid problems in collection.

Iraqi law does not recognise the concept of foreclosure in mortgages or pledges and therefore, with the exception of retention of title, a secured creditor must always follow the relevant procedures to enforce the pledge or mortgage in question. There are also no floating charges or similar concepts in Iraq, all securities that attach to property must identify the property burdened by the security. However, mortgages and pledges can be validly entered into with the expectation that they attach to future assets not acquired at the time of creation of the security interest, provided that other perfection requirements such as registration and\or possession are met. All assets that can legally be the subject matter of transactions can be pledged or mortgaged.

Personal securities

A personal security allows a secured creditor to satisfy the secured debt from the assets of a guarantor in addition to the initial creditor. The most basic form of a personal security under Iraqi law is joint and several liability because it allows a successful claim to be enforced in full against all named judgement debtors. Joint and several liability is not assumed if multiple parties enter jointly into one contract and requires either express or implied agreement or a mandatory legal provision giving rise to joint and several liability. A personal guarantee does not automatically create joint liability and a secured creditor must first collect from its debtor before the guarantor is liable for the secured debt. This provision can be varied by agreement. Iraqi law does not require a specific formality for personal guarantees. Disputes over the existence of a personal guarantee are frequently viewed as questions of proof rather than questions of validity. Personal securities can never be enforced without a judicial decision; the only exception to this rule is a personal security offered before a public executor in the course of enforcement of another enforceable instrument.

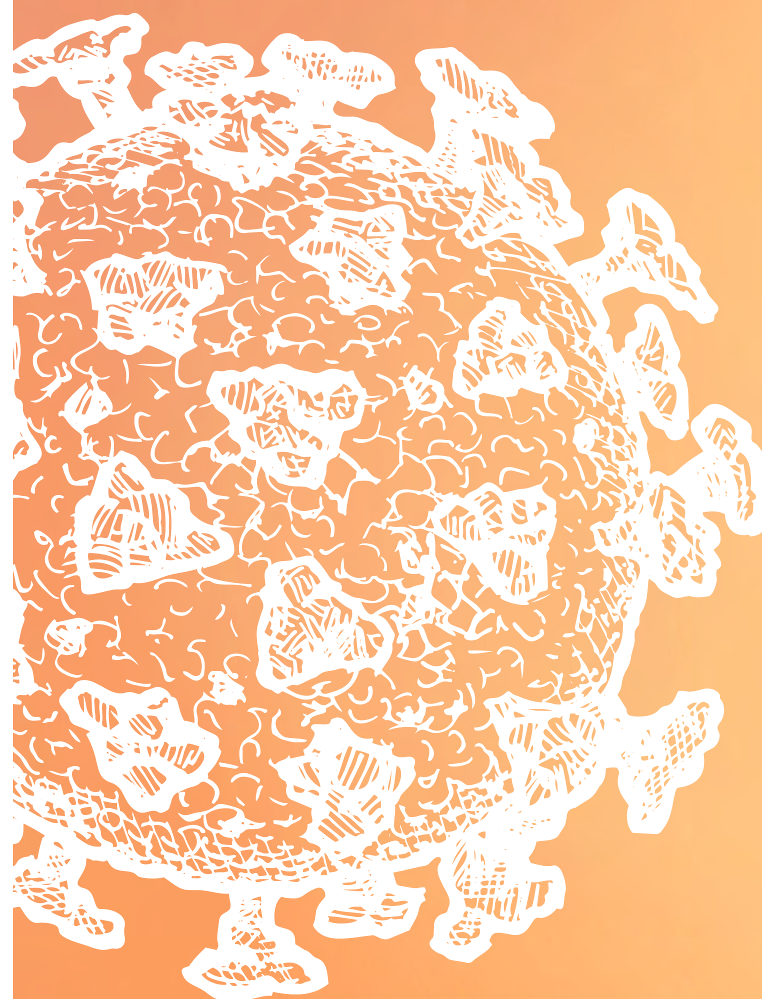
Assignments and commercial papers

So far, we have examined traditional forms of security however, creditors are increasingly relying on alternative tools to secure their rights. Assignments of the proceeds of a project or an investment are now a common form of security. Unlike many common law jurisdictions, an assignment is not automatically revocable at the discretion of the assignor under Iraqi law. An assignment needs to be distinguished from a mere agency that allows the agent to enforce and collect on behalf of the principal because an agency relationship, even if the agent has an interest, is always revocable by the principal and agreements otherwise are prohibited on public policy grounds. An assignment of benefits does not need the consent of the third party who furnishes said benefits to be valid. A third party to an assignment of benefits only needs to be notified of the assignment and the assignment becomes enforceable from the date of notification.

Commercial papers are another common method of securing transactions. Iraqi law recognises three types of commercial papers: promissory notes; bills of exchange; and cheques. Iraq has ratified the Geneva Convention dated 7 June 1930 providing a uniform law for bills of exchange and promissory notes. Promissory notes are treated as an instrument of credit and are always negotiable even if they state otherwise. Promissory notes also have the least creation formalities among the other commercial papers under Iraqi law. Cheques are considered an instrument of payment and would freeze the amounts in question if used as a security. Bills of exchange share a lot of features with promissory notes but involve a third party who undertakes to pay on behalf of the drawer. Commercial papers create an independent payment obligation separate from the underlying transaction and are enforceable instruments without the need for a judicial decision under Iraqi law. If commercial papers are authenticated in a manner that prevents denial, for example before a notary public, they can be an effective tool for creditors.

For further information, please contact Ali Al Dabbagh (a.aldabbagh@tamimi.com).

Is COVID-19 considered as a Force Majeure in Oman?



Faris Al Maashari
Head of Litigation - Oman
Muscat, Oman
f.almaashari@tamimi.com

Wassim Mahmoud
Paralegal
Litigation
Muscat, Oman
w.mahmoud@tamimi.com

With the beginning of the new decade, the world witnessed a rapid spread of novel coronavirus disease ('COVID-19'). This pandemic, as so declared by the World Health Organization ('WHO'), has had, and continues at the time of writing to have, negative consequences on the economies of many countries and has led to a major disruption of global markets.

The Sultanate of Oman, like other Middle Eastern countries, has also been affected by this pandemic. As a result of the temporary suspension of operations in many vital sectors of the economy, in compliance with various directives issued by relevant authorities, Oman is facing a significant decline in commercial activities and services. This decline in economic activity will impact many contractual obligations between parties. Therefore, it is necessary at this juncture, to understand whether such circumstances are considered to be force majeure ('Force Majeure') from an Omani legal perspective, and analyse the legal impact on contractual obligations between parties.

What is Force Majeure in Oman?

Usually, when we read or review the clauses of a contract or an agreement, whether one of its parties is government, company or a natural person, we come across a specific clause with regard to Force Majeure. So what does that term mean?

Force Majeure has no official definition under Omani Law. In general, it is "a clause in a contract that excuses a party from not performing its contractual obligations that become impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled."

The Omani Civil Transactions Law, promulgated by Royal Decree 29/2013 ('Law') states in article 172 that:

1. *"in bilateral contracts, if force majeure occurs rendering the performance of the obligation impossible to complete, the corresponding obligation shall be extinguished, and the contract shall automatically be revoked.*
2. *In the case of partial impossibility, the corresponding obligation shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligee to rescind the contract provided that the obligor is made so aware."*

To illustrate, Force Majeure theory is based on the fact that fulfilling a contractual obligation has become impossible due to the occurrence of a new circumstance beyond the control of the affected parties. The remedy for that, as per the Law, is the termination of the contract. However, it should be stressed that this will not be applicable unless it is proven by the party claiming Force Majeure that it is absolutely impossible to fulfil its obligation due to Force Majeure.

How to apply Force Majeure?

The party claiming Force Majeure must prove that the new circumstance has led to the impossibility of fulfilling its obligation, and that anyone else who is in the same position, would not be able to fulfil that obligation. Moreover, the new circumstance must be external and not caused by the party pleading Force Majeure, and one which could not have been anticipated, controlled or avoided. If a party to a contract has caused or contributed to the circumstance having occurred, such circumstance is not considered a Force Majeure event and the responsible party will not be exempted from liability for any failure to fulfil its obligations.

Is COVID-19 considered as a Force Majeure in Oman?

The Sultanate of Oman, with the beginning of the spread of COVID-19, has taken a number of precautionary measures to deal with the pandemic. Among those measures was the establishment of Oman's Supreme Committee for Dealing with COVID-19, which is a government committee responsible for nationwide decisions in response to the current novel coronavirus outbreak. ('Competent Authority'). The Competent Authority, in order to mitigate the spread of the pandemic in Oman, has implemented numerous directives, one of which is the temporary suspension of the education, commercial, transport, sport and tourism sectors from their normal operations.

COVID-19 could be considered as Force Majeure from an Omani legal perspective if certain conditions are met. The conditions to claim for Force Majeure in any COVID-19 case will be as follows:

- the contracting parties could not expect COVID-19 to take place before entering into a contract, nor control it when occurred;
- the contract should have been drafted well in advance of COVID-19 spreading (i.e. prior to WHO declaring COVID-19 as a pandemic); and
- the Competent Authority has taken certain measures that make the performance of the contract obligation impossible.

A real case example of the above conditions can be illustrated by the cancelling of events, such as weddings. What distinguishes these contracts is that its parties must perform their obligations within the specified time agreed upon. Time.in these contracts, is an essential element, but in view of the new circumstance (COVID-19), and the directives issued by the Competent Authority to cancel all events and gatherings, implementation of the contractual commitment or obligation in this case is considered impossible. Accordingly, the contract will be entirely or partially rescinded

> **Deciding if COVID-19 is Force Majeure or an Unforeseen Event is based on whether the performance of the contractual obligations is absolutely impossible or just burdensome to the obligor under the contract...**

by operation of Law pursuant to the Article 172 (Force Majeure) or Article 339 of the Law which states that: *"The Obligation shall be extinguished if the debtor proves that the fulfilment thereof becomes impossible due to a foreign reason beyond his will".*

However, is COVID-19 always considered a Force Majeure?

It is certainly not the case that COVID-19 may be considered as a Force Majeure in all circumstances. If for example, a defaulting party, in view of the new circumstances that have arisen, is finding it merely difficult to fulfil its obligation under a contract, such that the obligation may not be seen as impossible but rather as onerous or imposing a heavy loss on such party, this would not constitute Force Majeure. Force Majeure is only established if the implementation of the contract is impossible along with the other conditions mentioned above. Relief in this case may be obtainable via unforeseen events ('Unforeseen Events') under article 159 of the Law.

Unforeseen Events

Article 159 of the Law states that:

> *"If general exceptional accidents that were unforeseen at the time of contracting occur and result in that the execution of the contractual obligation, even if not impossible, becomes exhausting to the debtor and threaten him with serious loss, the court has the discretion to, according to the circumstances and after balancing the interests of both parties, reduce the exhausting obligation to a reasonable limit. Any other agreement to the contrary shall be deemed void."*

At first glance, it may appear that this article is similar to the Force Majeure doctrine, but in fact there is a difference. In essence, Force Majeure exists when the implementation of the obligation is impossible. However, Article 159 confirms that a contractual obligation becomes burdensome to the debtor or obligor as a result of the occurrence of unforeseen or unexpected event.

It is valid to construe the current COVID-19 situation in Oman as an unforeseeable circumstance which is beyond the parties' will or control. It does not, however, render the performance of many obligations impossible, but makes it exhausting for obligors to fulfil them and/or threatens the obligor with a heavy loss. The reason for this is that the Competent Authority's directives or decisions are, to date, temporary (i.e. specified for a certain time period) such as the suspension of work.

Therefore, it is not impossible to perform the contractual obligation if one is talking about permanent contracts, rather there is only a burden or difficulty in doing so. As a result, the Unforeseen Event doctrine may be more appropriate in these circumstances and any judge or adjudicator will have wide discretion to amend, if it is required, the contractual obligations. That is, the judge will have to, after considering the circumstances and balancing the contractors' interests, return the burdensome obligations to a reasonable extent on a case-by-case basis.

Differences between Force Majeure and Unforeseen Events

It should be noted when addressing Force Majeure provisions in contracts and agreements and their legal implications, that we must not confuse Force Majeure with Unforeseen Events. The occurrence of Force Majeure causes the impossibility of implementing the contractual obligation stated in the contract. A defaulting party who succeeds in establishing Force Majeure will be exempt from legal liability. In all other circumstances, such as Unforeseen Events, where events merely render the implementation of the contractual obligation exhausting or burdensome, rather than impossible, the occurrence of such events will not exempt the obligor or debtor from liability, rather, the court will have the discretion to balance between the contracting parties' interests and return the burdensome obligations to a reasonable extent.

Conclusion

To sum up, the decision as to whether COVID-19 qualifies as Force Majeure or an Unforeseen Event must be based on whether the performance of the contractual obligations is absolutely impossible or just burdensome to the obligor under the contract. This will depend entirely on the nature of the contract between the parties and the impact of the relevant directives or decisions issued by the Competent Authority, which cannot be anticipated in advance due to the continuous and rapid development of the pandemic. In the interim, we continue to assist contracting parties with detailed analyses of specific circumstances as new measures are put in place in Oman.

For further information, please contact Ahmed Al Barwani (a.albarwani@tamimi.com), Faris Al Maashari (f.almaashari@tamimi.com) or Wassim Mahmoud (w.mahmoud@tamimi.com).

Jurisdiction Update
Qatar

Trademarks in Qatar in light of the recent law on the protection of the Arabic language

Diana Al Adel
Associate
Intellectual Property
Doha, Qatar
d.aladel@tamimi.com

The importance of Arabic language is not limited to the fact that it is the official language of Arab Countries; it is the language that unifies millions of Arabic speakers, reflects their identity, culture, history, and independence. It also has significant spiritual importance for millions of Muslims reading the Arabic verses of the Holy Quran.

Understanding the importance of the Arabic language as an essential basis of the country's identity and culture, while opening the market to further foreign investments and opening Qatar to the world in 2022, Qatar introduced Law No. 7 of 2019 on the Protection of Arabic language (the 'Arabic Language Law').

What changed? Arabic is everywhere!

According to the Arabic Language Law, all company names must be in Arabic, except for well-known company names which should be accompanied with an Arabic name (Article 8). All trademarks must also be written in Arabic. However, it is possible to use a foreign trademark provided that the Arabic version is placed in a clear position near the original language (Article 10).

This applies to company names, shops, signboards, and products.

Non-compliance with the abovementioned provisions of the Arabic Language Law is punishable with a fine not exceeding QAR 50,000 (approximately US$13,700) (Article 11).

Does this mean that all Trademarks must only be in Arabic? Definitely not!

Understanding the importance of the Arabic language is illustrated in the importance of languages, and the way they reflect the identity and culture of people and businesses.

This is why many international trademarks are created in the language of the home country of the trademark owner, with different translations and even transliterations, reflecting the global vision and expansion objectives of the owner.

Law No 9 of 2002 on Trademarks ('Trademarks Law') already prohibits the registration or use of any mark which might be considered confusingly similar to a trademark that has already been registered or well-known in Qatar. The Trademarks Law also prohibits the registration of any company name that is identical or confusingly similar to a registered or well-known trademark. It is worth noting that company name registration in Qatar was already done in Arabic, even before the implementation of the Arabic Language Law, considering that commercial registration certificates are issued in Arabic.

The above concept is more clearly prescribed in the GCC Trademarks Law which was ratified by Qatar in 2014, and which is currently awaiting the ratification of its implementing regulations. The GCC Trademarks law prohibits the registration of any trademark that is a translation of a wellknown trademark.

Does the Arabic Language Law limit the protection of Trademarks in Qatar? Not at all!

The Arabic Language Law confirms that all translations (or transliterations) of trademarks should be owned and used by the same owner. Further, it states that a mere translation (or transliteration) cannot be considered a creation of a different, unique trademark.

As a consequence, the above provisions offer trademark owners a further means of protecting their intellectual property and the ability to prevent the use and registration of their mark even where it is a translation or transliteration of the owner's trademark.

What should be done by Trademarks owners? Consider a localised version of their Trademarks in Arabic!

A trademark in a foreign language could have a number of different translations in Arabic because of the rich nature of the Arabic language and its extensive vocabulary. As a result, a trademark owner may consider many translation options depending on the intended meaning and intensity of the word in question.

For example, the word 'friend' may be translated into Arabic using 13 different nouns depending on the degree of friendship; at least two of those nouns are nowadays commonly used in Arabic as synonyms.

The transliteration of a foreign trademark in Arabic could also be done in more than one way, considering the pronunciation of Arabic Letters, the use of vowels for long sounds, and marks for short sounds, unlike the English language.

For example, the letters 'P' and 'B' would be replaced by the same letter in Arabic, due to the absence of a letter reflecting the sound 'P'. While the word 'kid' could be written in Arabic using two letters reflecting 'k' and 'd' letter sounds without the use of any vowels.

Therefore, it is important to create a localised version of the trademark in Arabic, whether translated or transliterated depending on the trademark owner's view. Further, the unique appearance of the trademark in the Arabic localised version should be carefully considered, to ensure it reflects the same level of creativity, stylisation and appearance as the foreign version of the trademark.

In some cases registration of an Arabic localised version of a foreign trademark with the Trademark Office or the Commercial Register is not a mandatory requirement, for example, where a trademark is used on a product and not a signboard. In other cases, including the use of a trademark on a signboard, registration is a mandatory requirement.

Registering the Arabic localised version with the Trademark Office, even if not mandatory, would protect the correct Arabic spelling of the trademark based on the owner's view (who may need to seek professional, local advice to confirm), and whether it should be used as a translation or a transliteration. Any such registration in Arabic would also expand and confirm the protection of the trademark in any other language, as it should prevent the registration and/or use of any identical or confusingly similar trademark or trade name.

Conclusion

Qatar is an attractive diversified market, which continues to attract further foreign investment. The introduction of the Arabic Language Law enhances trademark protection in many aspects, and provides a further legislative basis confirming a commercial practice which was implemented for practical and commercial reasons.

Creating, protecting and using a localised version of any trademark in Arabic may be used not only to comply with the Arabic Language Law in Qatar, but might also be used for commercial reasons in all the Arab countries considering the size of the market.

Qatar appears to be moving in the right direction, realising the importance of foreign investment and international trade, with the aim of seeking to continue to maintain and protect its identity and culture.

For further information, please contact Omar Obeidat (o.obeidat@tamimi.com) and Diana Al Adel (d.aladel@tamimi.com).

Preparing for the new 'norm'

Despite COVID-19's impact on expectations for economic growth and investment across the globe, governments, with encouraging results, have been quick to realign policy objectives to prioritise not just the health of their citizens but also of their economies.

Although not at the front end of states bearing the full brunt of the pandemic, the Middle East and North Africa ('MENA') region has not been immune to its reverberations, but like elsewhere, governments in the region have been swift to adapt and innovate, the two acknowledged elixirs for economic preservation.

In this Corporate Structuring practice focused edition of the Law Update, with special emphasis on technology and foreign investment, we provide our readers a glimpse into regional governments' execution of adaptive polices through laws intended to promote and sustain businesses.

Technology and its enhanced use by government and the private sector has become unavoidably obvious. We discuss, in this edition, Jordan and Egypt as two examples of countries that have used regulation to promote digital transformation.

Supporting foreign investment continues to remain a priority for governments in the region and in this Law Update we cover recent developments in Bahrain, Kuwait and Oman in this regard. For our readers' benefit we have also added an update section on the foreign investment laws in the UAE which we have been covering in earlier editions and which can be found *here*.

We have noticed a growing interest in the responsibilities and obligations of managers of companies, especially the process of their decision making aimed at safeguarding them from third party claims. We have, therefore. added a brief overview of managers' obligations towards interested stakeholders.

A corporate reorganisation must follow its objectives, which invariably are wide-ranging hence there is no one optimal corporate structure that can meet all objectives. That being said, we have included, in this edition, introductory information about the items that can be kept in mind while considering corporate reorganisation and what the free zones in the Emirate of Abu Dhabi offer in this regard.

Unfortunately, some businesses will not be able to withstand the current economic headwinds and may turn to commercial discontinuance through deregistration of their business licence. A brief analysis of this process in the UAE is also included in this edition with some practical and legal insights in this regard.

Our *Corporate Structuring* team at Al Tamimi & Company is at the forefront of these developments across the region, advising both policy-makers and corporate entities on how best to capitalise on the changing economic landscape, mitigate the current challenges and achieve sustainable development.

Samer Qudah
Managing Partner,
Head of Corporate Structuring
Dubai, UAE
s.qudah@tamimi.com

Company deregistration in the UAE from a legal and practical perspective

Ali Bachrouch
Partner, Head of Corporate Structuring – Northern Emirates
Dubai, UAE
a.bachrouch@tamimi.com

Odai Mismar
Senior Associate
Corporate Structuring
Dubai, UAE
o.mismar@tamimi.com

Introduction

The company 'deregistration' or in other words the 'licence cancellation', is a common concept introduced by various licensing authorities in the UAE, for closing down limited liability companies. Notwithstanding the argument about the definition and legal basis of the concept, this article will focus on the implementation of 'deregistration', with special consideration given to the major liabilities associated with the transaction. The first section of this article will tackle the practical application of the concept, and the second section will focus on the liability and other legal implications.

Practical application

This section will discuss the main requirements of the deregistration, and the main difference between deregistration and the concept of liquidation.

Deregistration is not an established concept under a specific regulation in the UAE however, it is a practical procedure introduced by some of the concerned licensing authorities in the various Emirates, with the ultimate objective of cancelling a licence and closing down a company. The benefit of the deregistration derives from the fact that it is a quick process with less stringent requirements compared to the liquidation process which, in UAE law, is the normal and only way for closing down companies at most licensing authorities. Hence, it is important to distinguish between the liquidation and deregistration processes and understand the requirements of each process.

Deregistration

The requirements of deregistration are usually governed by the internal rules and guidance issued by the relevant licensing authorities. In general, the main requirements for deregistration are:

- resolution to be issued by the company approving the cancellation of the licence and closing it down;
- clearances will be required from the relevant authorities (i.e. tele-communication provider, SEWA, Emirates Post, etc) ; and
- cancellation of the Memorandum of Association.

Once the completed application (as detailed above) is submitted with the deregistration fees, the authority will issue a final certificate confirming the deregistration and cancellation of the licence of a company.

Deregistration can be understood as a route to facilitate the cancellation of the licence of a limited liability company and close it down in the fastest way possible, leaving the decision about the dissolution and liquidation formalities to the shareholders.

Liquidation

The concept of liquidation is well established in accordance with the provisions of the Federal Law No. 2 of 2015 on Commercial Companies ('2015 Law'). Unless the Memorandum of Association or Articles of Association of the company specify special provisions or provisions contrary to the 2015 Law, the liquidation process should be executed in accordance with the default provisions as set out under the 2015 law.

Liquidation can be either voluntary or compulsory (through a court order). Voluntary liquidation is when the shareholders agree to liquidate the company and appoint a liquidator through a shareholders' resolution. In the event there is a dispute between the shareholder(s) and the liquidation is requested by the shareholder(s) through the courts, the competent court shall select the method of liquidation to be used and formally appoint a liquidator. In any event, the task of the liquidator shall not be terminated by the death, declaration of bankruptcy, insolvency or interdiction ordered against the partners, even if the liquidator is appointed by the partners.

The main requirements for the liquidation process, (specifically voluntary liquidation), are:

- resolution to be issued by the company approving the liquidation of the company and the appointment of a liquidator;
- clearances will be required from the relevant authorities (i.e. telecommunication provider, SEWA, Emirates Post, etc.);
- advertisement or notice shall be published in two local daily newspapers (one of which issued in Arabic) for a period of least 45 days; and
- the appointed liquidator should prepare and submit a liquidation report to the relevant licensing authority.

Upon the completion of the liquidation process and submission of the liquidation report by the liquidator at the relevant licensing authority, the latter will issue a liquidation certificate announcing the completion of the liquidation and closure of the company.

Liability and other legal Implications

Practically speaking, and taking into consideration the above, a company can be deregistered without going through a liquidation process, and more specifically without appointing a liquidator who would be obliged to notify the creditors and prepare a liquidation report.

Dissolution and the appointment of a liquidator

The absence of a liquidator, and consequently the liquidation report in the deregistration process, raises the question of whether the appointment of a liquidator, and more generally the adoption of the dissolution and liquidation steps, will still be required even if the company is deregistered.

Pursuant to Article (308) of the 2015 law:

> *"The liquidation shall be conducted by one or more liquidators appointed by the partners or under a Decision by the General Assembly or any other similar body, provided that the liquidator is not an auditor of the company at the time being or has already audited its accounts within five years preceding the appointment".*

A question about the roles and liabilities of the mangers and shareholders of the company is also raised, as well as the role of the licensing authority and the extent of its intervention in the liquidation activities that can be initiated before or after the completion of the deregistration. It is worth mentioning that certain liquidation actions cannot be completed without the authority's permission, for instance the publication in a newspaper, as the request for publication should be sent to the relevant newspaper via the concerned licensing authority.

Notification of the creditors of a company

During the liquidation process the liquidator should arrange for a publication as per Article (316) of 2015 law, which states the following:

> *"All the debts payable by the company shall become immediately outstanding upon its dissolution. The liquidator shall notify all the creditors by registered letters with acknowledgment of receipt of the commencement of the liquidation, inviting the creditors to present their claims. The notice shall be published in two local daily newspapers; one of them is issued in Arabic. In all events, the notice of liquidation shall include a period granted to the creditors for at least 45 days from the date of the notice to present their claims".*

Deregistration does not require the creditors to be notified, and hence a question may arise in relation to the liability of managers and shareholders towards the creditors of the company after deregistration. Therefore, the deregistration route should be followed with due caution, in order to avoid a situation where shareholders and mangers may remain liable to any creditor(s) or third party(ies).

Conclusion

The deregistration concept originated from general procedural practice adopted by various licensing authorities in the UAE.

The deregistration path can be understood as a route to facilitate the cancellation of a licence of a limited liability company and ensure its closure in the fastest way possible, leaving the decision about the dissolution and liquidation formalities to the shareholders to decide upon based on the circumstances of the company. However, special consideration should be given to the fulfilment of the notification and publication requirements during the transaction; otherwise the managers and shareholders of the company may remain liable for any (or all) debts related to the business.

For further information, please contact Ali Bachrouch (a.bachrouch@tamimi.com) or Odai Mismar (o.mismar@tamimi.com).

Keep calm: Invest Saudi

Hesham Al Homoud
Partner, Head of Corporate Structuring - KSA
Riyadh, Saudi Arabia
h.alhomoud@tamimi.com

These are challenging times to consider investment. The impact of COVID-19 will be profound. The pandemic comes at a time of significant change in the Saudi investment ecosystem. This article will look at those key changes in institutions and personnel, and see how the new regime is facing up to the current challenge of global pandemic.

Key institutional change

Consistent with the aims of Saudi Arabia's Vision 2030 to build a vibrant society, a thriving economy and an ambitious nation, 'Invest Saudi' is the strapline for the Kingdom's marketing campaign encouraging global investors to include Saudi Arabia in their investment plans. Recent changes have seen the Saudi Arabian General Investment Authority ('SAGIA') morph into a fully constituted ministry of state: the new Ministry of Investment or 'MISA' as it will become known.

SAGIA had already undergone a significant sea-change in its role in 2018, developing from being a licensing 'gate-keeper' to adopting a role of investor champion: it will now will be able to offer that 'One Stop Shop Service' with the authority and weight of a fully-fledged ministry. The new ministry will continue to deliver the three investment stages identified by SAGIA:

- prior to setting up the investor's business, to help investors to build their business case, providing them with market information and facilitating working relationships with all governmental entities;
- during setting up of the investor's business, to assist in navigating through the professional ecosystem of Saudi; and
- post setting up, if there is any regulation that slows down the foreign investor's growth, to work to change or replace that regulation after carrying out the root-cause analysis.

This new evolution emphasises the pivotal role of foreign investment in delivering the thriving economy and gives the ministry genuine power to challenge and overcome regulations, customs and practices which may be inconsistent with the goals of Vision 2030. The investment principles of MISA are succinct:

1. *"Ensure equality between Saudi and non-Saudi investors, and among non-Saudi investors.*
2. *Ensure the protection of investments, in line with the Kingdom's regulations.*
3. *Enhance the sustainability of investments and deal with investor complaints in a transparent manner.*
4. *Provide investment incentives when needed and ensure full transparency when granting. Provide a list of investment incentives and grant them in accordance with general, clear and non-discriminatory criteria.*

The financial stimulus package of these initiatives reaches more than SAR 70 billion, which consists of exemptions and postponement of some government dues to provide liquidity to the private sector thereby enabling them to manage continuity of their economic activities. In addition, SAMA has announced a package of SAR 50 billion, to support the banking sector, financial institutions and SMEs.

5. *Maintain environmental and social standards in order to ensure that Saudi and non-Saudi investors comply with regulations regarding labor, health, and environmental safety in accordance with national regulations and policies and the international conventions in which Saudi has acceded.*
6. *Facilitate entry procedures for non-Saudi employees including technicians, administrators, and their dependents. Arrange their residency in the Kingdom to facilitate their participation in activities related to foreign investments in accordance with the Kingdom's regulations and its international obligations.*
7. *Transfer and localize science and technology resulting from foreign direct investment in accordance with the Kingdom's international obligations."*

At the same time as the creation of MISA, King Salman also decreed that the General Sport Authority would be transformed into the Sports Ministry with Prince Abdulaziz bin Turki bin Faisal as the new Sports Minister and that the Commission for Tourism and National Heritage would be transformed into the tourism ministry, with Ahmed al-Khatib as its minister. The emphasis on sport and tourism also chimes with Vision 2030's aims of seeing the economy diversify away from an over reliance on hydro-carbons.

Key personnel change

In a move which can only emphasise the strategic importance placed on MISA, Khaled Al Falih has been appointed as its first ever minister. Al Falih is well known and a hugely respected figure worldwide stemming in no small part from his former roles as Minister of Health, Minister of Energy, Industry and Mineral Resources and his stewardship of Saudi Aramco, the biggest company in the world. His experience and depth of vision are going to be key attributes in the newly minted MISA. As far back as 2012 he helped shape the agenda for the Davos World Economic Forum by writing that:

> *"Nations cannot achieve first-tier economic performance simply by producing and exporting goods. Rather, they must be able to create their own differentiating knowledge through investments in education, research and development and a vibrant entrepreneurial ecosystem."*

Nor did he ignore the environmental agenda which we face globally: from the same 2012 article:

> *"It would be a mistake to believe that environmental protection and economic growth are mutually exclusive. Instead, resource-rich states can take several actions that advance economic development and minimize environmental impact…by improving energy efficiency; utilizing cleaner fossil fuel technologies; consuming cleaner natural gas; moving industries down the value chain to add greater value and create higher-paying jobs while consuming less energy; reducing carbon emissions through the use of high-end technologies; and introducing renewables in a deliberate and pragmatic manner as their economic viability improves."*

The transformation of SAGIA into MISA is a highly significant step, illustrating how the Kingdom and its leaders are working to facilitate investment, overcome bureaucratic obstacles and maintain momentum in the reform programme. In the new Minister they have someone with a breadth of perspective and depth of experience who will rapidly make an impact.

COVID-19 pandemic

It is hard to imagine a more challenging start for the new Ministry and Minister. Within weeks of the announcement the economy was substantially locked-down. In what is a public health crisis it is entirely correct that the main emphasis has been placed on protecting and caring for citizens and residents: the Kingdom has prioritised health above all else and shown genuine leadership and compassion in so doing.

However, MISA has itself been pro-active in: (a) calming investors' fears; and (b) promoting common-sense practical solutions to the day-to-day challenges of the new environment. The latter manifests itself in a carefully thought through and well-presented publication on business continuity (available on the MISA website here).

The former is contained in a series of responses to 'frequently asked questions' which have been collated on the MISA website. These questions range from employment issues through to import/export and taxation issues. Perhaps the key element addresses the level of support available to the private sector which states the following:

> *"…the government has prepared urgent initiatives to support the private sector, especially small and medium enterprises and economic activities most affected by the virus. The financial stimulus package of these initiatives reaches more than SAR 70 billion, which consists of exemptions and postponement of some government dues to provide liquidity to the private sector thereby enabling them to manage continuity of their economic activities. In addition, SAMA has announced a package of SAR 50 billion, to support the banking sector, financial institutions and SMEs."*

These practical initiatives include the following:

- automatic three month extension for all resident's visas with a fee exemption (till the end of June 2020);
- enabling employers to refund the fees of issued work visas that were not used during the ban on entry and exit, even if they were stamped in the passport, or extend them for a period of three months without charge;
- enabling employers to extend exit and re-entry visas that were not used during the ban on entry and exit from the Kingdom for a period of three months without charge;
- enabling business owners, for a period of three months, to postpone the payment of value added tax, excise

tax, income tax, and the submission of Zakat declarations and the payment of obligations due therefrom. The decision also allows the grant of zakat certificates without restrictions for the period of fiscal year 2019, and to accept instalment requests to the General Authority of Zakat and Income Tax without applying the condition of advance payment;

- postponing the execution of services suspension procedures and financial seizure by the General Authority of Zakat and Income, and setting the necessary criteria to extend the postponement period for the most affected activities as needed;
- postponing the collection of customs duties on imports for a period of 30 days against the submission of a bank guarantee, for the next three months and setting the necessary criteria for extending the postponement period for the most affected activities as needed;
- postponing the payment of some government services fees and municipal fees due on private sector, for a period of three months, and setting the necessary criteria to extend the postponement period for the most affected activities as needed; and
- authorising the Minister of Finance to approve lending and other forms of financing as well as an exemption from payment of fees and returns on loans granted until the end of 2020, under the Corporate Sustainability Program initiative.

In addition to the immediate practical steps indicated above a committee headed by the Minister of Finance with members including the Ministers of Economy and Planning; Commerce; Industry and Mineral Resources, and the Governor of the National Development Fund has been established to take the initiative in:

- identifying and reviewing incentives, facilities, and other initiatives led by the National Development Fund or any of its funds and banks, with the aim of mitigating the exceptional and unprecedented economic situation, in light of the implications of the coronavirus, the impact of the precautionary measures taken by the Kingdom's government and the low oil prices;
- setting the criteria for designing and applying initiatives and their details;
- identifying the amounts that will be used to support these initiatives from the resources available at the funds and banks under the National Development Fund for this purpose and as needed; and
- conducting transfers between these funds and banks and the Saudi Export-Import Bank as needed.

We are a long way from fully understanding the 'new normal' that may emerge from the pandemic... in terms of institutions and personnel, Saudi Arabia can approach that task with well-founded confidence.

The committee may direct both the Kafala program and the General Authority for Small and Medium Enterprises to develop the necessary initiatives to provide support to business during this exceptional period, and to support them from the available resources as needed.

We are a long way from fully understanding the 'new normal' that may emerge from the pandemic. The Kingdom, in common with every other country, is facing up to this severe challenge. The immediate priority has to be sustaining good health for families, colleagues and workers. Balancing that imperative with the need to ensure a future thriving economy is a hard task: in terms of institutions and personnel, Saudi Arabia can approach that task with well-founded confidence.

For further information, please contact Hesham Alhomoud (h.alhmoud@tamimi.com) or Francis Patalong (f.patalong@tamimi.com).

New dawn for professional companies in Saudi Arabia

Hesham Al Homoud
Partner, Head of Corporate Structuring - KSA
Riyadh, Saudi Arabia
h.alhomoud@tamimi.com

Sultan Akbar
Associate
Corporate Commercial
Jeddah, Saudi Arabia
s.akbar@tamimi.com

Introduction

The pace of legislative and regulatory change in Saudi Arabia has accelerated in recent years keeping all manner of advisors busy understanding, applying and advising across a broad spectrum of innovations. The latest change, however, will have a direct impact on those very advisors. The new Professional Companies Law of 2020 ('PCL') represents a sea-change in how professionals will be able to constitute their businesses.

All governmental authorities in Saudi Arabia are tasked with improving the business ecosystem in Saudi Arabia in order to fulfil the ambitious goals of Vision 2030. The Ministry of Commerce has taken the lead on the PCL. It is anticipated that this law will have a significant impact on the foreign investment climate and market competition.

The previous law dates from 1991 and, given the pace of change in the intervening period, needed refreshing to accommodate the realities of business practice in this highly complex sector. The old law presented a number of challenges to modern business practice, many of which are resolved in the new PCL. In this article we will briefly explain the key drawbacks of the old law and survey the key features of the new law.

So what is a 'professional company'?

The PCL defines a professional company as:

> *"a civil company that operates independently, which is incorporated by an individual (or more) whom are licensed to legally carry out one (or more) profession, or with others, for the purpose of practicing professions."*

The concept of 'profession' in Saudi law is therefore focussed on business activities which require a professional licence granted by a legally recognised regulatory body. This would include legal, audit, accounting, engineering and any other activities of a similar nature.

Drawbacks in the old law

The old law had a limited number of options when it came to the structure of the professional company: the sole permitted structure was a partnership. Direct, joint and several liability of the partners was inevitable. In addition, only individuals licensed in the specific profession were permitted to participate and only one such licensed activity was allowed. There was also a distinct grey area as regards foreign investment and participation in these services. These constraints limited investment options and curtailed the ability to innovate in service offerings. The new PCL addresses these issues and provides a platform for innovation, investment and growth in the sector.

A new dawn

The PCL addresses many of the issues that had been challenging in the past and provides many new features, including such innovations as formation by way of limited liability and joint stock companies as well as major changes in terms of shareholdings, activities and succession.

The PCL allows licensed professionals to partner with either individuals or corporate entities. This should improve investment opportunities in professional companies, as previously this was not permitted. Consistent with the new Companies Law introduced in 2016, it is now acceptable for a sole practitioner to incorporate a single-member limited liability company. Indeed, the PCL indicates that if there is anything that is not specifically stated or indicated in the PCL, reference can be made to the Companies Law for clarification.

Different professional activities now can be merged into one company to foster innovation and enhance competition and this could, for example, include a professional company that can legally practice two (or more) objectives such as legal and auditing activities. This innovation will have a great impact on the market in terms of the variety and sophistication of services and, as a consequence, on competition.

Under the old law, the trade name of the firm was generally limited to the names of the partners. Creative names were difficult to obtain in most cases. This has now been rectified and creative trade names are allowed and acceptable.

The PCL empowers the Minister of Commerce to mandate, in respect of certain activities, specific professional indemnity and other insurance policy requirements. Non-compliance will lead to penalties as stipulated in the PCL. The introduction of this insurance underwriting for regulated activities will provide clients of these companies with greater assurance and will require regulated professional companies to carefully review their risk management strategies with their insurance providers.

The maximum permitted percentage of non-professionally licensed shareholding is 30 per cent.

The new law addresses, in detail, scenarios where a practitioner's licence is temporarily suspended or revoked by the licensing authority. The consequences can include a total shutdown of the company within six months in cases where the relevant practitioner is the only practising partner or, if there are other partners or shareholders, the ability to continue trading conditional on the exit of the relevant individual or with their continued participation on a non-licensed basis as provided in the company's Articles.

Succession is generally a complex issue under Saudi law. The old law did not allow the inheritors of a deceased practitioner to continue his or her interest in the partnership. The rule was that the share would be evaluated and a cash sum paid to the heirs. The PCL allows heirs to inherit shares (in a limited liability company) and maintain an interest in the business: although clearly it will be a matter for the parties to determine the detail around how this works in practice (having regard, in part, to the threshold on non-professional participation discussed below).

The implementing regulation for the PCL has also recently been issued and provides further detail on key issues. For example, the implementing regulation provides that the maximum permitted percentage of a non-professionally licensed shareholding is 30 per cent.

There must also be a minimum 25 per cent Saudi participation in any professional company which includes foreign entities as participants.

The implementing regulation also provides detail on the constitution of multi-disciplinary practices.

For a professional company to carry out more than one activity the following criteria must be met:

1. non-objection by the relevant authorities;
2. the combination of the shareholders should include licensed practitioners in each of the activities the company is wishing to carry out;
3. there is no objection in the regulations that prohibit these specific activities to be jointly carried out in the same company or partnership; and
4. satisfying the requirements and obligations of the competent authorities in relation to the incorporation of any company or partnership that wishes to carry out more than one professional activity.

The implementing regulation also addresses the incorporation process and other governance and compliance matters such as partner or shareholder resolutions, publications, management and supervision of authorities.

Future developments

Although the implementing regulation gives the Minister of Commerce and the relevant professional authorities' discretion over the list of activities that are allowed to be jointly practised we anticipate that will include accounting and legal services, management consultancy and possibly audit services. The list may be much more extensive in scope in the future, but will need to balance considerations such as conflicts of interest (perhaps especially in the nexus between advisory and audit functions).

Needless to say, each profession has a regulator: legal services are regulated by the Ministry of Justice; engineering services are supervised by the Council of Engineers; the auditing and accounting services are under the Saudi Organization for Certified Public Accountants. Each of these regulators will rightly view themselves as custodians of the integrity of any given profession and will now have to collaborate in developing an increasingly consistent approach to issues such as professional ethics and governance.

It is now acceptable to incorporate a sole partnership limited liability company by a licensed practitioner.

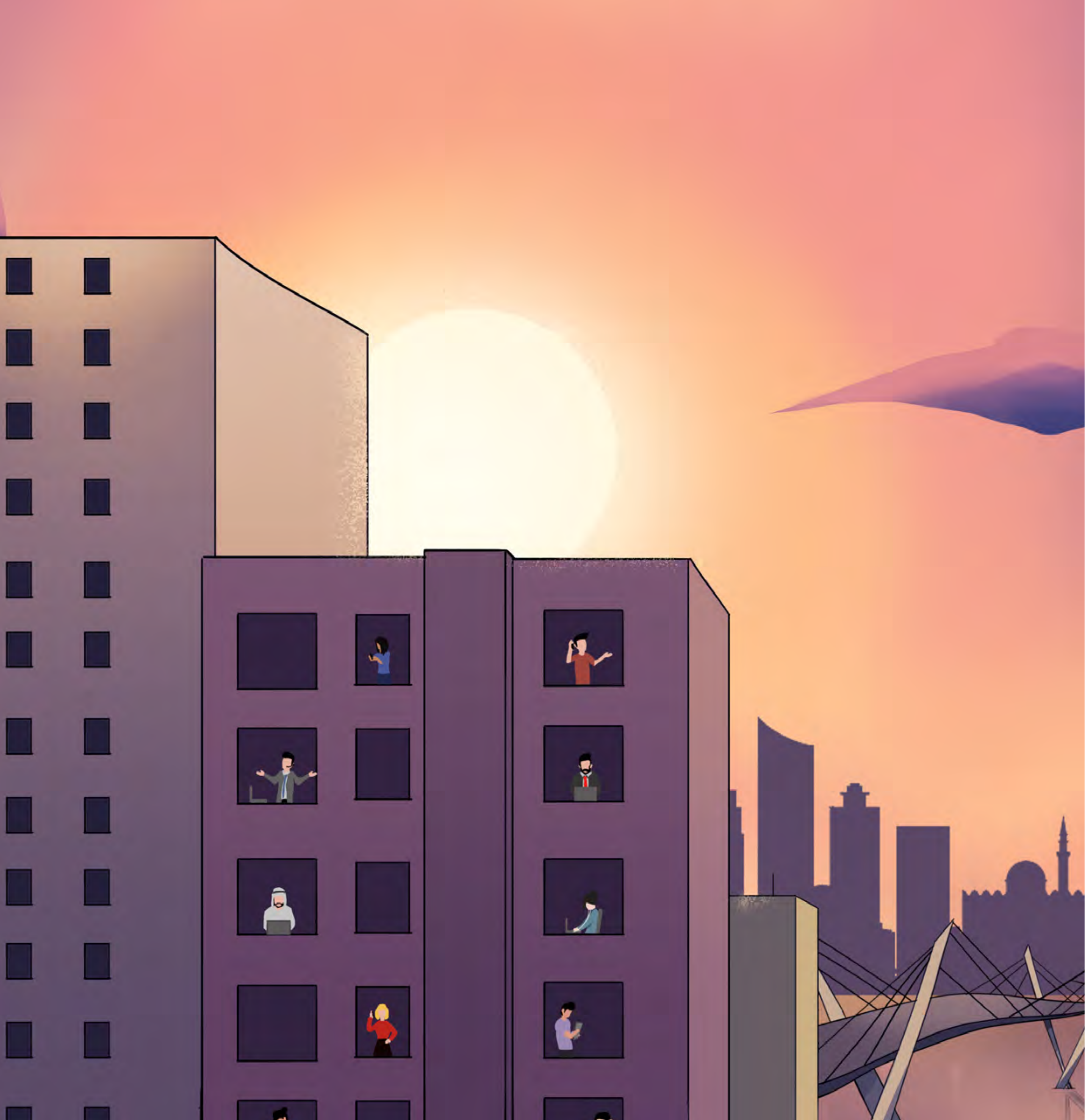
Conclusion

The new PCL is going to improve the general options of the legal structures of professional companies and provide more options to investors. The law introduces a new methodology for professional companies which is going to lead the long awaited change.

The new law will affect the overall market for professional companies. In the long run there will be significant implications for clients and practitioners alike, with a higher level of supervision imposed over companies and more options for their clients from which to choose. Practitioners can now also have investors supporting them in their company, providing not only financial support but an external understanding of the market which as a result will affect the practice of the company in a positive way.

For further information, please contact Hesham Alhomoud (h.alhmoud@tamimi.com), Sultan Akbar (s.akbar@tamimi.com) or Francis Patalong (f.patalong@tamimi.com).

The future of technology in corporate structuring



Khaled Saqqaf
Partner, Head of Office – Jordan & Iraq
Corporate Commercial
Amman, Jordan
k.saqqaf@tamimi.com

Thamer Shomar
Trainee Lawyer
Corporate Structuring
Amman, Jordan
th.shomar@tamimi.com

Introduction

The corporate structuring environment in Jordan currently does not utilise any online platforms for conducting general 'bread and butter' activities such as incorporation of entities or depositing agreements and documents at the Ministry of Industry, Trade and Supply. Therefore, most matters which involve a governmental authority require the physical presence of someone who can submit hard copies of all the necessary documentation.

However, the recent physical closure of non-essential governmental authorities in Jordan has led to an emphasis on the importance of a functioning online platforms to conduct regular corporate practices without the need to physically attend Ministries or Commissions. Currently, there are some systems for online applications (such as incorporation of entities) however, all of them, at some stage in the process, require physical presence at a governmental authority, which ultimately defeats the purpose of the online application.

Technology in the future of corporate legal practice

In recent years, technology has assumed increasing importance in the corporate world. This is because public and private entities, in many countries, are starting to conduct many legal activities online in order to improve efficiency. In Jordan this drive for technological advancement has been spearheaded by the Ministry of Digital Economy and Entrepreneurship and the Telecommunication Regulatory Commission which has been working at an accelerated pace to produce functional platforms for online activities. Main examples of such platforms include improving the use of Virtual Wallets for both natural and juristic persons. This platform was developed to facilitate the payment of incorporation fees and the deposit of share capital fees to the Ministry of Industry, Trade and Supply prior to incorporation. As time is generally of the essence, it is vital that advisors be able to complete the incorporation of entities efficiently and in an expeditious manner.

Further, deregistration of existing entities in Jordan is a complex matter that is time consuming and requires documents to be obtained from multiple governmental authorities such as the Income and Sales Tax Department and the Social Security Corporation. This process could be expedited by creating a platform for entities to deregister online, specifically by allowing online applications to the relevant governmental authorities and the payment of any fees online using the said Virtual Wallets.

The current technological advances taking place in Jordan may not seem of much importance in the short term however, they are likely to pave the way for a more integrated online presence for corporate legal

A focus on protecting our clients and advising them on the dangers of the increased use of technology will be imperative when entering into a more technologically driven corporate legal environment.

practice and corporate structuring. Given the prominence that the Ministry of Digital Economy has gained together with the shift in Jordan's corporate culture in accepting the use of technology in everyday commercial activities it is hoped this will lead to a better understanding of how technology is essential to a more efficient corporate environment.

The downsides of technology

In light of the above, it is worth taking into account the disadvantages of a sudden increased use of technology in the general corporate environment and corporate structuring matters. These mainly relate to data protection and cybersecurity.

As at the time of writing, Jordan does not have general data protection legislation that protects both natural and juristic persons however. there is a draft law being studied by Parliament which is expected to be ratified at some point in the near future. The lack of a data protection law would become an issue if, with the increased use of technology, personal and corporate information will be required to be submitted to several parties and access to this information could be abused. It is important for corporations to be assured their sensitive information (e.g. financial and shareholder information) remains confidential. Unfortunately, in the absence of a formal data protection law the lack of training and understanding of employees in the public sector regarding the technology and the importance of protecting the data of applicants is likely to pose potential problems.

In relation to cybersecurity, this area is regulated in Jordan by the Cybersecurity Law, No. 16 for the year 2019, and the governmental authority responsible for monitoring cybersecurity is the National Center for Cybersecurity which was recently formed pursuant to the National Center for Cybersecurity Regulation, No.1 for the year 2020, which was published in the Official Gazette on the 20th of January 2020. Al Tamimi & Company noticed the increased importance of this area and set up a Cyber-Crime Task Force in the second half of 2019. Therefore, a focus on protecting our clients and advising them on the dangers of the increased use of technology will be imperative when entering into a more technologically driven corporate legal environment.

Conclusion

It will be difficult to predict the effect that the current surge of online governmental platforms will have on the future of corporate structuring in Jordan. However, it is increasingly apparent that it will include technological advances that our team will need to utilise for the benefit of clients. The corporate lawyer will be required to have a thorough understanding of data protection and cybersecurity in order to properly navigate this new technology driven corporate environment.

Furthermore, meeting the needs of the client through online platforms to the relevant governmental authorities will require continuous monitoring of the application process to ensure that everything is being handled correctly.

Ultimately, technology is becoming an unequivocally important part of being a corporate structuring lawyer and this will require the team to keep up with all technological advancements, while simultaneously understanding the pitfalls of the increased use of such technology.

For further information, please contact Khaled Saqqaf (k.saqqaf@tamimi.com).

Developments: stimulus offering due to COVID-19

Izabella Szadkowska
Partner
Corporate Structuring
Dubai, UAE
i.szadkowska@tamimi.com

Noff Al Khafaji
Senior Associate
Corporate Structuring
Dubai, UAE
n.alkhafaji@tamimi.com

Introduction

After a period of confinement, on 26 April 2020, subject to certain specific restrictions, DIFC entities were allowed to recommence their operations. In particular, offices were allowed to open (with a maximum of 30 per cent of the workforce being allowed to work from office premises) provided that they comply with social distancing and public health procedures.

Although no sales or promotions were permitted, a number of retailers were able to open their doors to customers.

With the objective in mind of making sure the business environment of the Dubai International Financial Centre remains relevant and attractive in the ever-changing world of today, the DIFC has been working on numerous initiatives, over the past months.

Whilst some are aimed at expanding the Prescribed Companies regime, the others concern certain technical aspects of the DIFC businesses' journey in the context of the DIFC portal experience.

Early this year, the Management of the DIFC Authority was faced with the challenges posed by the outbreak of COVID-19.

On one hand, HR teams of DIFC businesses were receiving enquiries from their employees about the measures the businesses planned to adopt in order to protect the health and safety of their staff. On the other hand, managers of those same businesses were starting to realise they may not be able to achieve financial targets for their organisations and may be forced to adopt certain emergency measures to secure business continuity and often, survival, of their organisations.

The DIFC Authority made it a priority to look into its legal framework and propose changes to its regulations with the aim of easing the financial and operational burden on DIFC businesses.

We share highlights of those changes below.

DIFC fiscal easing measures

Due to the impact of COVID-19 and in line with the UAE Government's efforts to support businesses, the DIFC introduced a number of fiscal easing measures on 31 March 2020 to assist DIFC business throughout the period of April 1 2020 – June 30 2020 ('Timeframe'), which are as follows:

Deferred payment on all leases

The DIFC has provided an opportunity to defer rent payments for three months on a six-month payment plan for all DIFC leases entered into with DIFC Investments Ltd. This covers offices within the Gate Building, Gate District Building 2 to 5, Gate Village Buildings 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11 and Gate Avenue.

Full waiver of annual licensing fees for new entities

The licence and registration fee has been waived for new registration applications submitted during the Timeframe.

Licence renewal fee discount

For all existing DIFC entities, the licence renewal fee will be reduced by 10 per cent during the Timeframe. This discount only applies to the licence fee and does not apply to Data Protection fees and DFSA fees (if applicable).

Reduction on fees for property registration from 5 per cent to 4 per cent for three months

Transfer fees for any sale or purchase of property within the Timeframe will be reduced from 5 per cent to 4 per cent provided that the transfer is registered with the DIFC Registrar of Properties, at the latest, within 30 days after the expiry of the Timeframe.

Free movement of labour

Employees are able to freely move in and out of the DIFC to other free zones, so long as the employers concerned have the necessary arrangements and contracts in place with their employees and a request to transfer the visa or issue a seconded access card is submitted to DIFC Government Services and adheres to DFSA's requirements (where it applies).

New DIFC client portal and process

The DIFC has revamped its client portal to ease the way in which new and existing DIFC entities conduct business.

The key developments are:

Agent account

The introduction of the agent account allows users to have one set of login details to manage the DIFC portal account of multiple DIFC entities.

Super user

Super users have the ability to grant access to an individual to have access to the DIFC portal account without the need to gain approval from the DIFC Registry Services. In the case of adding or removing a super user, the authorised signatory of the DIFC entity would need to provide their approval.

New entity name availability

This new capability allows clients to verify available entity names either when establishing a new entity within the DIFC, or when changing an entity name post incorporation.

Initial approval and final registration both completed on the DIFC portal

This new development will streamline and simplify the application and registration process. In particular, incorporating shareholders, directors, UBO details need to be entered under this new application form only upon the initial approval request process. The information will automatically be generated under the registration application, without the need to provide it again at that stage (which was the case previously).

Initial approval for company structures

This functionality allows an applicant to obtain initial approval for a group of entities that form a structure such as Holding Company Structures without the need for filing a different initial approval form for each entity. It also that information of a repetitive nature, e.g. details of the same directors for more than one entity, does not need to be re-entered on the platform and will automatically appear on future applications.

Passport certifications

Certified passport copies of individual partners or shareholders or those of directors are only required at an entity's incorporation. Any post incorporation applications will be acceptable based on regular passport copies only; there is no need for certification of the passport copies.

The DIFC Authority made it a priority to propose changes to its regulations that would ease the financial and operational burden on DIFC businesses.

Constitutional documents to be signed electronically

Constitutional documents such as articles, charter or by-laws, partnership agreements etc. can now all be signed electronically via the DocuSign software.

Emergency measures: Directive No. 4 of 2020

Similarly, to the fiscal easing initiatives introduced to assist DIFC companies, the DIFC has also released Directive No. 4 of 2020 to provide emergency measures between 21 April 2020 and 31 July 2020 ('Directive') to provide flexibility and protection to employers and employees during this challenging time.

The objective of the Directive is to ensure that DIFC employers are able to make the necessary changes to their employees' terms of employment which will therefore minimise the risk of employees being terminated.

The measures available to DIFC employers under the Directive are, for example:

- reduced working hours;
- imposed annual leave;
- reduced remuneration;
- restricted workspace access;
- imposed remote working; and
- waivers of application of certain DIFC Employment Law No. 2 of 2019.

Under the Directive:

- DIFC employers should provide their employees with a five-day written notice before imposing any of the measures under the Directive;
- any employee of a DIFC entity who contracts COVID-19 or has been quarantined by the relevant authority to reduce the spread of the virus will still maintain full remuneration; and
- visa cancellations for terminated employees can be deferred, so that, e.g. the terminated employees could continue to benefit from their medical insurance coverage.

Prescribed company regime: expansion

The eligibility requirements to establish a prescribed company ('PC(s)') in the DIFC are now broader.

A PC can be incorporated by a qualifying applicant or with a qualifying purpose.

When the regime was introduced, the following categories were considered as qualifying applicants:

- authorised firm;
- fund;
- fintech entity;
- holding company;
- family office;
- private trust company;
- foundation;
- proprietary investment; and
- Government entity.

Going forward, the following categories of applicants will also be eligible to form a PC:

- non-retail DIFC entities (other than PCs);
- shareholders (body corporate or individual shareholders) and ultimate beneficial owners with a majority interest in a DIFC-based qualifying applicant;

- any Affiliates of a DIFC-based qualifying applicant; and
- family owned businesses that meet the definition of a Single Family under the DIFC Single Family Office Regulations and have a large presence in the UAE, that meets certain criteria (asset value, number of employees, space/sq ft in UAE).

Economic substance

In accordance with the Ministers Resolution No. 31 of 2019 concerning Economic Substance Regulations ('Resolution'), all DIFC entities must submit an economic substance notification by 12 June 2020 via the DIFC Client Portal, regardless of whether or not the DIFC company conducts a relevant activity under the Resolution.

The contents of the Resolution together with the supporting guidelines will assist DIFC companies in determining whether or not they are captured under the Resolution.

Under the current regime, each DIFC entity shall notify the DIFC Registrar of Companies by 12 June 2020, via their DIFC portal, if the Resolution applies to that entity.

For those entities that are, indeed, captured by the Resolution, the deadline for filing the economic substance report with the DIFC is 31 December 2020.

DIFC foundation and JAFZA vehicles

A DIFC foundation is a unique structure, with its own legal personality that is separate from its founder. Unlike a typical company, it has no shareholders or partners; rather it is 'self-owned'. A DIFC foundation allows the founder to separate their personal wealth from their commercial interest. Assets owned by the DIFC foundation become part of the founder's estate.

Despite some previously experienced challenges in utilising DIFC foundations under wider structures, DIFC foundations are now eligible to become a holder of shares in a company incorporated in the Jebel Ali Free Zone ('JAFZ'). This development is particularly interesting when it comes to succession planning and owning real estate within the UAE as a combination of DIFC foundations and JAFZA entities under a complex asset-ownership model allows parties to benefit from limitation of liability under a JAFZA vehicle while securing a succession planning mechanism under the DIFC foundation.

Assets owned by a JAFZA entity which, in turn, are then owned by a DIFC Foundation allows for the assets to be managed and controlled in a flexible and sophisticated common law jurisdiction.

Conclusion

In line with its vision of continuously developing to meet the dynamically changing needs of the business community, the DIFC has demonstrated commitment to and support for DIFC companies.

Enabling documents' execution in an electronic manner, the software upgrade that allows DIFC portals to be managed time-efficiently as well as the broadening of the eligibility criteria to form a PC are perfect examples of those exciting new initiatives.

At the same time, the DIFC has implemented various fiscal easing initiatives to nurture companies during this challenging time, along with new developments that ease the way in which companies operate within the DIFC. Some businesses will be able to benefit from office space rent reduction and possibly work out arrangements with their employees that will allow their financial position to remain relatively stable.

Although the challenges resulting from the pandemic are not yet behind us, the DIFC's measures have been welcomed by the business community and viewed as pain relief to those somewhat painful and bitter times.

For further information, please contact Izabella Szadkowska (i.szadkowska@tamimi.com) and Noff Al Khafaji (n.alkhafaji@tamimi.com).

Managers and directors in the spotlight!

Omer Khan
Partner
Corporate Structuring
Dubai, UAE
o.khan@tamimi.com

Khadija Hussain
Associate
Corporate Structuring
Dubai, UAE
k.hussain@tamimi.com

Introduction

At the best of times managers are required to make difficult business decisions, In times as testing as these, such decisions become critical and consequently are likely to be the subject of heightened scrutiny by corporate regulators, creditors and shareholders. To ensure their decisions stand up to such scrutiny managers must be aware of their responsibilities and obligations.

In the UAE, the use of the terms 'manager', 'board of managers', 'director' or 'board of directors' are often used interchangeably, especially in cases of limited liability companies on the UAE mainland and in circumstances where express authority for a particular 'position' is not specified, and in most cases the extent of authority in favour of any one or more individual(s) is often left for the shareholders to decide.

In the UAE, there are various legislative sources that set out the responsibilities and liabilities of managers and directors which are applicable to companies located in the UAE mainland as well those companies incorporated in free zones.

Duties under applicable laws

The UAE Commercial Companies Law (2015) ('CCL'), the Civil Code and the Commercial Transaction Law set out the responsibilities of managers and directors via a combination of rules stating what managers and directors should do as well as what they may be personally liable for (and hence what they should not do), rather than simply relying on a general concept of fiduciary duties being owed by a director or a manager of a company. In all cases, managers and directors are generally required to: (1) act honestly and in good faith with a view to achieving the best interests of the company; (2) exercise the level of care, diligence and skill expected from a reasonably prudent person in similar circumstances; and (3) exercise their powers for the purposes for which they are conferred and in accordance with the relevant regulations.

When determining the scope of authority, regard should be had to the Memorandum and Articles of Association, contract of employment and/or power of attorney all of which should be considered within the parameters of the law. In the absence of any specific restrictions or authorisations in the law or otherwise the managers and directors have full capacity to manage the company and any such action shall be binding on the company. It is, therefore, essential to always be mindful of any limitations on the scope of the powers as to exceed any such limitations may expose a manager/director to a potential claim for breach of duty and hence personal liability.

Criminal and civil liabilities

The CCL sets out various penalties for breach of its provisions which shall be borne by whoever legally represents the company. Liability would extend to cover any losses or expenses incurred due to any improper exercise of power or contravention of the provisions of any law, the articles of the company, fraud or any gross error by a manager or director. Hence, to the extent that limitations to the scope of the powers have been exceeded, or misapplied such that that the company suffers damages as a consequence, personal liability of the manger or director in question may arise.

Further, it is always open to an aggrieved party to bring a civil claim against a manager or director who has breached any of the duties as a result of which losses have been sustained by said party.

In the event that such a person finds themselves in a position where he or she is uncomfortable with a course of action being proposed by a fellow officer, his or her objections should be recorded in writing either by a letter addressed to the other officer, or evidenced in the minutes of meeting.

It would be prudent to ensure that issues pertaining to related party transactions and conflicts of interest are closely considered and monitored, as participation in a business in competition with another company is generally prohibited, and conflicts of interest in relation to transactions of those companies should be disclosed, in order to mitigate the prospect of any criminal proceedings at a later stage.

How to reduce personal liability

Directors and managers should always act in what they reasonably believe to be the best interests of the company and within the confines of the instrument granting such authorisations.

> **Managers and directors should always act in what they reasonably believe to be the in the best interests of the company and within the confines of the instrument granting such authorisations.**

Conclusion

Managers and directors are liable to the company, its shareholders and third parties for all acts of fraud, abuse, negligence and mismanagement. Thus, it is essential that they always act within the scope of their prescribed authority, in a transparent and ethical manner and in what they reasonably believe to be in the best interests of the company. If they do so, they should be able to act safely and with the knowledge that their action(s) will not expose them personally to the risk of civil or criminal sanctions.

For further information, please contact Omer Khan (o.khan@tamimi.com) or Khadija Hussain (k.hussain@tamimi.com).

UAE foreign direct investment law: recent developments

Sherif Rahman
Partner
Corporate Structuring
Dubai, UAE
s.rahman@tamimi.com

Gulsun Ozmen
Associate
Corporate Structuring
Dubai, UAE
g.ozmen@tamimi.com

The UAE has emerged as a major access point for foreign investment in the region. Global investors are using the UAE as a platform to enter the wider region. The growth in foreign direct investment in the UAE has led the Government to enhance its efforts in building a sustainable and diversified economy.

In line with the various initiatives to encourage foreign investment in the UAE, His Highness Sheikh Khalifa bin Zayed Al Nahyan issued the Decree Law No 19 of 2018 ('Decree'), which permits 100 per cent foreign ownership of local businesses by global investors in the UAE mainland to increase Foreign Direct Investment ('FDI') in the UAE.

The Decree prescribes a negative list which consists of sectors in which foreign investors cannot own more than the legally prescribed registered shares ('Negative List'). The Negative List includes the following activities:

1. exploring, prospecting and producing the petroleum;
2. investigation, security, military sectors, and manufacture of weapons, explosives, military equipment, devices and uniforms;
3. banking and financing activities;
4. insurance services;
5. Hajj and Umrah services;
6. water and electricity services;
7. services related to fisheries;
8. post, telecommunication and audio-visual services;
9. services of land and air transport;
10. printing and publishing services;
11. commercial agent services;
12. medical retail trade such as private pharmacies; and
13. poison centres, blood banks and quarantine centres.

While prescribing a Negative List, the Decree also proposes a Foreign Direct Investment Committee ('Committee'), to be formed pursuant to a resolution by the UAE Cabinet ('Cabinet'), with the responsibility of recommending to the Cabinet, sectors and activities in which foreign investors may be permitted to own up to 100 a per cent registered shareholding.

On 2 July 2019, the Cabinet issued a resolution approving a positive list, which includes permitted sectors and activities for FDI pursuant to the Decree and covers 122 main activities categorised into numerous sub-activities, in the agriculture, manufacturing, education, health and services sectors ('Positive List').

The Cabinet delegated the implementation of the Positive List to relevant corporate regulators in each Emirate of the UAE, which is effectively the Department of Economic Development ('DED') in each Emirate.

On 17 March 2020, the Cabinet issued Cabinet Resolution 16 of 2020 Concerning The Determination of the Positive List of Economic Sectors and Activities Eligible for

In line with the various initiatives to encourage foreign investment in the UAE..... Decree Law No 19 of 2018 was issued... permitting 100 per cent foreign ownership of local businesses by global investors in the UAE mainland.

Foreign Direct Investment and Percentage of their Ownership which sets out the activities included in the Positive List which finally paved the way for its publication in the Official Gazette on 31 March 2020 and came into force in the UAE.

Applications pursuant to the Positive List are currently being accepted by the DED in Dubai and Ras Al Khaimah ('RAK'). The DED in Abu Dhabi did accept a few applications however, for now, it has suspended the same until the upgrade of its IT system can accommodate that applications to be filed online. The other Emirates have not, as of yet, commenced receiving FDI applications under the Positive List. The DED in Dubai and RAK are the only two Emirates that have approved applications and in both instances Al Tamimi & Company assisted its clients to get these approvals.

Frequently asked Questions

Who should apply for an exemption under the Decree?

The aim is to target large companies that are able to positively influence the UAE's economy.

Can existing companies benefit from the Decree?

A foreign investor can submit an application to convert his/her existing company to a FDI company or incorporate a new company, subject to the FDI committee's approval.

How can an application be made?

An application can be made to a committee (currently sitting in the DED) alongside any supporting documentation that the committee may request such as:

1. yearly consolidated turnover of the foreign investor(s)' group entities;
2. individual audited financial reports of the significant companies in the group;
3. copy of the companies' lease agreements (if any);
4. the number of the employees in the UAE and other countries (otherwise, the projected number of staff that the company will have once incorporated in the UAE and the number of subsidiaries that the foreign investor has worldwide);
5. in terms of UAE companies, total salary of the employees and total expenses' amount (if any);
6. future investment plans in the UAE and generally;
7. a request letter for the application; and
8. the prescribed application form.

It is understood that the reason behind requesting the aforementioned documents is that the committee is looking for evidence of the foreign investors' financial capabilities in UAE, the country of origin and globally.

How much is the required minimum foreign capital?

The Decree defines the foreign capital as fixed assets and intangible rights, such as concession rights, patents, trademarks and trade names owned or registered in accordance with the laws and regulations applicable in the UAE.

The Positive List includes a specific value of capital for each sector. As such, investors are required to submit financial statements and auditors' reports as evidence of their financial capabilities.

Is the FDI approval only for 100 per cent ownership?

No, it is at the committee's sole discretion. The application may be approved to allow up to 100 per cent foreign ownership. There are instances in which the committee granted 75 to 80 per cent foreign ownership to the foreign investors.

The growth in the foreign direct investment in the UAE has led the Government to enhance its efforts in building a sustainable and diversified economy.

Is a local service agent required?

Although the Decree does not require the appointment of a local service agent, the DED in Dubai requests FDI companies appoint a local service agent that will not have any authority to manage, operate or interfere in the business of the company. Such local service agent will not acquire any rights or interests in the company and will simply provide services on matters that concern federal and local government departments such as fulfilling immigration requirements on the company's behalf in return for a fixed annual fee. The agent cannot claim any rights over the assets of the company during its operation of after liquidation.

Licensing

The applications are reviewed by the committee in DED on a case-by-case basis. Where an application meets all the conditions and procedures set out in the Decree, the foreign investor will be able to incorporate a new FDI company or convert his existing company into an FDI company based on the committee's approval.

As the approval will be granted to a limited liability company, a minimum of two shareholders are required either of which can be corporate entities or natural persons.

For further information, please contact Sherif Rahman (s.rahman@tamimi.com) and Gulsun Ozmen (g.ozmen@tamimi.com).

Corporate Structuring related developments in the Kingdom of Bahrain: spring round-up

Rad El Treki
Head of Corporate Structuring - Bahrain
Manama, Bahrain
r.eltreki@tamimi.com

Yara Frotan
Trainee Lawyer
Corporate Structuring
Manama, Bahrain
y.frotan@tamimi.com

Zaina Albuainain
Trainee Lawyer
Corporate Commercial
Manama, Bahrain
z.albuainain@tamimi.com

Subsequent to the emergence of the Novel Coronavirus ('COVID-19') global pandemic, the Kingdom of Bahrain has implemented swift and decisive measures which seek to protect the health of the population of Bahrain, whilst also mitigating the impact of the pandemic on economic growth in the Kingdom. The measures also demonstrate the government's continued support of the private sector's role in the local economy and its commitment to minimise the legal and/or financial obligations of businesses operating in Bahrain.

In this article we provide a brief summary of some of the key ministerial decisions and resolutions which have been passed, clarifications issued, and amendments made to existing laws aimed at achieving the above stated objectives.

Shareholder meetings: videoconferencing facilities

Commensurate with the global emphasis on social distancing, the Minister of Industry, Commerce and Tourism passed Resolution No. 26 of 2020 allowing commercial companies to hold shareholder meetings via electronic or telephonic means of communication ('Decision'). Meetings may also be held by circulation if the number of shareholders does not exceed ten.

The usual requirements applied by the Ministry of Industry, Commerce and tourism ('MOICT') in relation to the holding of shareholder meetings via electronic means of communication is that this is only permissible in the event that the Articles or Memorandum of Association of the commercial company clearly and explicitly provide for the same. The Decision however, allows all commercial companies, for a period of three months from 8 March 2020, to hold their shareholder meetings via electronic means, even if a company's Articles or Memorandum of Association do not expressly provide for the holding of meetings by such means.

The Decision lists the requirements of the MOICT in order to render such shareholder meetings valid. Requirements include: (i) submission of the reasons and justifications for holding the meeting via electronic means of communication; (ii) verification of the identity of the participants of the meeting (and the validity of any power of attorney, if applicable); (iii) enabling the attendee to participate fully in the meeting as if such attendee were physically present at the meeting venue; and (iv) correctly recording any statement or vote or decisions taken during the meeting. The provisions of the Decision do not apply to decisions requiring secret voting in accordance with the provisions of the Commercial Companies Law.

As we approach the so called Annual General Meeting season in Bahrain, the above mentioned measures will offer considerable reassurance to many corporate entities, by providing them with the means to remain compliant with their legal obligations in the circumstances.

Extension of the deadline to submit the economic substance rules annual return form

The MOICT previously issued Resolution No. 106 of 2018 ('Resolution') regarding the requirements for validating the actual economic substance of entities' activities in the Kingdom of Bahrain, prescribing the requirements to be met by entities in Bahrain in terms of economic substance in Bahrain ('Rules'). Following the issuance of the Resolution, the MOICT published detailed guidance notes that serve as a preliminary guide to relevant entities on the scope and application of the Rules ('Guidance Notes').

In brief, the Rules and Guidance Notes apply to commercial entities in Bahrain which engage in the following commercial activities ('Relevant Entities'): distribution and service centre activities; headquarters activities; holding company activities; leasing activities (other than those activities undertaken by licensees of the Central Bank of Bahrain); shipping activities; and intellectual property activities in Bahrain.

Amongst other obligations, as per the Guidance Notes, all Relevant Entities are required to file an Economic Substance Rules Annual Return Form ('ESR Annual Return') with the MOICT within three months of the Relevant Entity's financial year end. This meant that for Relevant Entities with a financial year that ended on 31 December 2019, the ESR Annual Return should have been submitted to the MOICT by 31 March 2020.

In light of the spread of COVID-19, and as a means to providing more flexibility to the Relevant Entities, the MOICT has extended the deadline for Relevant Entities to submit the ESR Annual Return until 30 June 2020. Whilst the MOICT online system (Sijilat) is not currently accepting online submissions of the ESR Annual Return, the MOICT is accepting submissions by way of hard copy submissions in person at the MOICT, as well soft copy PDF submissions by way of email. We anticipate that the MOICT online portal will have been updated to accept online submissions of the ESR Annual Return by the extended deadline of 30 June 2020.

Suspension of Labour Market Regulatory Authority ('LMRA') fees

The LMRA typically imposes administrative fees on employers in Bahrain, including the following:

1. fees for issuing and renewing all types of work permits;
2. monthly work fees in relation to (1) above; and
3. enhanced fees for employers not compliant with the required Bahrainisation rate(s).

In support of the private sector, Resolution No. 5 of 2020 on the Exemption of Some Fees Imposed by the LMRA was passed. As a result, effective from 1 April 2020, the above fees are to be waived for a period of three months, as part of the government's efforts in combating the economic effects of COVID-19. The Resolution further clarifies that, where an employee relocates to another employer during the months of April, May or June, the new employer will compensate the previous employer for any fees for the remaining period of the permit.

Three-month salary payment scheme for Bahraini employees

As part of the 4.3 billion Bahraini Dinars (approximately US$11.4 billion) economic stimulus package announced by the Ministry of Finance and National Economy ('Ministry of Finance') to support citizens, residents and businesses in the Kingdom, the government recently approved a bill to cover the salaries of all Bahraini employees in the private sector who are registered with the Social Insurance Organisation ('SIO'), which will be paid from the Unemployment Insurance Fund. The funding is expected to support more than 100,000 Bahraini employees in the private sector.

The payments, which will be made directly to the relevant private companies, will cover the relevant employees' wages for the months of April, May and June. The salaries will be calculated after deducting the SIO contributions payable by employers, and will have a cap of four thousand Bahraini Dinars (approximately US$10,600); where an employee's salary exceeds the cap, the employer has the discretion as to whether or not to pay the rest of the amount. The mechanism of the pay-out to ensure that payments made are exact and timely is still in the process of being finalised by the Ministry of Finance, SIO, and the Information and eGovernment Authority.

Amendment to Article 284(a) of the Commercial Companies Law No. 21 of 2001 ('CCL') – use of shareholder proxies

Whilst not directly related to the COVID-19 pandemic, Law No. 6 of 2020 was issued, amending paragraph (a) of Article 284 of the CCL relating to the use of proxies at shareholder meetings.

It is worth noting that paragraph (a) of Article 284 was previously amended in 2018. The article previously stated that a proxy shall represent no more than one partner, and was amended in 2018 by removing the reference to a proxy representing more than one partner.

The article, as amended now, provides that each shareholder shall have the right to attend the meetings of the general assembly either in person or by way of a proxy, provided that the proxy shall not be a member of the control board or the company's manager, or a company's employee.

Additionally, the amendment clarifies that the proxy attending on behalf of a partner must clearly have a written power of attorney prepared by the company for the specific purpose of attending such meeting.

The remainder of the article remains unchanged (whereby each shareholder is entitled to exercise a number of votes equal to the shares he or she owns in the company)

Conclusion

The measures implemented by the Government of Bahrain are to be commended in seeking to protect the general public whilst also easing the burden placed on businesses by the unprecedented circumstances which have culminated as a result of the COVID-19 Pandemic.

In light of the uncertainty behind the longevity of the virus in the Kingdom, it remains unclear whether the decisions and resolutions mentioned in this article will be renewed by the government to cover the months beyond June 2020. However, given the extremely pro-active and decisive approach taken by the government to date, we anticipate that additional clear guidance will be issued by the government in a timely and complete manner as developments continue to unfold.

For further information, please contact Rad El Treki (r.eltreki@tamimi.com).

Oman's new foreign investment law

Arif Mawany
Senior Associate
Corporate Commercial
Muscut, Oman
a.mawany@tamimi.com

Oman's new foreign capital investment law ('FCIL') is now in force and repeals the previous law that was passed in 1994. This article takes a brief look at a number of progressive changes to the inbound investment regime in Oman.

Full ownership

The key structural highlight of the FCIL is the recognition that foreign investors may wholly own investment projects in Oman. An investment project is defined as *"an economic activity established by a foreign investor, whether individually or together with an Omani partner"*. The investment project must be conducted through a company in one of the categories of permitted activities and the share capital invested into the company can be wholly owned by the foreign investor. The FCIL requires new foreign investors to provide a short economic feasibility study of the business that they expect to carry out in Oman. The requirement to prepare a feasibility study has been introduced to provide comfort to the Government that the business activity is considered viable and likely to be of benefit to both the investor and the Omani economy.

Equal treatment, preferential treatment

The FCIL further provides that the investment project has all of the incentives that 'national projects' enjoy under Omani law. This is a key development and suggests foreign companies will be placed on an equal footing with local/ Omani companies; this could alter the way in which foreign companies are currently perceived, particularly with regard to public tendering and Omanisation requirements and new foreign investors may now be able to access favourable terms for debt finance from the domestic banking sector. The FCIL also opens the door for the Cabinet of Ministers to issue a resolution to provide preferential treatment for foreign investors, in a manner that is similar to the way in which US investors are currently afforded reciprocal treatment under the US-Oman free trade agreement.

Importation regime

The FCIL expressly permits the investment project to import (by itself or a third party) products through the border of Oman without registering itself with the registry of importers. This is a key benefit and will be an improvement on the current regime which generally requires the engagement of agents and distributors. The new regime is also likely to assist with alleviating the complexities associated with licensing and cross licensing with other Ministry bodies.

Other guarantees and benefits

Various forms of comfort to foreign investors have been baked into the FCIL. These include:

1. freedom to remit proceeds of the investment project, proceeds of sale or liquidation and court settlement amounts;
2. a restriction on expropriation of the investment project's assets; and
3. freedom to transfer the shares or assets of the company that runs the investment project.

An additional highlight from the FCIL relates to the licensing procedure. The FCIL now requires the body that is responsible for issuing foreign investment applications to simplify the licensing process and commit to specific timelines in relation to issuing those approvals.

The FCIL further provides that the investment project has all of the incentives that 'national projects' enjoy under Omani law. This is a key development and suggests foreign companies will be placed on an equal footing with local/ Omani companies.

Supporting regulations and impact of COVID-19

Regulations that provide more detail on the scope of the FCIL were expected during 2020. Those regulations are intended to confirm the business sectors that would not be available for 100 per cent foreign ownership. Other areas that would be expected to be covered by those regulations include the minimum share capital (if any) to set up a foreign investment company, licensing requirements and any other restrictions and benefits. However, due to the various measures taken by the Government to curb the effects of COVID-19, those regulations are likely to be delayed. It is pertinent to note that the Ministry of Commerce and Industry of Oman is already accepting applications from foreign investors under the new law in all but a very limited range of business activities so the FCIL is already being implemented in the absence of those regulations.

How can foreign investors apply?

As noted above, the Ministry of Commerce and Industry is accepting applications from new foreign investors although it is likely that these applications will be delayed significantly in the current climate. Existing foreign investors will be able to review their current arrangements and obtain the requisite consents to restructure their Omani businesses, unless those businesses are in a restricted category, in which case their current shareholding pattern must remain as is.

For further information, please contact Ahmed Al Barwani (a.albarwani@tamimi.com) or Arif Mawany (a.mawany@tamimi.com).

Corporatising the ownership of your assets

Georges Daoud
Senior Associate
Corporate Structuring
Abu Dhabi, UAE
g.daoud@tamimi.com

Nasouh Raslan
Associate
Corporate Structuring
Abu Dhabi, UAE
n.raslan@tamimi.com

In this article, we will explore why it may be better for an individual ('Owner') to 'corporatise' the ownership of their assets such as business interests, company shares and property investments ('Assets'), through a corporate entity ('HoldCo'), rather than hold these in his or her personal capacity. We will also discuss the advantages and disadvantages of each.

Advantages of personal ownership

The advantages of owning Assets in a personal capacity are:

1. Efficiency

The Owner can sign business documents related to their Assets, such as shareholder resolutions and powers of attorney, directly and relatively quickly; and

2. Cost-effectiveness

There are little to no extra costs, except where, for example, these documents are required to be executed in front of an authority such as a Notary Public, and a fee is required.

Disadvantages of personal ownership

The main risks of owning Assets in a personal capacity are those that relate to the Asset's business and ownership continuity. It is possible that situations might arise where substantial and consequential business decisions will be on hold while the rest of the market and competition is still active. These risks include, for example:

1. Inability to sign business documents due to illness

If an Owner becomes seriously ill, they may not have the physical and/or mental capacity to sign the business documents, or even to grant powers of attorney ('POAs');

2. Reduced ability to make major business decisions during probate (death of Owner)

If the Owner passes away, their holdings in the Assets would be frozen while the probate procedures (of the jurisdiction in which those Assets are held) take place. Major decisions or actions regarding the Assets would likely be put on hold. The quicker the relevant jurisdiction traces and confirms the identities of the deceased Owner's rightful heirs and beneficiaries, the shorter the probate period, and the quicker the ownership of the Assets will pass on to the new legal owners. The probate period differs from one jurisdiction to another, and it is generally administratively costly and time consuming. The new owners, assuming they want to maintain the Assets, can then make the required business decisions.

3. Cancellation of POAs (death of Owner)

If the Owner passes away, any POAs that they have granted will automatically be cancelled once the jurisdiction in which those POAs are issued receives formal notice of the death. This means that any authorised signatory will no longer be able to take any action(s) relating to the Assets which are the subject of that POA. This includes both general POAs relating to appearing in front of government authorities, as well as specific POAs relating to property, investments, legal proceedings, etc. If the grantor of the POA passes away, and the authorised signatory uses their powers before the relevant jurisdiction is aware of the grantor's passing, i.e. illegally, it is very likely these decisions will be challenged by other interested parties and that there will be criminal penalties against that authorised signatory. The exact penalties will differ from one jurisdiction to another.

4. Risks from illness or death of other individual co-Owners

The above risks are present if any of the Asset's Owner(s) holds their shares in a personal capacity. For example, Owner 1 is in peak health and fitness, it is possible that important business decisions be on hold should any of their partners (e.g. Owner 2) become seriously ill or pass away. In addition, any decisions relating to the deceased Owner 2's shares in the Assets will be put on hold, and any POAs Owner 2 granted will be cancelled. The more individual co-Owner(s) there are for an Asset, the higher the risk.

Advantages of ownership through a HoldCo

The main advantages to owning Assets via a legal entity such as a HoldCo relate to the continuity of the business and ownership of the Assets, It is less likely that major and consequential business decisions will be put on hold, and the HoldCo can adjust more quickly to the market and the competition. These advantages include for example:

1. Ability to sign business documents regardless of Owner's illness ('Business Continuity')

Even if an Owner becomes seriously ill, a HoldCo's board of directors ('Board') can still sign the business documents and take care of the day-to-day running of the HoldCo;

2. Business Continuity and ownership continuity after Owner's death

If the Owner passes away, their holdings in the HoldCo would be frozen while the probate procedures (of the jurisdiction in which HoldCo is based) take place. After the probate period, the Owner's rightful heirs and beneficiaries will hold shares in the HoldCo. Assuming that there are no citizenship (or other) restrictions on the indirect ownership of the Assets, HoldCo's ownership in the Assets is generally not affected;

3. Business Continuity after Owner's death (POAs)

The Board would typically be the authority delegating powers to an authorised signatory. Depending on the jurisdiction, it could do this by way of a POA or a Board resolution. Even if the Owner or any or all of the Board members pass away, the authorities to which they granted the POAs would be deemed to have been on behalf of the HoldCo and would still be valid;

4. Business Continuity with partners

The above advantages are present if all of the Assets' Owners hold their shares via a legal entity such as a HoldCo. If for example, Owner 1 and Owner 2 have their own respective HoldCos (e.g. HoldCo 1 and HoldCo 2) to own the Assets, then if Owner 2 becomes seriously ill or passes away, the ownership of the downstream Assets is generally not affected: there would still be Business Continuity and ownership continuity;

Disadvantages of ownership through a HoldCo

The disadvantages of owning Assets through a HoldCo are:

1. Inefficiency

If HoldCo has multiple directors, it can be more time-consuming to obtain the required signatures;

2. Expensive

There are costs, in terms of time and money, associated with establishing and maintaining a HoldCo. Points to consider are the HoldCo's compliance requirements with the relevant jurisdiction's regulations. While some requirements may be straightforward, others may require professional advice.

3. Business Continuity risks at HoldCo

Although owning Assets through a HoldCo can save the Owner from the Business Continuity and ownership risks at the Asset-ownership level (mentioned above), these risks may transfer upwards and apply at the HoldCo level. This means that it may be the HoldCo itself that will face the Business Continuity and ownership risks. This can apply, for example, if the Owner is the only HoldCo director, and they are unable to execute a HoldCo Board resolution, or if they are the only shareholder and unable to execute a HoldCo shareholder resolution. If the HoldCo has multiple Board members or shareholders, the Owner's incapacity may mean there is no quorum for the HoldCo to implement the required action(s).

5. Business Continuity risks from HoldCo partners

If Owner 1 and Owner 2 own shares in the same HoldCo, and Owner 2 becomes seriously ill or passes away, then the same risks would apply as if both Owners held the Assets directly. This would result in Owner 2 being unable to sign the HoldCo business documents due to illness. If Owner 2 passes away, then major decision making relating to HoldCo itself will likely be frozen pending a probate period regarding Owner 2's shares, and any relevant POAs Owner 2 granted in their personal capacity will be cancelled.

Factors to consider in choosing a jurisdiction for HoldCo

Choosing a jurisdiction in which to establish a HoldCo is a multi-faceted and important decision. Critical factors to consider include the Owner's comfort with:

1. the jurisdiction;
2. the legal system;
3. its reputation;
4. the type of entity one can establish there (e.g. special purpose vehicles, foundations, headquarters company, etc.);
5. the ability of entities from that jurisdiction to own the Assets;
6. whether any tax advantages exist;
7. the flexibility in amending HoldCo's Articles of Association;
8. the ease of altering the ownership structure;
9. the ability to make officer appointments; and
10. the ease of doing business in that jurisdiction.

Corporatising the ownership of your assets

While specific circumstances of each Owner may differ from one to another, it may be worth exploring whether it is viable and worthwhile for Owners to corporatise the ownership of their Assets, since one cannot mitigate against all risks. Not all Assets are equally valuable. Not all Owners have partners and there are no unlimited budgets. Corporatising the ownership of the substantial or 'high-priority' Assets can be a significant step towards maintaining Business and ownership continuity for Owners and their families.

For further information, please contact Georges Daoud (g.daoud@tamimi.com) or Nasouh Raslan (n.raslan@tamimi.com).

Digital transformation: a step forward amid the exceptional circumstances ordained by the spread of the global pandemic COVID-19

Hadia El Beshry
Senior Associate
Corporate Structuring
Cairo, Egypt
h.elbeshry@tamimi.com

Amr Hamdy
Senior Associate
Corporate Structuring
Cairo, Egypt
a.hamdy@tamimi.com

Introduction

Over recent years, the Egyptian authorities have endeavoured to penetrate the digital world and provide governmental services through the internet and cellular phone applications to facilitate a more efficient and less time consuming service.

Law No. 72 of 2017 known as the 'New Investment Law' explicitly mandated the necessity of resorting to new technologies in providing services to investors. In that respect, the Governmental Authority for Investment and Free Zones ('GAFI') adopted various initiatives that aim to use technology such as providing selected services through the internet.

Attempts by the authorities to enter the digital world were distinct, aiming to break the monotony of executive routine and lift bureaucratic burdens that are weighing on investors and individuals dealing with governmental authorities. However, it was the outbreak of COVID-19 that forced several Egyptian authorities to take further measures to enforce and activate exceptional mechanisms to provide remote services to their intended audience.

Digitalisation measures

The Tax Authority, Financial Regulatory Authority ('FRA') and GAFI were among the most prominent governmental authorities that undertook the digitalisation of their services.

1. Tax Authority

The Tax Authority had taken effective measures prior to COVID-19, allowing tax declarations to be submitted remotely on several portals including mobile applications as well as providing cloud storage spaces for individuals to securely save all relevant information to tax files. Tax files may be accessed at any time and managed proactively by the individual as well as the Tax Authority's officer, thereby allowing greater flexibility and efficiency.

These measures are considered fundamental during the current circumstances in order for taxpayers to submit tax declarations without the need to personally visit the Tax Authority as the regular process would usually require.

2. Financial Regulatory Authority

Upon the issuance of the Prime Ministerial Decree No. 606 of 2020, by virtue of which the Government suspended all group activities and mass gatherings (the 'Prime Ministerial Decree'), the Chairman of the FRA issued a statement urging listed companies and companies working in financial non-banking activities to put in place effective electronic systems that would enable their shareholders to vote remotely during the general assembly meetings.

The Chairman of the FRA also explained that the Prime Ministerial Decree required the concerned authorities to enforce the relevant provisions provided in the Companies Law No. 159 of 1982 (the 'Companies Law') which allow listed companies to use electronic voting systems for the purposes of their Ordinary General Assembly meetings and Extra Ordinary General Assembly meetings.

3. Governmental Authority for Investment and Free Zones

Currently, GAFI permits companies to be established online by submitting all required documents through a dedicated portal for incorporation processes. The previous process for company incorporation and establishment required the physical presence of the founders' agent at GAFI in order to personally submit all documents in addition to attending a review by the relevant officer of such documents. Said process could take up to a week and require several visits to GAFI.

To facilitate the incorporation process, GAFI had also permitted the use of electronic signatures in accordance with Law No. 15 of 2005 regulating the use of electronic signatures. However, the documents would then still need to be submitted physically to GAFI, which made the use of said electronic signature redundant.

In the wake of COVID-19 and following in the FRA's footsteps, GAFI's Chairman issued a decision regulating the convening of general assembly meetings remotely. This decision complements the Prime Ministerial Decree, which allowed for board of directors' meetings and general assembly meetings (whether ordinary or extra ordinary) to be convened remotely via new telecommunication means (audio or video are admissible), subject to their conformity with the Companies Law and the New Investment Law. This is the first time in GAFI's history that non-physical attendance in general assembly meetings has been permitted.

GAFI's Chairman's decision further provided that companies should put in place effective means for shareholders, managers, members of the board of directors to vote, as the case may be.

As for the minutes of meetings and relevant documents, they should be signed and submitted to GAFI on a combined disc (CD) for notarisation. Additionally, GAFI's Chairman's decision also mandated that said minutes should be submitted through an internet portal. However, given the rapid change in the means of submission of documents for notarisation the portal lacks the practical means of review and is yet to be an effective alternative to physically attending GAFI for notarisation.

Given the measures taken by the Government to slowly resume work as usual while enforcing physical distancing measures, GAFI has further introduced a system, through its website, whereby individuals can reserve appointments for specific time slots to visit GAFI. Once the appointment is confirmed, the appointment holder is required to arrive 15 minutes prior to the designated time slot in order to be medically examined and sanitised. While this initiative minimises the risk of contagion and spreading of the virus, it is not a sustainable course of action as it limits the services that may be provided due to time and capacity constraints.

Conclusion

The Authorities' efforts aim to facilitate a targeted transformation as is practicable under the current circumstances as well as pave the way for further development during and post COVID- 19 times. However, in many cases, such as processes where physical identification is required, they remain unused. Services provided by the Notary Public for instance would require this form of identification. The latter may be substituted by an electronic signature which again suffers the same obstacle of required physical submission.

GAFI, which is known as a 'one stop shop' for investors providing services to various ministries, is considered a leader in revolutionising governmental services. Services provided by the Commercial Chamber, the Commercial Register and others requiring a decreased level of formality are likely to be considering following a similar path of digitalisation in the near future.

Digital transformation of governmental services is considered to be at an early stage of implementation however, solid steps have put the Egyptian Authorities on the right track for further change.

For further information, please contact Ayman Nour (a.nour@tamimi.com) or Hadia El Beshry (h.elbeshry@tamimi.com).

The Kuwait Companies Law: application and practice

Ahmed El Fass
Associate
Corporate Structuring
Kuwait City, Kuwait
a.elfass@tamimi.com

Margaret McKenzie
Trainee Lawyer
Corporate Commercial
Kuwait City, Kuwait
m.mckenzie@tamimi.com

Corporate structuring in Kuwait

On the 1 February 2016, Kuwait issued Law No. 1 of 2016 Promulgating the Companies Law ('Companies Law') amending the previous law No. 25 for the year 2012. The new Companies Law is aimed at providing a more practical view compared to the previous companies' law. Since the issuance of the Companies Law, we have tested the application of its provisions from a practical perspective while dealing with the relevant ministries and governmental institutions.

Some argue that the Companies Law reforms outdated practices and offers investors a more attractive investment environment, and yet the practice in Kuwait sometimes does not follow a strict application of the law.

The Companies Law governs corporate entities in Kuwait, and offers details and clarifies the previous law. Further, it provides guidance and a legal footing in relation to certain matters that were previously silent, for instance, shareholders agreements. Although the current Companies Law can appear clear in many instances, Kuwait ministries occasionally follow a more ambiguous method of implementing the law. Furthermore, these methods can sometimes be at odds with what is codified in the law. Below are several examples of how the Companies Law diverges from the practical application of the same in Kuwait.

1. Submission of financial statements

Like most companies with limited liability in various jurisdictions, each must submit its financial statements approved by a certified auditing firm on an annual basis. Article 113 of the Companies Law states that the ordinary general meeting shall not be valid unless attended by a number of partners owning more than half of the capital, and Article 114 states the matters that may be discussed during a general assembly meeting, include approving the company's financial statements.

Although the Articles provide owners that hold more than half of the capital an opportunity to legally approve the companies financials, the Budgets Department of the Ministry of Commerce and Industry ('MOCI') requires the approval of all the partners in the company in relation to the financial statements. Such a divergence between the provisions of the law and its actual application may create hurdles in the operation of a company because proof of submission of the financial statements is a requirement by most of the government entities. The latter case means that a partner, holding even one per cent ownership in the company, could affect the company's operation if that owner decides to reject the company's financial statements.

2. Dismissal of the company's general manager

Companies with limited liability in Kuwait must have a general manager. There are two cases mentioned in the Companies Law regarding the management of the company that, depending on the case, may contradict the implementation of the law. Article 103 of the Companies Law states that *"The company shall be managed by one or more managers, to be appointed in the Company Contract from among the partners or third parties. In the event of the Company Contract does not appoint the managers, the general meeting of the partners shall appoint them"*. The previous Article provides that a manager may not be named in a company's Memorandum of Association. However, while applying via the online system of the Kuwait Business Center (a branch of the Kuwait MOCI), additional information regarding the manager must be included, otherwise the application will not be accepted.

Another potential ambiguity between the provisions of the law and the actual implementation, can be found in Article 117, which states that dismissal of the company's manager may be agreed through a resolution at an extraordinary general assembly meeting. The article provides that, in order to dismiss a company's manager (without the manager's approval) those owning 75 per cent of the capital are required to issue a resolution doing so. However, the practice of MOCI, in many cases, obliges the attendance of the manager before the relevant official as well as specific documents signed by the manager in order to proceed with the amendment otherwise, the amendment may not be approved. This may lead, in some instances, to filing a claim in the relevant court in order to obtain a judgment dismissing the manager, which can cause an undue burden on the management and operations of a company.

3. Pledging a company's shares

Articles 42 and 102 of the Companies Law grant a partner in a limited liability company the power to pledge its shares. The law does not restrict a local (Kuwaiti) or foreign (non-Kuwaiti) partner from pledging its shares in favour of third parties. Although the Kuwait Ministry of Justice may approve the pledging of the local partner's shares in favour of the foreign partner, the MOCI does not permit such a pledge to be recognised or recorded in its records. It limits the pledge of shares in favour of Kuwaiti companies or Kuwaiti individuals *only*. This again highlights a contradiction between the operations of various ministries as well as between what is allowed under the Companies Law and the actual practice of the relevant ministry.

Although the Kuwait Ministry of Justice may approve the pledging of the local partner's shares in favour of the foreign partner, the MOCI does not permit such a pledge to be recognised or recorded in its records.

4. Setting up a company with limited liability and special approvals

Depending on the type of activity that is desired in relation to the establishment of a company in Kuwait, special approvals may be required in order to operate the business of the company. The Kuwait Companies Law addresses the registration of the limited liability company without addressing any special approvals or licenses required for setting up such entities. Article 7 of the executive regulation issued by the executive regulation No. 287 for 2016 of the Kuwait Companies Law states, *"a special department shall be created at the MOCI, consisting of a sufficient number of competent officials in departments from other entities such as, Department of Real Estate Registration and Authentication, Kuwait Municipality, the Ministry of Interior, etc."*. The purpose of this department is to ensure the proper co-operation between the MOCI and other government entities. The department is tasked with ensuring the proper and efficient establishment of a company once the commercial licence has been issued. However, in some instances, other government entities refuse to grant special approvals (depending on the types of activities in question) even after a company may already have obtained a commercial licence and an executed Memorandum of Association. In this scenario, if more efficient and effective co-operation had existed between the MOCI and other relevant government departments, a licence could have been denied by the MOCI at the initial stage of applying to set up a company and prior to the commercial trading licence being issued, or the approval could be granted thereby eliminating any uncertainty in practice.

Conclusion

We have outlined a few examples illustrating when the practice in Kuwait ministries deviates from the codified provisions of the Companies Law. These examples are not exhaustive and we anticipate additional changes between the law and practice in the future. We note that although the Companies Law is clear in relation to certain provisions, when applied in practice the outcome can be different than what is set out in the law.

Finally, not all internal regulations or circulars within the ministries in Kuwait are shared with the public. By changing this practice and sharing these internal regulations with the public or amending the executive regulations, the public could then have been aware of the actual implementation of the law and plan accordingly. In order to solve the discrepancy between the provisions of the Companies Law and its application in practice, the amendment of the executive regulation of the Companies Law would be a welcomed first step, and would assist in modernising and ensuring the efficiency of Kuwait's Company Law and procedures.

For further information, please contact Ahmed El Fass (a.elfass@tamimi.com).

Focus Corporate Structuring

The Unified Economic Registrar in Qatar

Ayman Raad
Associate
Corporate Structuring
Doha, Qatar
a.raad@tamimi.com

Masa Takriti
Associate
Litigation
Doha, Qatar
m.takriti@tamimi.com

H.H Sheikh Tamim bin Hamad Al Thani, Emir of the State of Qatar has issued Law No. 8/2019 regarding the Unified Economic Registrar ('Law'). The Law ambitiously aims to create an all-encompassing Unified Economic Registrar aimed at enhancing the transparency of economic and financial transactions, by collecting basic information, data and documents of:

1. **Economic Enterprises:** defined by the Law as establishment, company or entity that shall be operational in any economic sector;
2. **Legal Arrangements:** defined by the Law as direct trust funds or similar arrangements. The Law further defines a direct trust fund as a legal relationship that does not result in a legal personality, created by a written document whereby a person places assets under the direction of the trustee for the benefit of one or more beneficiaries or for a specific purpose;
3. **Non-Profit Organisations:** defined as any entity, organisation, legal arrangement that collects or disburses funds for charitable, religious, cultural, educational, social, or solidarity purposes, or for one or more public benefit purposes;
4. **Profession:** defined as activities that depend on the direct exploitation of mental or scientific human capabilities and pure mental talents, which depend on the personal skills of those who practise it, and their exercise shall be regulated by special laws; and
5. **Real Beneficiaries:** The natural person who effectively owns or controls a legal person, or a final legal arrangement, or a natural person on whose behalf the operations are performed, and which also includes a person who exercises effective and final control over a legal person or legal arrangement.

As stipulated in the Law, the Unified Economic Registrar aims to enhance the transparency of economic and financial transactions, by collecting basic information, data and documents of the Economic Enterprises, Legal Arrangements, Non-Profit Organisations, Profession, related to the Real Beneficiaries, and by maintaining and making them available to the public and stakeholders.

Basic information is defined in the Law as *"information that allows the identification of the applicant in the record maintained by each Competent Authority, to determine its legal form, to describe its basic features and purpose, and any other information provided by the law to which the applicant is subject"*. Competent Authorities are any party that undertakes the licensing or registration of an Economic Enterprise, Legal Arrangement, Non-Profit Organisation, or Profession licence, in accordance with the Law.

In the spirit of Qatar's Vision 2030 and the Emir's grand national plan for Qatar to become an advanced society capable of sustaining its development including economic growth, social development and environmental management.

As a centralised platform, the Unified Economic Registrar will accumulate information from the following existing records:

- commercial registrar;
- legal arrangements record;
- non-profit organisations record; profession record; and
- any other record similar to the aforementioned records maintained by the authorities.

The Unified Economic Registrar contains all the information and records existing in the databases of the records listed above. The Ministry of Commerce and Industry will enable Competent Authorities to enter the relevant record and update existing data and basic information through a Standard Economic Number assigned to each economic entity.

To apply for a licence or renewal or amendment thereof, applicants are required by Article 4 of the Law to apply using the form prepared by the Competent Authority for this purpose, accompanied by all supporting documents, as specified the applicable law. If the applicant is a legal person or legal arrangement, it must attach a declaration of the Real Beneficiary to the requisite application form. This is a mandatory requirement and applications will not be accepted without such a declaration. Further, legal persons and legal arrangements must maintain up-to-date information regarding the Real Beneficiaries and provide copies to the Competent Authority as set out in the regulations.

The basic information on Economic Enterprises, Legal Arrangements, Non-Profit Organisations and Profession will be made available to the public by the Competent Authorities. Further, for the purposes of enhancing the transparency of economic and financial transactions, Article 7 of the Law prescribes that the required information by the Unified Economic Registrar with regards to Real Beneficiaries will be made available to law enforcement and judicial authorities, regulators, financial institutions, non-financial businesses and professions as specified in accordance with laws regulating Anti-Money Laundering and Terrorism Financing, the General Tax Authority and other authorities as may be requested. Such information may also be exchanged with foreign counterparts upon request in accordance with applicable laws or principles of reciprocity. Additionally, and notwithstanding applicable laws regulating the protection of personal data privacy, the Unified Economic Registrar shall also allow the information to be used by the Competent Department to produce statistics and analyses to be published in bulletins or annual reports. This will, indeed, be a very effective tool which the State can use to analyse and identify current economic needs and capacities.

It is important to note that under Article 13 of the Law, Competent Authorities that are subject to special legal regulations, are in compliance with the Law insofar as they provide the basic information required regarding Real Beneficiaries of the entities to which they are licensed or registered and are not subject to the duty of obtaining a standard economic number from the Competent Department, as those that are licensed or registered will be linked through the existing databases to the Unified Economic Registrar. The manner in which this data sharing and exchange shall be carried out will become more clear once regulations are issued in line with the Law. The regulations to be enacted will specify the mechanism for organising and preparing the Unified Economic Registrar and the manner in which databases of other bodies will be linked as specified by the Competent Department.

Article 12 of the Law prescribes a penalty of imprisonment for a period not exceeding two years and a fine not exceeding QAR 500,000 (US$137,000) for violating the requirement under Article 5 of the Law for legal persons and legal arrangements to maintain a thorough, accurate and up-to-date record of the information required regarding the Real Beneficiaries, and provide a copy to the Competent Authority, as specified. Less severe penalties for violations of other articles of the Law are provided for in Article 11 which range from written warnings to the cancellation of the economic entity's licence. Such penalties may however, be appealed in accordance with the regulations to be enacted under the Law.

Finally, Competent Authorities will be required to regulate their records in accordance with the provisions of the Law, within six months from the date of their commencement, and such period may be extended by a decision of the Cabinet.

In the spirit of Qatar's Vision 2030 and the Emir's grand national plan for Qatar to become an advanced society capable of sustaining its development including economic growth, social development and environmental management, this Law is enacted with a view to further aid the State's efforts to achieve such aims and efficiently monitor growth, ensure transparency, and regulate the private sector by offering an all-encompassing unified transparent platform reflecting the private sector.

For further information, please contact Ahmed Jaafir (a.jaafir@tamimi.com) or Ayman Raad (a.raad@tamimi.com).

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 676
21 Sha'ban 1441H
15 April 2020

FEDERAL DECREES

65 of 2020	Appointing the Director General of Emirates Health Services Establishment.
66 of 2020	Appointing the Undersecretary of the Ministry of Community Development.

REGULATORY DECISIONS OF THE CABINET

19 of 2020	Regulating government work under exigent circumstances.
20 of 2020	On fees for services provided by the Ministry of Economy.
21 of 2020	On the administrative services fees and fines of the Ministry of Human Resources & Emiratization.
22 of 2020	On the return of bank and financial guarantees provided to the Ministry of Human Resources & Emiratization.
23 of 2020	On the return of bank and financial guarantees provided to the Federal Authority for Identity and Citizenship.
24 of 2020	On the publication and exchange of medical information related to communicable diseases and epidemics, and misinformation related to human health.
25 of 2020	Promulgating the executive regulations of Decree-Law No. (5) of 2016 regulating Human Organ and Tissue Transplantation.
26 of 2020	On the National Human Resources Development Fund.
27 of 2020	The Federal Government Remote Work Regulations.
28 of 2020	On the National Cancer Registry.

MINISTERIAL DECISIONS

- From the Ministry of Justice

4 of 2020	Chairman of the Supreme Committee of the Federal Judiciary decision on the regulation of court operations, hearings, and execution cases under exigent circumstances.
333 of 2020	Authorizing certain officials at the Ministry of Education to enforce the law as judicial officers.
334 of 2020	Authorizing certain officials at the Ministry of Community Development, the Community Development Authority, and the Dubai Foundation for Women & Children to enforce the law as judicial officers.

- From the Ministry of Climate Change & Environment

106 of 2020	On the EU requirements to be satisfied by exporters of camel milk and products.
109 of 2020	Amending Ministerial Decision No. (43) of 2019 regulating Shark Fishing and Trade.

ADMINISTRATIVE DECISIONS

- From the UAE Central Bank
  - The Central Bank's published audited financial statements for the year ended 31.12.19.
  - Amendments to Circular No. 31/2013 on the Mortgage Loan System.

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 677
7 Ramadan 1441H
30 April 2020

FEDERAL DECREES

67 of 2020	Appointing the Governor of the UAE Central Bank.
73 of 2020	On the promotion and assignment of a member of staff of the Supreme Council for National Security.
74 of 2020	Establishing a UAE embassy in Kinshasa, Democratic Republic of the Congo.
75 of 2020	Establishing a UAE consulate general in Cape Town, Republic of South Africa.
76 of 2020	Transferring the UAE ambassador to the Czech Republic.

REGULATORY DECISIONS OF THE CABINET

29 of 2020	Promulgating the executive regulations of Federal Law No. (4) of 2015 concerning Private Health Facilities.
30 of 2020	Amending Cabinet Decision No. (56) of 2018 regulating Residence Visas for Investors, Entrepreneurs, and Professional Talent.
31 of 2020	Approving the Articles of Association of Emirates General Transport and Services Corporation PJSC.
32 of 2020	Promulgating the executive regulations of Federal Law No. (2) of 2019 on the Use of Information and Communication Technology (ICT) in Healthcare.
33 of 2020	Amending Cabinet Decision No. (57) of 2018 promulgating the executive regulations of Federal Law No. (11) of 1992 (the Civil Procedure Law).

MINISTERIAL DECISIONS

- From the Ministry of Justice

359 of 2020	Regulating the use of digital technology in notary activity.
360 of 2020	On the formation of the moon sighting committee for Ramadan 1441H.

ADMINISTRATIVE DECISIONS

- From the Telecommunications Regulatory Authority

6 of 2019	Chairman's resolution approving the Public Access Mobile Radio License Template.
7 of 2020	Chairman's resolution approving the Satellite Services License Template.
9 of 2020	Chairman's resolution on the renewal of the satellite services license of Al Yah Satellite Communications.
10 of 2020	Chairman's resolution on the renewal of the public access mobile radio license of Nedaa Professional Communication Corporation.

12 of 2020 Chairman’s resolution approving the SMS spam policy.

13 of 2020 Chairman’s resolution approving the National Frequency Plan, Version 3.0.

- From the Emirates Authority for Standardization and Metrology

4 of 2020 Chairman’s resolution approving UAE standard specifications.

- From the UAE Central Bank

  - Regulatory treatment of accounting provisions and capital requirements – transitional arrangements.

- From the Securities and Commodities Authority

  - Certificate of approval of amendment of the Articles of Association of National Central Cooling Company PJSC.

  - Certificate of approval of amendment of the Articles of Association of Sharjah Islamic Bank PJSC.

Webinars

April 2020: the month we moved our events online. With widespread uncertainty and anxiety brought about by the spread of COVID-19, it was pivotal that we could communicate directly with all and any concerned clients about the impact coronavirus could have on their businesses. Through a series of online seminars, our lawyers were able to shed light and offer guidance on many significant issues facing companies and institutes across the region. We hope our webinars and the information shared within them have been useful to this point, and we plan to deliver many more in the months to come.

1st April 2020
Joint webinar in collaboration with GCC BDI Group
Navigating the Coronavirus - the Legal Implications
Speakers: Foutoun Hajjar and Naief Yahia

6th April 2020
Joint Webinar in collaboration with LexisNexis
Coronavirus (COVID-19) Outbreak and its Impact on Contractual Obligations
Speakers: Naief Yahia and Justin Carroll

8th April 2020
COVID-19: Considerations in the UAE
Speakers: Alaa Momtaz and Krishna Jhala

14th April 2020
COVID-19 and Force Majeure: UAE Construction and Maritime Law Focus (Mandarin Language)
Speakers: Euan Lloyd and Gabriel Yuen

15th April 2020
Digital innovation and disruption by emerging companies in the wake of the COVID-19 virus pandemic: have you prepared your patent weapons?
Speaker: Ahmad Saleh

15th April 2020
Joint Webinar in collaboration with British Business Group
UAE Considerations in the UAE - COVID-19
Speaker: Natalie Jones

16th April 2020
Tax in the age of Corona: An update on COVID-19 related tax developments across the MENA Region
Speakers: Abdullah Mutawi and Shiraz Khan

20th April 2020
Joint Webinar in collaboration with DMCC
Learn how you can address the challenges as a UAE Employer
Speaker: Natalie Jones

22nd April 2020
Joint Webinar in collaboration with Business Live ME
Sustaining Business Continuity and Evolution During and Post COVID-19
Speakers: Mamoon Khan and Natalie Jones

30th April 2020
DIFC COVID-19 emergency employment measures
Speaker: Gordon Barr

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	73 Partners	350+ Lawyers
450+ Legal Professionals	850+ Employees	50+ Nationalities	1 Fully Integrated Law Firm

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 • Projects • Real Estate • Regulatory • Tax • Technology, Media & Telecommunications •

Sectors

Automotive • Aviation • Education • Expo 2020 • FMCG • Healthcare • Hotels & Leisure • 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	Bahrain	Jordan	Qatar
Abu Dhabi Dubai, DIC Dubai, DIFC Dubai, Maze Tower Ras Al Khaimah Sharjah	Manama	Amman	Doha
	Egypt Cairo	**Kuwait** Kuwait City	**Saudi Arabia** Al Khobar Jeddah Riyadh
	Iraq Baghdad Erbil	**Oman** Muscat	

Key Contacts

CHAIRMAN
Essam Al Tamimi
e.tamimi@tamimi.com

MANAGING PARTNER
Samer Qudah
s.qudah@tamimi.com

SENIOR PARTNER
Husam Hourani
h.hourani@tamimi.com

Offices

UAE
ABU DHABI
Alex Ghazi
alex.ghazi@tamimi.com

DUBAI, DIC
Ehab Morcos
e.morcos@tamimi.com

DUBAI, DIFC
Husam Hourani
h.hourani@tamimi.com

DUBAI, THE MAZE TOWER
Bassem El Dine
b.dine@tamimi.com

RAS AL KHAIMAH
Ammar Haykal
a.haykal@tamimi.com

SHARJAH
Zafer Oghli
z.oghli@tamimi.com

BAHRAIN
MANAMA
Foutoun Hajjar
f.hajjar@tamimi.com

EGYPT
CAIRO
Ayman Nour
a.nour@tamimi.com

IRAQ
BAGHDAD
Mohammed Norri
m.norri@tamimi.com

ERBIL
Khaled Saqqaf
k.saqqaf@tamimi.com

JORDAN
AMMAN
Khaled Saqqaf
k.saqqaf@tamimi.com

KUWAIT
KUWAIT CITY
Alex Saleh
alex.saleh@tamimi.com

Philip Kotsis
p.kotsis@tamimi.com

OMAN
MUSCAT
Ahmed Al Barwani
a.albarwani@tamimi.com

QATAR
DOHA
Matthew Heaton
m.heaton@tamimi.com

SAUDI ARABIA
AL KHOBAR
Grahame Nelson
g.nelson@tamimi.com

JEDDAH
Ahmed Basrawi
a.basrawi@tamimi.com

RIYADH
Abdullah Mutawi
a.mutawi@tamimi.com

Practices

ARBITRATION
Thomas Snider
t.snider@tamimi.com

BANKING & FINANCE
Jody Waugh
j.waugh@tamimi.com

CAPITAL MARKETS
Andrew Tarbuck
a.tarbuck@tamimi.com

COMMERCIAL
Willem Steenkamp
w.steenkamp@tamimi.com

COMPETITION
Omar Obeidat
o.obeidat@tamimi.com

CONSTRUCTION & INFRASTRUCTURE
Euan Lloyd
e.lloyd@tamimi.com

CORPORATE/M&A
Abdullah Mutawi
a.mutawi@tamimi.com

CORPORATE SERVICES
Izabella Szadkowska
i.szadkowska@tamimi.com

CORPORATE STRUCTURING
Samer Qudah
s.qudah@tamimi.com

EMPLOYMENT & INCENTIVES
Samir Kantaria
s.kantaria@tamimi.com

FAMILY BUSINESS
Richard Catling
r.catling@tamimi.com

Nawal Abdel Hadi
n.abdelhadi@tamimi.com

FINANCIAL CRIME
Khalid Al Hamrani
k.hamrani@tamimi.com

INSURANCE
Yazan Al Saoudi
y.saoudi@tamimi.com

INTELLECTUAL PROPERTY
Omar Obeidat
o.obeidat@tamimi.com

INTERNATIONAL LITIGATION GROUP
Rita Jaballah
r.jaballah@tamimi.com

LEGISLATIVE DRAFTING
Mohamed Al Marzouqi
m.almarzouqi@tamimi.com

LITIGATION
Hussain Eisa Al Shiri
h.shiri@tamimi.com

PRIVATE CLIENT SERVICES
Essam Al Tamimi
e.tamimi@tamimi.com

PRIVATE EQUITY
Alex Saleh
alex.saleh@tamimi.com

PRIVATE NOTARY
Taiba Al Safar
t.alsafar@tamimi.com

PROJECTS
Mark Brown
m.brown@tamimi.com

REAL ESTATE
Tara Marlow
t.marlow@tamimi.com

REGULATORY
Andrea Tithecott
a.tithecott@tamimi.com

TAX
Shiraz Khan
s.khan@tamimi.com

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS
Martin Hayward
m.hayward@tamimi.com

Sectors

AUTOMOTIVE
Samir Kantaria
s.kantaria@tamimi.com

AVIATION
Yazan Al Saoudi
y.saoudi@tamimi.com

EDUCATION
Ivor McGettigan
i.mcGettigan@tamimi.com

EXPO 2020
Steve Bainbridge
s.bainbridge@tamimi.com

FMCG
Samer Qudah
s.qudah@tamimi.com

HEALTHCARE
Andrea Tithecott
a.tithecott@tamimi.com

HOTELS & LEISURE
Tara Marlow
t.marlow@tamimi.com

RAIL
Foutoun Hajjar
f.hajjar@tamimi.com

SHIPPING
Omar Omar
o.omar@tamimi.com

SPORTS & EVENTS MANAGEMENT
Steve Bainbridge
s.bainbridge@tamimi.com

TRANSPORT & LOGISTICS
Yazan Al Saoudi
y.saoudi@tamimi.com

Country Groups

CHINA
Jody Waugh
j.waugh@tamimi.com

INDIA
Samir Kantaria
s.kantaria@tamimi.com

KOREA
Omar Omar
o.omar@tamimi.com

RUSSIA & CIS
Matthew Heaton
m.heaton@tamimi.com

Sergejs Dilevka
s.dilevka@tamimi.com

Alina Ponomarova
a.ponomarova@tamimi.com

TURKEY
Omar Obeidat
o.obeidat@tamimi.com

> **We appreciate the diversity of the lawyers' backgrounds – there's always someone qualified to answer any query.**
>
> *Chambers Global*

Contact Us

UNITED ARAB EMIRATES

Abu Dhabi Al Sila Tower, 26th Floor, Abu Dhabi Global Market Square, Al Maryah Island, PO Box 44046, Abu Dhabi, UAE

T: +971 2 813 0444 / F: +971 2 813 0445

Dubai Internet City DIC Building No. 5, G 08, PO Box 500188, Dubai, UAE

T: +971 4 391 2444 / F: +971 4 391 6864

Dubai International Financial Centre 6th Floor, Building 4 East, Dubai International Financial Centre, Sheikh Zayed Road, PO Box 9275, Dubai, UAE

T: +971 4 364 1641 / F: +971 4 3641 777

Dubai Maze Tower Level 15, Sheikh Zayed Road, PO Box 9275, Dubai, UAE

T: +971 4 331 7161 / F: +971 4 331 3089

Ras Al Khaimah Julphar Office Tower, 39th Floor, Al Jissar Street, PO Box 34053, Ras Al Khaimah, UAE

T: +971 7 233 3841 / F: +971 7 233 3845

Sharjah Al Khan Corniche Street Near Al Qasba Canal 30th Floor, Al Hind Tower PO Box 5099, Sharjah, UAE

T: +971 6 572 7255 / F: +971 6 572 7258

BAHRAIN

Manama Bahrain Financial Harbour, West Tower, 13th floor, Suite 1304, Office 13B, Building 1459, Block 346, Manama, Bahrain

T: +973 17 108 919 / F: +973 17 104 776

EGYPT

Cairo Building No. 5&7 (Star Capital Building), 10th Floor, Geziret El Arab Street, Mohandseen, Giza, Cairo, Egypt

T: +20 2 3368 1000 / F: +20 2 3368 1002

Al Tamimi & Company is associated with Nour & Partners providing legal services in Egypt.

IRAQ

Baghdad Al Harithiya, Kindi St., Dist. 213 Building 106, 1st Floor, Baghdad, Iraq

T: +964 780 029 2929 / F: +964 1 542 0598

Erbil English Village, Gulan Street, Villa No. 130, Erbil, Iraq

T: +964 780 588 7848 / F: +964 750 445 2154

Basra info@tamimi.com.

JORDAN

Amman 6th Circle, Emmar Towers, 11th Floor, Tower B, PO Box 18055, Zip 11195, Amman, Jordan

T: +962 6 577 7415 / F: +962 6 577 7425

KUWAIT

Kuwait City Khaled Bin Al Waleed Street, Sharq, Al Dhow Tower, 16th Floor, PO Box 29551, Safat 13156, Kuwait City, Kuwait

T: +965 2 246 2253 / F: +965 2 296 6424

Al Tamimi & Company International Ltd. provides services in Kuwait through a joint venture with Yaqoub Al-Munayae. Yaqoub Al-Munayae is a registered and licensed lawyer under the laws and regulations of Kuwait.

OMAN

Muscat Al Assalah Towers, Building 223, Block 237, Office 409, Street 3701, Ghubrah South, Muscat, Oman

T: +968 2421 8554 / F: +968 2421 8553

Al Tamimi, Al Barwani & Co. is trading under the registered trade mark of "Al Tamimi & Company".

QATAR

Doha Tornado Tower, 19th Floor Majlis Al Taawon Street, PO Box 23443, West Bay, Doha, Qatar

T: +974 4457 2777 / F: +974 4360 921

Adv. Mohammed Al-Marri in association with Al Tamimi & Company.

SAUDI ARABIA

Al Khobar 9th Floor, Zamil House Prince Turkey Street, Corniche District, PO Box 32348, Al Khobar, Saudi Arabia 31952

T: +966 13 821 9960 / F: +966 13 821 9966

Jeddah King's Road Tower, 11th Floor, King Abdulaziz Road, Al Shate'a District, PO Box 9337, Jeddah, Saudi Arabia 21333

T: +966 12 263 8900 / F: +966 12 263 8901

Riyadh Sky Tower (North Tower), 9th Floor, King Fahad Road, Al Olaya District, PO Box 300400, Riyadh, Saudi Arabia 11372

T: +966 11 416 9666 / F: +966 11 416 9555

For any queries, please email info@tamimi.com.

@AlTamimiCompany

Al Tamimi & Company