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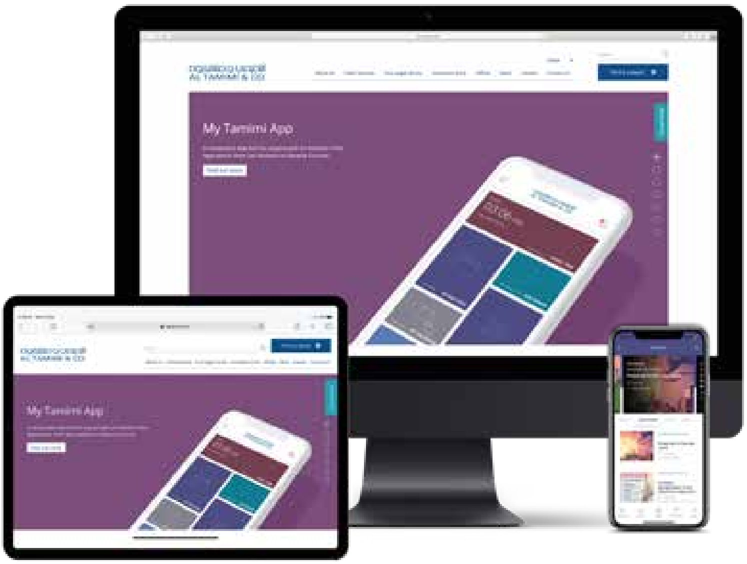

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In this Issue

Welcome to July's edition of Law Update.

In this month's issue, we focus on Dispute Resolution, as well as legal developments in Jordan.

After a very challenging six months due to the pandemic, we are now seeing the emergence of green shoots across several countries in the MENA region. Travel restrictions are easing, businesses are returning to full on-site capacity and we, at Al Tamimi & Company, are once again looking forward to meeting our clients face-to-face with a view to collaborating on new matters and business ventures.

In our Dispute Resolution corner, we consider the impact of COVID-19 on dispute resolution in the region; both in terms of how litigation and arbitration proceedings are conducted and the types of disputes to which it has given rise. Our detailed Dispute Resolution Opening Statement (page 54) highlights some of the major developments pertaining to dispute resolution during this period.

Jordan, one of the first countries in the world to implement strict lockdown procedures, appears to have come out on top, enabling it to reignite 'business as usual' activities and move closer to its goal of realising the nation's 2025 national vision. In the same breath, we are proud to announce the appointment of our firm to act on one of the largest PPP Projects in Jordan, as well as to assist the Government's Steering Committee and the European Bank for Reconstruction and Development in the ongoing review and reform of the capital markets' legal regime in Jordan.

In this edition, we also examine a wide array of legal topics relevant to the Jordanian market, including the government's commitment to digitalisation (page 112), which our Jordan experts see as a valuable window of opportunity. If nothing else, the pandemic has underlined the importance of being able to adapt to the modern world and its technology. Our Corporate team in Amman also examines the importance of adapting and accepting technology as part and parcel of doing business (page 116). We are also pleased to report that Jordan is taking proactive steps to support its real estate market by exploring ways and means of offering legal comfort to owners so as to encourage further foreign direct investment (page 120).

Turning to our General focus, we look at 'PPP' - the concept of ventures between the public and private sectors – which is becoming more popular as a means of funding and implementing projects effectively (page 26). Recalling a trending topic in these times - the importance of technology - the Dubai International Financial Centre has enacted a new data protection law which will more closely align it with the approach to personal data protection presently taken in Europe (page 34).

Honing in on our Judgment section, we look at the impact of a European decision regarding data protection and the potential impact this may have on our clients in the MENA region (page 10); an interesting take on how jurisdictions are evolving and learning from each other.

I hope you enjoy this edition. Should you wish to explore any of these issues or have any questions, please do not hesitate to reach out.

Best regards,

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Bahraini Court establishes the finality of ICC Arbitral Awards

Law Update Judgments aim to highlight recent significant judgments issued by the local courts in the Middle East. Our lawyers translate, summarise and comment on these judgments to provide our readers with an insightful overview of decisions which are contributing to developments in the law. If you have any queries relating to the Law Update Judgments please contact info@tamimi.com.

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Introduction

The finality of an arbitral award is a hallmark feature of arbitration and a distinguishing characteristic from the default dispute resolution mechanism through the national courts which is typically subject to multiple layers of appeal and review. The finality of an arbitral award means that the arbitral tribunal's decision is final and binding. This is valuable to the parties, both in terms of time and cost, because it minimises the risk of an appeal or challenge of that arbitral award before national courts.

Since the entry into force of the Bahrain Arbitration Law No. 9/2015 in August 2015 ('Bahrain Arbitration Law'), which applies the provisions of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration of 1985 as amended in 2006 (UNCITRAL Model Law'), the Bahraini courts have adopted a less interventionist approach to arbitration. In a noteworthy judgement of 2017, the Bahraini Supreme Court of Appeal expressly acknowledged the finality of an arbitral award issued under the Rules of Arbitration of the International Chamber of Commerce ('ICC').

Facts and procedural background of the case

The facts of the case can be summed up in that the award debtor brought an action before the High Civil Court in Bahrain seeking, among other things, the setting aside of an ICC arbitral award issued in proceedings seated in Singapore.

> **While most institutional rules provide for the principle of finality of arbitral awards, they do so in varying degrees.**

In support of its setting aside application, the award debtor argued that:1. it was not a party to the agreement which was the subject matter of the dispute containing the arbitration agreement; 2. it was not afforded an opportunity to select an arbitrator; 3. the arbitral award was issued based on fraud and collusion between the award creditors; 4. the arbitral award was not issued within the specified time period of the arbitration; 5. it did not sign the arbitration agreement and, lastly; 6. that the arbitral tribunal did not verify the capacity of the parties to the arbitration proceedings.

After the High Civil Court dismissed the case on the grounds of lack of jurisdiction, the case, having been filed before the incompetent forum, the award debtor commenced proceedings, in reliance on the same grounds, before the Supreme Court of Appeal, which claimed jurisdiction over the matter.

Before the Supreme Court of Appeal, the award creditors argued, among other things, that: 1. the Bahraini courts lacked jurisdiction to set aside an arbitral award issued outside the Kingdom of Bahrain; and 2. it is not permissible to challenge arbitral awards issued in accordance with the ICC Rules of Arbitration.

The Bahrain Supreme Court of Appeal dismissed the case for the reasons set out below.

The Court's reasoning

After confirming that Bahraini courts are not competent to set aside a foreign arbitral award, the Supreme Court of Appeal expressly confirmed the finality an arbitral award issued in accordance with the ICC Rules of Arbitration.

1. Bahraini Courts' jurisdiction over set aside an application

The Supreme Court of Appeal held that pursuant to the applicable provisions of the UNCITRAL Model Law, and in particular, Article 34, setting aside forms the exclusive recourse against an arbitral award. In this regard, Article 34(2) of the UNCITRAL Model Law provides for limited grounds for setting aside an arbitral award.

The Court further drew a distinction between enforcement and setting aside actions highlighting that in accordance with paragraph 48 of the Explanatory Note of the UNCITRAL Secretariat on the UNCITRAL Model Law, *"[...] an application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State."* In this regard, the Court concluded that, in circumstances where the award debtor relied on the application of the UNCITRAL Model Law for its set aside application before the Bahraini courts, the Courts of Bahrain have no jurisdiction to set aside the award in question in circumstances where such an award was foreign as it was issued in Singapore. The Court further highlighted that the award creditor's application for recognition of the award in question, before the Bahraini courts, cannot be construed as a tacit acceptance of the jurisdiction of the courts of Bahrain in application of the Code of Civil Procedure given that the special provisions of the UNCITRAL Model Law prevail over the general rules of procedure.

The Bahrain Supreme Court of Appeal, in another decision (2018), drew a fundamental distinction between the legal place or seat of an arbitration and the venue of the arbitration. In this decision, the Court highlighted that *"[...] there is a difference between the venue of an arbitration or the material place of an arbitration"* [i.e. where procedural meetings take place, such as London in the case at hand] and the legal place of the arbitration – seat- [Singapore] where *"[...] the award should be issued and carries several legal effects such as the identification of the competent court to challenge an arbitral award and whether the award was domestic or foreign and the applicable procedural law."*

In addition to the importance of the choice of seat or legal place of the arbitration which dictates the competent, supervisory court of arbitration, including for setting aside applications, the Bahraini court's decision further highlights the significance of the parties' choice of institutional rules.

2. Finality of an Arbitral Award under the ICC Rules of Arbitration

While most institutional rules provide for the principle of finality of arbitral awards, they do so in varying degrees. For example, the UNCITRAL Arbitration Rules of 2010 (see, Article 34(2)) expressly provide that the resulting arbitral award shall be *"final and binding"*. While the Arbitration Rules of the ICC (Article 34(6) of the 2011 edition (applicable in the present instance) and Article 35(6) of the 2017 edition) do not use the term "final", they nevertheless provide that *"[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*

As an additional ground for the dismissal of the award debtor's setting aside application, the Supreme Court of Appeal considered that it shall not be permitted to challenge an ICC arbitral award which is deemed "final and binding" and that by agreeing to resolve their dispute through arbitration under the auspices of the ICC Rules of Arbitration, the parties have *"waived their right to challenge the award"*. By deeming an arbitral award, issued in accordance with the Rules of Arbitration of the ICC to be both "final" and "binding", the Bahrain Supreme Court of Appeal has adopted a wide, arbitration-friendly interpretation.

With respect to the scope of the waiver of *"right to any form of recourse insofar as such waiver can be validly made"* referred to under the ICC Rules of Arbitration, the Bahraini court provided instructive guidance. The Supreme Court of Appeal held that the finality of an arbitral award shields it from an original setting aside action without prejudice to applications for the refusal of the recognition or enforcement of an award under Article 5 of the Convention on the Recognition and Enforcement of Foreign Award of 1958 (commonly referred to as the New York Convention) to which the Kingdom of Bahrain acceded to in 1988, and which provides for an exhaustive list of instances where the recognition and enforcement of an award may be refused.

Accordingly, the Supreme Court of Appeal dismissed the award debtor's setting aside application on grounds that the arbitration agreement refers to the application of the ICC Rules of Arbitration which render the resulting arbitral award final and binding and not subject to any set further challenge.

Conclusion

The Supreme Court of Appeal's judgment confirms the Bahraini courts' continued commitment to enforcing foreign arbitral awards subject only to narrow grounds of refusal. This final decision, which expressly upholds the principle of finality of arbitral awards, reflects a growing recognition by the Bahraini courts of its limited interventionist stance in arbitration matters.

While the national courts' reluctance to interfere in the arbitral process is welcomed by many parties that look to arbitration to provide an efficient resolution to a dispute, this decision also serves as a reminder to parties as to whether arbitration is the most appropriate option for them and, if so, to carefully devise their arbitration agreement. Amongst the salient issues to consider, parties need to be aware that their choice of seat and institutional rules impact the latitude of their ability to challenge an arbitral award. This decision undoubtedly serves as a precedent to a notably underdeveloped area of arbitral jurisprudence in the Middle East and underpins the principle that party autonomy in arbitration should be carefully considered.

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[T]he Supreme Court of Appeal considered that it shall not be permitted to challenge an ICC arbitral award which is deemed 'final and binding' and that by agreeing to resolve their dispute through arbitration under the auspices of the ICC Rules of Arbitration, the parties have 'waived their right to challenge the award'.

Another venture to no-man's land: ICSID jurisdiction cannot be established using the MFN Clause in the OIC Investment Agreement *Itisaluna v. Iraq*

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A most-favoured-nation ('MFN') clause links investment treaties by guaranteeing that a host state must provide investors with treatment no less favourable than the treatment it provides to investors under other investment treaties. MFN clauses often tend to be generally worded which can lead to interpretational issues. Opinion is divided on whether such generally worded MFN clauses in bilateral investment treaties ('BITs') should be narrowly interpreted to exclusively apply to the substantive protections contained in the treaty (such as fair and equitable protection or protection from expropriation) or whether they are capable of being more broadly interpreted to also include the dispute resolution provisions contained therein.

Many of the cases leaning towards a broad interpretation of the MFN clause relate to particular aspects of the dispute resolution provisions at issue (such as waiting periods, exhaustion of local remedies, or the expansion of jurisdiction *ratione materiae*). However, there have been instances where an investor has used an MFN clause to modify the forum or applicable rules for dispute resolution. In particular, some investors have established their entitlement to commence an arbitration at the International Centre for Settlement of Investment Disputes ('ICSID') on the basis that an MFN clause contained in a treaty that does not provide for ICSID arbitration allows an investor to invoke ICSID provisions contained in another investment treaty to which the host state is a party.[1]

This topic is pertinent in the Middle East-North Africa ('MENA') region at the time of writing following a recent award on jurisdiction rendered by an ICSID tribunal in *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10. In that case, a majority of the Tribunal held that it lacked jurisdiction in the case because the claimants could not rely on the MFN clause in the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference ('OIC Investment Agreement'), which does not provide for ICSID arbitration, to invoke the ICSID arbitration provisions in the BIT between Iraq and Japan.

Overview of the dispute resolution provisions in the OIC Investment Agreement

The OIC Investment Agreement was signed in 1981 and entered into force in 1988. It is intended to develop a favourable climate for investments among its 57 member states.

Article 17 of the OIC Investment Agreement contains the treaty's dispute resolution provisions. It provides that, until an 'Organ' is established for the settlement of disputes (which has not occurred to date), disputes are to be resolved by conciliation or arbitration in accordance with the procedures contained in Article 17. The OIC Investment Agreement does not prescribe any particular arbitral rules or institutions for the arbitral process.

The dispute resolution provisions in the OIC Investment Agreement sat dormant for many years. In 2012, however, an UNICTRAL tribunal seated in Singapore found that it had jurisdiction under the OIC Investment Agreement and went on to issue a final award in December 2014 in the *Al-Warraq v. Indonesia* case. Several other cases have since followed.

While there has been some debate about whether the dispute resolution provisions in the OIC Investment Agreement provide only for state-to-state arbitration rather than investor-state arbitration, the *Al-Warraq* tribunal concluded that the agreement allowed for investor-state arbitration.

> **"The question of whether an investor is entitled to commence an ICSID arbitration on the basis of aMFN clause has been described by one tribunal as 'venturing into a fiercely contested non-man's land in international law**

There have also been some key developments in relation to the appointment of arbitrators under the OIC Investment Agreement. Notably, while the use of the MFN clause in the OIC Investment Agreement was not successfully invoked in *Itisaluna* to trigger ICSID jurisdiction (as discussed in more detail below), the MFN clause in the OIC Investment Agreement has reportedly been used to enable the Secretary-General of the Permanent Court of Arbitration ('PCA') to act as the appointing authority, i.e., the authority responsible for appointing an arbitrator, in several other cases even though Article 17.2(b) of the OIC Investment Agreement designates the Secretary-General of the OIC as the

[1] *Examples include Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, dated 3 July 2013, and Plama Consortium Limited v Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, dated 8 February 2005. This argument was also made in Ali Alyafei v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/15/24; however, no decision was made on the issue since the arbitration was discontinued.*

appointing authority. The OIC Secretary General had opted not to appoint an arbitrator on behalf of the respondent state in these cases, thereby opening the door to the respondents to potentially stymie the proceedings. The claimants went to the PCA in these cases, which reportedly stepped in to make the appointments on the basis of the MFN clause and enabled the arbitrations to proceed.

Background of the *Itisaluna* case

The *Itisaluna* case involved a dispute relating to investments that the claimants had made in the telecommunications sector in Iraq. The claimants consisted of two companies incorporated in Jordan and two companies incorporated under the laws of Dubai. The claimants contended that the Republic of Iraq breached its obligations under the OIC Investment Agreement through various acts and omissions that harmed their investments.

Since the dispute resolution clause of the OIC Investment Agreement does not provide for ICSID arbitration, the claimants sought to initiate ICSID arbitration in reliance on the MFN clause in the OIC Investment Agreement, which they argued entitled them to import the dispute resolution provisions from the Iraq-Japan BIT, which provides for ICSID arbitration, into the OIC Investment Agreement. While the particular reasons why the *Itisaluna* claimants sought ICSID jurisdiction are not known, parties often find ICSID arbitration to be appealing because of the robust enforcement regime that ICSID provides and the publicity generated by ICSID proceedings, which may serve to increase pressure on the respondent state to settle the dispute or comply with the award to avoid adverse publicity.

Decision of the tribunal

The tribunal – consisting of Sir Daniel Bethlehem QC, Wolfgang Peter, and Brigitte Stern –commenced its analysis on jurisdiction by observing that the multilateral character of the OIC Investment Agreement was crucial in this case. According to the tribunal, a cautious approach should be adopted because any interpretation of the OIC Investment Agreement by reference to a non-OIC bilateral treaty obligation of Iraq would inevitably *"colour the appreciation"* of the legal obligations of the other Contracting Parties to the OIC Investment Agreement (paragraph 153).

The tribunal then considered the MFN clause of the OIC Investment Agreement, which is found in Article 8. In particular, Article 8(1) provides that

> *"[t]he investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in the respect of rights and privileges accorded to those investors."*

Iraq had argued for a textual interpretation of Article 8(1) and maintained that the resolution of disputes does not arise *"within the context of economic activity"* that is carried out *"within the territory of the respondent state"* (paragraph 193).

The tribunal, however, was not persuaded by this argument and considered it to be *"excessively narrow and formalistic"* (paragraph 194). According to the tribunal, the right to arbitration is a right that is an unarguably important component of the *"favourable climate for investments"* that is at the heart of the object and purpose of the OIC Investment Agreement (paragraph 194).

The tribunal considered a key exception to the MFN clause found in Article 8(2)(a) of the OIC Investment Agreement. Article 8(2)(a) provides that the general MFN entitlement set forth in Article 8(1) *"shall not be applied to any better treatment given by a contracting party in"* cases involving *"[r]ights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement."* The tribunal considered that the effect of this provision is that the Contracting Parties of the OIC Investment Agreement may adopt *"a variable investment framework in respect of investors from OIC Agreement Contracting Parties and that the OIC Agreement MFN clause cannot be used as a leveller to circumvent such differential treatment"* (paragraphs 198-199).

The tribunal noted that the two Jordanian claimants came naturally within the scope of the Iraq-Jordan BIT, which contains express consent to ICSID arbitration in Article 19(2)(b). Nevertheless, the claimants did not to rely on that treaty in the case because it fell under Article 8(2) of the OIC Investment Agreement;[2] instead, they invoked the Iraq-Japan BIT, which does not fall under Article 8(2). By doing so, however, the claimants led the tribunal to conclude that it was *"difficult to escape the whiff of overreach that casts a pall over the Claimants' case"* since they were *"endeavouring to take themselves outside the framework of"* Article 8(2) by relying on a BIT with a non-Contracting Party to the OIC Investment Agreement (paragraph 200).

Further, the tribunal noted that the MFN clause in Article 4(3) of the Iraq-Japan BIT expressly *"does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes."* The majority thus considered that an application of the MFN clause would place the claimants in a more favourable position than Japanese investors invoking the Iraq-Japan BIT (paragraph 207). According to the tribunal, a *"balance"* must be struck between the need to preserve the MFN principle, and the necessity to guard against *"overreach"* (paragraph 208).

In seeking to strike this balance, the tribunal found useful guidance in Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000. The Maffezini case *"concluded that the claimant could invoke the dispute settlement provisions in one BIT by operation of the MFN clause in another BIT, in respect of which he was a qualifying investor"* (paragraph 210). At the same time, however, the Maffezini case held that, as a matter of principle, the beneficiary of an MFN clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question.

In view of this analysis, the *Itisaluna* tribunal noted that the OIC Investment Agreement established a *"clearly defined and particular dispute settlement regime"*, which did not include ICSID arbitration, although it very easily could have done so (paragraph 216). Thus, according to the tribunal, *"[t]he necessary implication is that this omission was a matter of conscious decision"* (paragraph 216).

Dissent

One of the arbitrators, Wolfgang Peter, dissented and concluded that the claimants were able to incorporate the ICSID arbitration clause in the Iraq-Japan BIT into the OIC Investment Agreement by operation of the MFN clause in the OIC Investment Agreement.

Mr. Peter observed that none of the limitations in Article 8(2) (specifically the limitation that refers to treatment between *"two Contracting Parties"* to the OIC Investment Agreement as explained above), should be applied to the case at hand as Japan is not a Contracting Party to the OIC Investment Agreement (paragraph 239).

He also noted that all of the examples given in the Maffezini decision refer to situations where clear rules regarding arbitration have been included in the agreement on which the parties relied (paragraph 241). In his view, that situation was different from the present case in which the OIC Investment Agreement *"sometimes lacks clarity"*, as acknowledged by the majority. As a result, Mr. Peter concluded that "the freedom of interpretation of the Tribunal should be used" (paragraph 241) such that the claimants could use the MFN clause to import Iraq's consent to ICSID jurisdiction in the Iraq-Japan BIT into the OIC Investment Agreement.

[2]More broadly, the Jordanian claimants did not seek to initiate an ICSID arbitration under the Iraq-Jordan BIT because it had just entered into force less than a month before the notice of arbitration was finalised and they preferred not to delay the notice by further considering the Iraq-Jordan BIT; the claimants also had a preference to join all of the claimants together in a single arbitration (paragraph 134).

Conclusion

The question of whether an investor is entitled to commence an ICSID arbitration on the basis of anMFN clause has been described by one tribunal as *"venturing into a fiercely contested non-man's land in international law."* (Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, dated 3 July 2013, paragraph 40.) Such a venture into *"no-man's land in international law"* arises in situations where the MFN clause is broadly phrased and the contracting parties to the treaty have neither expressly excluded or included dispute resolution mechanisms in the MFN clause.

The 57 Member States of the OIC are reportedly negotiating the creation of a new dispute resolution mechanism for investment disputes. While contributing towards an understanding of the key provisions of the OIC, the *Itisaluna* case, particularly when viewed in light of the PCA cases noted above, may also serve as a reminder for the contracting parties to also consider adding clarifications or carve-outs to the MFN obligations.

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Qatari arbitration law: to apply or not to apply

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Introduction

On 12 April 2017, Qatar's first stand-alone arbitration law titled Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law ('Qatari Arbitration Law' or 'the Law'), which is largely based on the United Nations Commission on International Trade Law ('UNCITRAL') Model Arbitration Law, entered into force. The Qatari Arbitration Law applies retrospectively (Article 3). It also repealed and replaced Part 13: Arbitration (Articles 190 to 210) of the Civil and Commercial Procedures Code, Law No (13) of 1990 ('CCPL' or 'the old law') as of 12 April 2017 (Article 4 of the Qatari Arbitration Law).

While the law signals Qatar's intent to transition into a pro-arbitration jurisdiction, it remains to be seen if local courts support arbitrations in line with current best practices. This article draws attention to a recent judgment of the Qatari Court of Cassation, which decided that the Qatari Arbitration Law does not apply to arbitrations arising from contracts signed prior to the effective date of the law, i.e.,12 April 2017. The judgment appears to contradict Articles 3 and 4 of the Qatari Arbitration Law.

Procedural history

The parties to the case had entered into a commercial consultation agreement (containing an arbitration clause) in 2013. In May 2017, following the repeal of Article 195 of the CCPL, the Claimant sought the assistance of the Court of First Instance under the same provision, (which allows the Court to appoint arbitrators in specific instances) on the basis that the Defendant failed to nominate an arbitrator. The Defendant contended that since the case was filed after the Qatari Arbitration Law came into force, the CCPL was not applicable to the dispute. Instead it argued that the Qatari Arbitration Law should apply. The Court of First Instance ruled in favour of the Claimant and appointed the members of the arbitration tribunal in reliance on Article 195 of the CCPL.

The Defendant appealed the judgment of the Court of First Instance to the Court of Appeal. The Court of Appeal denied the Defendant's application to appeal and upheld the decision of the Court of First Instance. The Court relied on Article 195 of the CCPL according to which decisions on court-appointed arbitrators under Article 195 may not be appealed.

Decision of the Court of Cassation

The Defendant, nonetheless, appealed to the Court of Cassation. It contended that the Court of Appeal wrongfully dismissed the appeal as the appeal was based on a dispute over the applicability of the Qatari Arbitration Law and not solely on the decision to appoint an arbitrator under Article 195 of the CCPL. The Court of Cassation allowed the appeal to proceed. The Court held that *"[t]he Qatari Arbitration Law is not applicable in this instance as the legal relationship between the parties was established before the effective date of the law. Since the arbitration clause was signed in January 2013, the consequence that follows is that the CCPL remains the law applicable to the arbitration agreement in question."*

The Court based its reasoning on Subsection 2: The Application of the Law with Regard to Time, Article 3(1) of the Civil Law no. 22 of 2004 states *"unless otherwise provided, the new law shall apply to any act from the effective date thereof."* As a result, it upheld the decision of the Court of First Instance that appointed the members of the arbitration tribunal in reliance on Article 195 of the CCPL.

Commentary

The decision of the Court of Cassation limits the scope of the Qatari Arbitration Law contrary to its express terms. The impact of the decision is that the CCPL will apply to all arbitrations arising out of contracts signed prior to 12 April 2017. The Court of Cassation seems to have solely relied on Article 3(1) of the Civil Law no. 22 of 2004 and not considered Articles 3 and 4 of the Qatari Arbitration Law.

Article 3 of the law states,

> *"the provisions of the attached Law of Arbitration in Civil and Commercial Matters shall apply to any ongoing Arbitration at the time the Law enters into force and to any Arbitration commencing after the Law enters into force."*

Article 3 consists of two parts. The Qatari arbitration Law shall apply to: 1) any ongoing arbitration at the time the Law enters into force; and 2) any arbitration commencing after the Law enters into force. Since, in the first part, the Qatari Arbitration Law applies *"to any ongoing arbitration at the time the law enters into force"* it is implicit that the Qatari Arbitration Law applies to arbitration agreements signed prior the commencement of the Qatari Arbitration Law. Even though, the second part of Article 3 does not explicitly state that the law shall apply to arbitrations arising out of previously existing arbitration agreements[1], the reference to *"any Arbitration"* (in the second part) arguably includes arbitrations based on arbitration agreements concluded prior to the time the Qatari Arbitration Law entered into force.

Article 4 of the law states,

> *"Articles 190 to 210 of the first Book of the aforementioned Civil and Commercial Procedures Law are repealed, as well as any provision that contravenes the provisions of the attached Law".*

The decision of the Court of Cassation upheld the decision of the Court of First instance, which applied a repealed law provision, i.e., Article 195 of the CCPL. It is also worth noting that the Qatari Arbitration Law specifies additional measures to be followed for the appointment of arbitrators. Article 11 of the Law states, arbitrators shall be appointed from a registry of arbitrators approved by the Ministry and must meet certain conditions including that they are persons of good conduct and reputation. Articles 195 of the CCPL did not contain such conditions, and the appointment of arbitrators pursuant to its provisions would arguably deprive the parties of their entitlements under Article 11 of the Qatari Arbitration Law. Further, it remains an open question as to whether an arbitrator appointed under Article 195 of the CCPL, following its repeal by the Qatari Arbitration Law, may issue enforceable awards. This question will be determined, we expect, by the Qatari courts in determining any future challenges to such awards.

It is hoped that future judgments will clarify the relationship between Article 3(1) of the Civil Law no. 22 of 2004 and Articles 3 and 4 of the Qatari Arbitration Law. In the meantime, the position appears to be that the Qatari Arbitration Law does not apply to arbitrations arising out of contracts signed prior to 12 April 2017.

For further information, please contact Roy Georgiades (r.georgiades@tamimi.com) and Aiman Kler (a.kler@tamimi.com).

[1]*Such language is deployed in the UAE Arbitration Law – Article 59, The Temporal Dimension of this Law - "The provisions of this Law shall apply to any Arbitration which is pending at the time of entry into force of this Law, including any Arbitration arising out of a previously existing Arbitration Agreement, and all proceedings which took place under any prior legislation shall remain valid."*

Investment funds: the EU Blacklist and Economic Substance

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In February 2020, the Cayman Islands was added to the European Union's ('EU') list of non-cooperative jurisdictions for tax purposes (the 'EU blacklist') as a result of its failure to introduce new laws relating to private funds within the necessary timeline. The list of non-cooperative tax jurisdictions is updated twice yearly, and the next review of the blacklist is expected in October 2020. In response, the Cayman Islands' government is working with EU officials to begin the process of being removed from the EU blacklist in October 2020.

Background

In December 2017, the EU Council adopted an EU list of non-cooperative jurisdictions for tax purposes containing a blacklist of non-cooperative jurisdictions together with a grey list. The jurisdictions identified on the grey list were those that committed to introduce changes in their tax laws to comply with the EU criteria within a stipulated period of time. The Cayman Islands was included on the original grey list since it establishes offshore structures that attract profits without real economic activity ('2.2 jurisdictions').

The Cayman Islands have historically been very proactive in responding positively to the standards established by The Organisation for Economic Co-operation and Development ('OECD') and the EU. In fact, the Cayman Islands have adopted in excess of 15 legislative changes in response to the EU's criteria, including the *Cayman International Tax Co-operation (Economic Substance) Law, 2018*, in response to this situation.

As a result of the proactive initiatives adopted by the Cayman Islands, in June 2019. it was determined that the Cayman Islands' economic substance legislation was *"not harmful"* (the highest positive rating possible) by the OECD's Forum on Harmful Tax Practices. Notwithstanding, the EU Council added the Cayman Islands to its blacklist joining Fiji, Oman, Samoa, Trinidad and Tobago, Vanuatu, the three US territories of American Samoa, Guam and the US Virgin Islands, Palau, Panama and Seychelles. The EU Council justified the addition of the Cayman Islands to this list by stating that *"Cayman Islands does not have appropriate measures in place relating to economic substance in the area of collective investment vehicles ('CVI')."*

As a result, the Cayman Islands government enacted the *Private Funds Law* and the *Mutual Funds (Amendment) Law*—both of which appear to have addressed the EU's economic substance concerns for CIVs. These laws were enacted and effective as of 7 February 2020. However, it appears that the blacklisting by the EU was due to the legislation not being in effect by the required deadline of 4, February 2020 (the date of the EU's Code of Conduct Group meeting).

Consequences of blacklisting of the Cayman Islands

In addition to the imposition of various administrative directives, as of 1, July 2020, most EU member states will need to comply with the EU Directive 2011/16 on Administrative Cooperation ('DAC6'), which relates to related party payments to an entity in a non-cooperative tax jurisdiction (i.e., the Cayman Islands). Any related-party payments to a Cayman entity will consequently be reportable to the *"home country"* under DAC 6 within 30 days. Further, EU funding is not available to or through entities established in a non-cooperative tax jurisdiction. Even if the Cayman Islands is removed from the blacklist in October 2020 (the next time the EU Council meet to review the list), a very large number of historical transactions with Cayman Islands entities are likely to be reportable in August 2020. This imposes a significant compliance burden on European investors, investment funds and their advisors.

While the EU does not impose automatic sanctions for countries on the EU blacklist, as of January 2021, EU Member States are encouraged to apply at least one of four tax measures on any transaction with a non-cooperative jurisdiction. These tax measures include: (i) limits on tax deductions; (ii) imposing controlled foreign company rules; (iii) imposing withholding taxes on payments made to non-cooperative jurisdictions; and (iv) limiting tax exemptions on revenue treated as received from a non-cooperative jurisdiction.

Luxembourg recently introduced draft legislation that may deny tax deductions on interest and royalty payments to related entities located in non-cooperative tax jurisdictions. Luxembourg already applies enhanced tax audit requirements for Luxembourg companies with related entities located in non-cooperative tax jurisdictions.

It is important to recognise, however, that there are no restrictions imposed on EU investors who choose to invest in Cayman Islands' CIVs or funds that have Cayman entities in their structure (i.e., parallel funds, master feeder structures, Cayman tax blockers, umbrella funds). Investment advisors and promoters can continue to market Cayman CIVs or funds that have Cayman entities to EU investors under the existing private placement regimes.

Notwithstanding, investment managers of Cayman CIVs will invariably incur additional compliance costs. The *Private Funds Law 2020* now requires certain private funds to register and file audited accounts adding to these costs. Further economic substance requirements may also include engaging Cayman resident directors and perhaps even establishing and staffing an office in the Cayman Islands.

Coupled with these concerns, investment managers will necessarily have increased reputational concerns, including increased concern over the audit risk and risk of increased tax leakage if there are Cayman blockers or other Cayman corporate vehicles in fund structures. This will invariably motivate them to consider alternate fund jurisdictions, including either of the two United Arab Emirates ('UAE') financial free zones, being the Dubai International Financial Centre (the

'DIFC') and the Abu Dhabi Global Market (the 'ADGM'), both of which are the predominant jurisdictions of choice for marketing to investors in the Middle East, Africa and South Asia ('MEASA') region, which comprises 72 countries with an approximate population of 3 billion and a nominal GDP of US$7.7 trillion.

Economic Substance Regulations in the UAE

The UAE Economic Substance Regulations ('ESR') came into force on 30, April 2019, and subsequent guidance on the ESR was issued on 11, September 2019. The ESR are applicable to all UAE entities, whether they are located onshore or in a free zone (including financial free zones, such as the DIFC and the ADGM), to honour the UAE's commitment as a member of the OECD Inclusive Framework on Base Erosion and Profit Shifting ('BEPS'), and in response to a review of the UAE tax reporting framework by the EU. The purpose of the ESR is to ensure that UAE entities undertaking certain activities report actual profits that are commensurate with the economic activity undertaken within the UAE (the 'Economic Substance Test').

The Economic Substance Test requires a UAE entity to demonstrate that:

- the entity and the relevant activity are being directed and managed in the UAE;
- the relevant *Core Income Generating Activities* ('CIGAs') are being conducted in the UAE; and
- the entity has adequate employees, premises and expenditure in the UAE.

There are potentially two broad filing requirements under the ESR:

- notification form; and
- annual substance return.

Under the ESR, all filing requirements fall under the remit of the relevant *"Regulatory Authority"* (i.e., Registrar of Companies), and as such, it is the Regulatory Authorities that set the requirements, deadlines and format for notification filing as they believe is appropriate and which may vary.

Conclusion

The UAE Ministry of Finance introduced the Economic Substance Regulations on October 10, 2019. While the Economic Substance Regulations introduce compliance and substance requirements for certain UAE entities, it has been viewed by local and international investors and financial institutions as a positive step in raising the profile of the UAE as an attractive funds' regime.

As with other nations, like the Cayman Islands, that have introduced or are in the process of introducing economic substance legislation in an effort to avoid the negative consequences that the EU may impose on non-cooperative jurisdictions, there will be an increased level of global scrutiny on those low or tax neutral jurisdictions that constantly compete with each other for the business of establishing and regulating collective investment funds. At the same time, fund managers and promoters now need to review and rationalise their existing fund platforms to assess the level of economic substance in those jurisdictions to determine the actions they need to undertake. This rationalisation exercise could result in managers deciding to enhance their economic presence in a particular jurisdiction, consolidate entities within their fund structures, continue to operate out of certain jurisdictions, undertake a reorganisation of its fund platforms or otherwise consider the winding up of a particular fund.

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New Corporate Governance Code for UAE PJSCs: what, why and how?

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The United Arab Emirates ('UAE') Securities and Commodities Authority ('SCA') issued new corporate governance rules under Chairman of SCA Board Decision No. (03 R.M.) of 2020 concerning adopting the Corporate Governance Guide for Public Joint Stock Companies ('New Rules'). The New Rules, which were published on 27 February 2020 and came into force on 28 April 2020, repeal the previous corporate governance rules (Chairman of SCA Board Decision No. (7 R.M) of 2016 concerning the Standards of Institutional Discipline and Governance of Public Shareholding Companies). The New Rules apply to Public Joint Stock Companies ('PJSCs') listed on the Abu Dhabi Securities Exchange or the Dubai Financial Market. This article provides a summary of the key elements of the New Rules.

What is corporate governance?

Corporate governance is the collection of rules, practices, mechanisms and processes by which corporate entities are operated, directed and controlled. Good corporate governance should create a balance between the interests of an entity's shareholders, its senior management, its other stakeholders and the wider community.

Good corporate governance should promote the rule of law, transparency, responsiveness, inclusion, efficiency, equality, accountability and participation and should be executed through a cultural mindset rather than treated as a 'tick-box' compliance exercise. Corporate governance best practices for PJSCs can assist in building and maintaining investor confidence and can mitigate the risks of corruption and mismanagement, all of which can enhance the reputation of a PJSC, and potentially improve its share price. It is very important for PJSCs to remember the "G" for governance in ESG (Environmental, Social and Governance) that is having an increasing impact on investor decision-making.

Corporate governance should not interfere in the day-to-day activities of the PJSC; instead, it should set out the framework for the different roles and responsibilities of the stakeholders in the PJSC such as its shareholders, board members, committee members, senior management, and auditors.

What do the Corporate Governance Rules require?

The Corporate Governance Rules set out the minimum corporate governance standards required of a PJSC. The constitutional documents of the relevant PJSC may impose higher standards.

1. The shareholders and the general assembly

The New Rules provide certain protections and rules relating to a PJSC's shares. These include the following:

- all shares must be of the same class;
- all shareholders must be treated equally;
- a share grants its holder the right to receive profits if and when distributable, and the free disposal thereof;
- a shareholder has the right to review the PJSC's financial reports and approve them;
- each shareholder enjoys the right to attend, participate in, and vote at general assembly meetings;
- a shareholder may delegate another person, save for a board member of the PSJC, to attend a general assembly meeting on his or her behalf. When signing the proxy document, the relevant shareholder should use the signature certified by either a notary public, the UAE chamber of commerce or economic department, a licensed bank in the UAE where the shareholder has an account, or any authority authorised to undertake notarisation activities;
- a PJSC shall appoint two representatives from law or audit firms certified by the SCA to represent shareholders at general assembly meetings. Lawyers from law firms operating in the UAE, financial consultancies and analysts approved by SCA, or any other body approved by the SCA are eligible for such appointment;
- in order to avoid consolidation of shares, a person attending by proxy may not represent more than one shareholder where such representation would exceed five per cent of the issued share capital of the PJSC; and
- certain actions of the PJSC can only be taken with the approval of a simple majority of the shares represented at the meeting, or in the case of very important matters, such as amending the PJSC's constitutional documents, a majority of 75 per cent is required.

2. The Board

The board of directors (the 'Board') manages and supervises a PJSC's business and operations. The New Rules place a number of obligations on members of the Board including the following:

- a Board member is expected to safeguard the PJSC's interests, exercise reasonable care, and undertake all acts required for the benefit of the PJSC;
- a Board member shall act with honesty and integrity and observe all applicable laws and the PJSC's constitutional documents;
- a Board member must avoid conflicts of interest – including abstaining from voting on matters where such member has an interest, and must disclose such interests to the remainder of the Board. Board members must fill in a specific form, to be kept by the Board Secretary declaring any interests or relationships that may affect their ability to perform their tasks as a Board member, which is to be reviewed quarterly or updated at the time as any existing interest changes or new interest arises.
- Board members should avoid the acceptance of gifts (gifts below AED500 (approximately US$136) are acceptable));
- the Board has to appoint an independent secretary that directly reports to it;
- the Chairman and majority of the Board members must be UAE nationals; and
- the majority of Board members have to be non-executive and independent.

The New Rules introduce the option for a PJSC to implement a dual governance structure under which the management function is separated from the supervisory function. This is achieved by establishing two Board committees: (i) a supervisory committee; and (ii) an executive committee. These committees will be required to co-operate to realise the PJSC's objectives.

The New Rules encourage the establishment of two non-mandatory committees; a risk committee and a technology committee.

3. Board committees

The New Rules provide that the Board shall establish a nomination and remuneration committee and an audit committee. Each committee shall comprise not less than three non-executive Board members, two of which must be independent. Each committee must be chaired by an independent Board member.

The nomination and remuneration committee prepares policies relating to remuneration, benefits, and incentives of the Board and the PJSC's employees.

The audit committee reviews the financial and audit policies and regulations of the PJSC and works closely with the external auditor of the PJSC to ensure that it carries out its engagement in accordance with applicable law.

In addition, the New Rules encourage the establishment of two non-mandatory committees, a risk committee and a technology committee. The risk committee sets out the risk management strategy of the PJSC and the implementation of such policy. The technology committee will review and approve the PJSC's technology plans and strategy and ensure the implementation of such plans and strategy.

4. Internal audit and compliance officer

The New Rules provide that each PJSC must develop an internal audit system and have a specific department in charge of its implementation. This manages and assists the implementation of the PJSC's corporate governance rules in an efficient and effective manner.

Each PJSC must also appoint a compliance officer who monitors compliance by the PJSC and its employees with applicable laws and regulations as well as their compliance with the PJSC's own constitutional documents.

5. The auditor

Pursuant to the New Rules, a PJSC must have an external auditor who is an impartial and independent person. The auditor must be registered with the SCA.

Corporate governance is the collection of rules, practices, mechanisms and processes by which corporate entities are operated, directed and controlled.

The auditor audits the PJSC's activities and examines its administrative and financial regulations and internal audit functions to ensure their effectiveness and appropriateness to the PJSC. The auditor also reviews the PJSC's financial statements and confirms the existence of its assets.

The auditor is required to report any non-compliance with relevant laws to the SCA.

6. Related party transactions

The New Rules contain restrictions on transactions between a PJSC and its related parties. For the purpose of the New Rules, those considered to be related parties are the chairman, the members of the Board, senior executives and employees, as well as any company in which such persons hold 30 per cent or more of the share capital, and such company's subsidiaries, sister companies, or affiliates.

Any transaction with a related party that does not exceed in value five per cent of the share capital of the PJSC must have prior approval of the Board. Where such deals are of a value exceeding five per cent of the share capital of the PSJC, the general assembly's approval is required. The related party may not vote with regards to either approval.

Where the value of the transaction exceeds five per cent of the share capital of the PJSC a valuation by an SCA approved valuer is required. Following such valuation, the transaction must be approved by the general assembly through an ordinary resolution.

Any related party transaction must be disclosed to SCA together with a confirmation that the transaction is at arms-length and in the interest of the PJSC's shareholders.

7. Corporate Governance of group subsidiaries

Where there is a group of companies, the parent company shall set out the group corporate governance framework with appropriate authorities and monitor their implementation across the group.

Application to banks

The New Rules apply to all PJSCs without exception, including banks. However, there are additional separate rules issued by the Central Bank that apply to banks. Accordingly, this article should not be considered a summary of corporate governance requirements for banks or a complete list of requirements for PJSCs. This is a summary only of the New Rules.

Conclusion

Corporate governance aims to create a check-and-balance system within a PJSC so it may realise an acceptable level of professionalism, accountability, impartiality and independence. This should lead to better performance by the PJSC, a potential uptick in share price, and increased investor confidence in the PJSC.

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Using an SPV as a holding company

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Introduction

In this article, we will discuss the use of Special Purpose Vehicles ('SPV') as a holding company. We will also discuss how business families, investors, entrepreneurs, property investors and existing companies can use a SPV to their advantage. Unless otherwise mentioned, the discussion will be in the context of a SPV registered in Abu Dhabi Global Market ('ADGM').

What is a SPV?

A SPV is a type of company that its shareholders set up for a specific purpose. One can use an ADGM SPV to hold assets such as shares of private companies (e.g. UAE mainland limited liability companies ('LLCs')), shares in publicly listed companies, real property, intellectual property rights ('IP rights') (e.g. trademarks), etc.

A SPV can only engage in "passive" activities and it is not allowed to act in an operational manner. So while for example, a SPV can hold shares in a construction company or a software development company, the SPV cannot itself engage in construction activities or software development activities. On this basis, the SPV does not have employees and would not be eligible for any work or residency visas in the UAE.

An ADGM SPV is not permitted to rent a physical office for purposes of registration, and is required to use the registered office of a group company (e.g. parent or subsidiary) based in ADGM or that of a corporate service provider registered in ADGM.

ADGM is an English common law jurisdiction, and it applies certain (amended) provisions of common law and equity. In other words, ADGM recognises the use of equitable arrangements such as nominee agreements and trust agreements. Foreign investors who are investing in in UAE mainland LLCs can consider combining both a SPV and equitable agreements. This can help foreign investors to both protect their interests and comply with the UAE mainland local ownership requirements.

Why use a SPV?

1. Flexibility of asset ownership

Many different parties can benefit from using a SPV. For example:

1. ***Investors and business people*** who own shares in UAE LLCs in their personal name can corporatise their holding and use a SPV instead (for a further discussion on the benefits of Corporatising your Ownership Structure, please see our article here);
2. ***Individual and corporate real estate investors*** who own property, or who plan to own property, may also use the SPV to hold the asset. A SPV can be used for a single property or for a property portfolio. Investors with large property portfolios may want to consider the feasibility of allocating ownership of the properties to different SPVs, e.g. whether by geography (Abu Dhabi, Dubai, etc.) or by property type (residential, commercial, industrial, etc.) or by some other split. However, note that since SPVs are a relatively new vehicle in the region, not all jurisdictions may be familiar with them. Therefore, it is advisable to confirm, with the property regulator in the jurisdiction where the property is based, whether a SPV can hold the specific property;
3. ***Inventors, companies, start-ups, and start-up founders*** who create or hold intellectual property can use a SPV specifically to hold those IP rights. The SPV can then enter into licensing and IP agreements as needed, and the shareholders will have a vehicle into which they can pool any royalties or licensing fees;
4. ***Business families***, especially if they have a complex family holding structure. This can be, for example, where the founder (in their personal name) holds the shares of certain family companies, and their siblings or offspring hold the shares in other family companies, and yet all are operating under the family company umbrella. The family can use SPVs to streamline their ownership at the family level, and allocate different family companies to different SPVs, e.g. on a geographic- (UAE entities, Abu Dhabi entities, Bahrain, etc.) or sector-specific basis (hotel company shares, retail company shares, etc.) or other split (e.g. one family SPV for assets that the family fully owns, and another family SPV for assets in which the family has co-shareholders); and
5. ***eCompanies entering into joint venture ('JV') agreements*** can consider whether they prefer to establish, with their partners, a SPV specific to that JV (i.e. the company and the partner will be the SPV's shareholders). Another option is for the company to establish its own SPV which will then enter into the JV with the partner.

2. Segregating risk

A SPV would be in the form of a "private company limited by shares". Since the SPV is a private company, the liability of the shareholders would be limited to any investment made (or yet to be made) in the company. The shareholders' other assets (i.e. outside the SPV) would generally not be exposed to liability, except where, for example, a shareholder made a personal guarantee or a corporate guarantee regarding the liability.

So to follow the examples from above, the liabilities of the following would be separated from one another:

1. ***the Investors and business people***, the SPV and UAE LLC;

An ADGM SPV is a holding company that business families, investors, entrepreneurs, property investors and existing companies can customise to cater to their needs. The SPV is flexible enough to hold shares, property, and IP rights. The SPV may make use of multiple share classes with different rights, as well as third-party beneficiary arrangements such as nominee agreements and trust agreements.

2. ***The individual and corporate real estate investors***, "Dubai Property SPV", "AUH Property SPV" and "Residential Property SPV";
3. ***Inventors, companies, start-ups, and start-up founders***, "IP SPV Invention 1" and "IP SPV Invention 2";
4. ***Business families as individuals***, "Family SPV", "UAE Entities SPV", "Bahrain Entities SPV", "KSA Hotel SPV" and "Retail SPV"; and
5. ***Companies entering into joint venture ('JV')*** agreements and "JV1 SPV" and "JV2 SPV"

3. Third party beneficiary arrangements

As mentioned above, ADGM recognises the use of third-party beneficiary arrangements such as nominee agreements and trust agreements. ADGM approves their use so long as the agreement is compliant with ADGM's provisions.

This can be relevant for SPV shareholders who want to protect the rights of third parties, or where the parties agree for one shareholder to hold the shares on behalf of another party. So while for example "Individual A" can be the 100 per cent legal shareholder of an SPV, ADGM allows that "Individual B" can be the 100 per cent beneficial owner of the shares.

4. Flexible shareholding

ADGM has a flexible shareholding regime where:

1. there are no residency requirements on the shareholders;
2. there is no minimum capital requirement;
3. shareholders are allowed to have multiple classes of shares (e.g. ordinary voting shares, multiple voting shares, preferential dividend shares, etc.), and enter these in the SPV's Articles of Association; and

4. shareholders can have incorporate pre-emption rights such as rights of first offer, drag-along rights, and tag-along rights into the Articles of Association or separate shareholder's agreement.

Other considerations regarding the SPV

1. The ADGM SPV nexus requirement

When applying to register an ADGM SPV, the applicants must satisfy the ADGM Registration Authority, which is the ADGM companies' regulator, that the SPV will have an appropriate connection, or 'nexus', to ADGM, the UAE or the GCC. This means the applicant must demonstrate that, and the ADGM Registration Authority must be satisfied that:

1. an UAE or GCC based individual, family, or company will own or control the SPV; or
2. the SPV holds or will hold assets based in the UAE or GCC; or
3. the SPV facilitates transactions connected, or provides real or economic benefit, to the UAE [For a discussion on the use of ADGM SPVs for financing transactions and for securitisation purposes, please see here]; or
4. the SPV's purpose includes issuing securities that the ADGM Financial Service Regulatory Authority approves for listing in ADGM, or on a trading platform or exchange in ADGM.

However, a non-UAE resident individual or company, that will only hold assets based outside the UAE or GCC is unlikely to meet the nexus requirement.

2. ADGM SPVs and Tax Residency Certificates ('TRCs')

The UAE is a signatory to several double-taxation treaties worldwide. The UAE Ministry of Finance is the party that reviews applications for TRCs, and which decides whether or not to issue them.

Generally, ADGM SPVs are not eligible for TRCs. However, if the SPV has an UAE parent company that has operational assets in the UAE, or if the SPV owns an UAE subsidiary that has operational assets in the UAE, it may receive the TRC (subject to the Ministry of Finance's discretion).

3. ADGM SPVs and Economic Substance Regulations

"The Cabinet of Ministers Resolution No. 31 of 2019 Concerning Economic Substance Regulations" ('ESR') applies to all entities in the UAE whether these are registered on the mainland or in free zones. The ESR specifies certain activities, and companies that perform these activities must demonstrate adequate economic substance in the UAE.

A SPV generally would be performing the "Holding Company Business" activity as per the ESR. To the extent the SPV owns any IP Rights, it would also be performing the "Intellectual Property Business" as per the ESR. This means that the SPV would be required to demonstrate adequate economic substance in the UAE according to the guidelines set for both those activities.

Conclusion

An ADGM SPV is a holding company that business families, investors, entrepreneurs, property investors and existing companies can customise to cater to their needs. The SPV is flexible enough to hold shares, property, and IP rights. The SPV may make use of multiple share classes with different rights, as well as third-party beneficiary arrangements such as nominee agreements and trust agreements.

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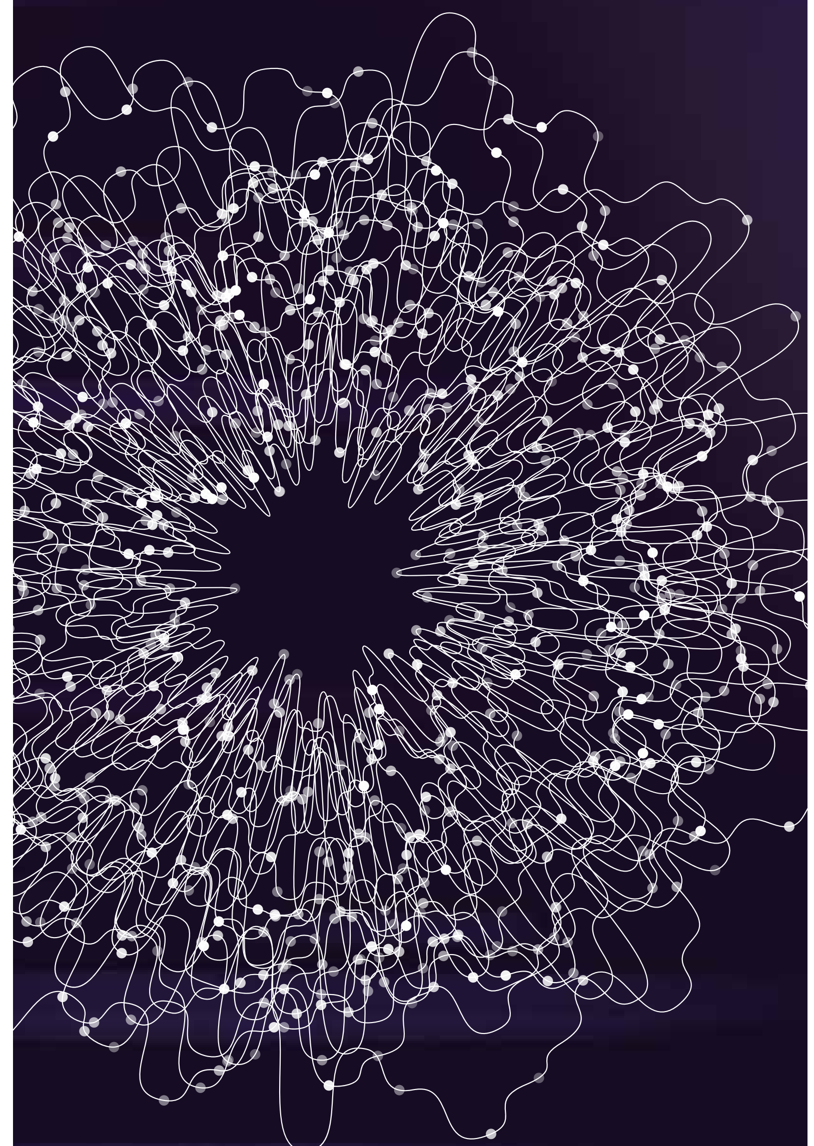
Schrems II: implications for data transfers from the GCC?



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The European Court of Justice's recent "Schrems II" decision (case C-311/18) has attracted a lot of attention in data protection circles. One of the key outcomes of the decision is that it removes one of the grounds upon which European entities could legitimately transfer personal data to certain entities in the United States.

So, what relevance does a European court decision, relating to Europe's General Data Protection Regulation and an arrangement between the EU and the US Department of Commerce, have on personal data processing operations in the GCC? That's a very good question.

Context

Modern data protection laws typically restrict transfers of personal data to recipients in other jurisdictions, unless it can be shown that those other jurisdictions offer a similar level of protection to personal data as applies in the originating jurisdiction. If there were no restriction of this nature, then data protection rules in the originating jurisdiction could be undermined, simply by transferring personal data to a jurisdiction that does not have similar high standards.

Some jurisdictions issue a list of jurisdictions that they consider to provide an adequate level of data protection. Transfers of personal data to recipients in such jurisdictions are permitted. In contrast, transfers of personal data to other jurisdictions would only be permitted if the responsible data controller can show that the proposed transfer falls within another justification set out in the relevant data protection law.

The United States does not have a generally applicable data protection law. Accordingly, it is not considered a jurisdiction that provides an adequate level of protection to personal data. For this reason, the US was not on Europe's list of jurisdictions to which personal data could be transferred without the need to meet one of the other justifications set out in the data protection legislation.

Noting that the transfer of personal data between the EU and the US was likely to be important, effort was made at a governmental level to establish a reliable mechanism. This resulted in an arrangement between the EU and the US Department of Commerce, whereby US entities could undertake to comply with data protection criteria issued by the Department of Commerce. This arrangement, known as 'Safe Harbor', established a mechanism by which transfers of personal data to such specific US entities would be treated as transfers to entities in a jurisdiction that provided an adequate level of protection to personal data.

In October 2015, the legitimacy of the Safe Harbor mechanism was rejected by the ECJ in "Schrems I" (case C-362/14). The ECJ concluded that Safe Harbor did not guarantee that personal data transferred to recipients in the US would enjoy the same level of protection as it enjoyed in Europe. As a result, EU data controllers who had previously relied on Safe Harbor to justify personal data transfers to recipients in the US had to scramble to find an alternative justification.

Again, noting the importance of the transfer of personal data between the EU and the US, an effort was made, at a governmental level, to establish an alternative mechanism. This resulted in the establishment of an approach referred to as the 'Privacy Shield'. The specific differences between the Privacy Shield and Safe Harbor are not material for present purposes. It is material that the legitimacy of the Privacy Shield was subsequently challenged on the basis that it did not provide an adequate level of protection to personal data transferred to the US. In Schrems II, the ECJ threw out the Privacy Shield as a legitimate basis for transferring personal data to the US.

How is this relevant to the GCC?

In general, the concept of data protection is relatively new to the Gulf Cooperation Council countries, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE. At the time of writing, only Bahrain and Qatar have nationally applicable data protection laws of general application. Two free zones in the UAE (Abu Dhabi Global Market ('ADGM') and Dubai International Financial Centre ('DIFC')), and a licensing authority in Qatar (Qatar Financial Centre ('QFC')), also have modern data protection regimes.

In the other jurisdictions (Kuwait, Oman, Saudi Arabia, and 'mainland' UAE), there are not currently any modern data protection laws of general application. (There are provisions that touch on data protection concepts, but these are not of general application, and not relevant for present purposes.) In this context, the Schrems II decision does not really change anything; data controllers operating in these jurisdictions would not have (legitimately) been relying on the Privacy Shield to justify personal data transfers to the US.

Amongst Bahrain, Qatar, ADGM, DIFC, and QFC, the respective laws and regulations provide for what can be understood as a 'traditional' approach when it comes to transfers of personal data to recipients located outside the respective jurisdictions. Generally, such transfers are prohibited unless the recipient is located in a jurisdiction that provides an adequate level of data protection or some other justification is available in the relevant law or regulations.

Bahrain and Qatar

For Bahrain and Qatar, the situation is such that, although the respective data protection laws contemplate that local data protection authorities will issue their own lists of jurisdictions they deem to be adequate, neither of these data protection laws is fully operational. At the time of writing, no such lists have been issued, so Schrems II is of no real consequence; no one in Bahrain or Qatar has been relying on the Privacy Shield as a basis of personal data transfers to the US.

"What relevance does a European court decision, relating to Europe's GDPR and an arrangement between the EU and the US Department of Commerce, have on personal data processing operations in the GCC?

Abu Dhabi Global Market

In contrast, ADGM's Personal Data Regulation 2015 specifically contemplates the application of the Privacy Shield as a mechanism for justifying the transfer of personal data to recipients in the US. The US is listed in ADGM's list of jurisdictions deemed to provide an adequate level of personal data protection, with the note, 'subject to compliance with the terms of the EU-US Privacy Shield'.

So, what does this mean for those data controllers, subject to the ADGM's Personal Data Regulation 2015, who have been relying on the Privacy Shield as the legal basis for transfers of personal data to the US?

In our view, as Schrems II has rejected the legitimacy of the Privacy Shield, it would not be correct for the same mechanism to continue to be recognised by ADGM. The wording of the note in the ADGM regulation itself is sufficient to conclude that, when the Privacy Shield was rejected by the ECJ, it was no longer a legitimate basis for personal data transfers from ADGM to the US pursuant to the ADGM Data Protection Regulations 2015.

We anticipate that ADGM's Office of Data Protection will issue a confirmation to this effect in the near future. Regardless, data controllers in ADGM who have been relying on the Privacy Shield will promptly need to establish an alternative basis to ensure that their transfers of personal data to the US are compliant with ADGM requirements.

Dubai International Financial Centre

For the DIFC, at the time of Schrems I (i.e. prior to October 2015), transfers of personal data to US entities registered with the US Department of Commerce pursuant to the Safe Harbor mechanism were treated as transfers to a jurisdiction with an adequate level of protection. In October 2015, the DIFC Commissioner of Data Protection was swift to act in removing Safe Harbor as a basis for the legitimate transfer of personal data to recipients in the US. At that time, DIFC licensed data controllers needed to identify an alternative basis for transferring personal data to recipients in the US. Notably, when the Privacy Shield became available, DIFC did not explicitly adopt it as an alternative.

In the new DIFC Data Protection Law 2020 (which came into law on 1, July 2020), the application of the Privacy Shield was specifically excluded. The explanation given in the law is that the DIFC does not have its own Privacy Shield arrangement with the US Department of Commerce.

Against this background, Schrems II should have no effect on data controllers subject to the DIFC Data Protection Law 2020. Such data controllers were not able to rely on the Privacy Shield from the outset. Any data controllers that have (erroneously) been transferring personal data to the US in reliance on the Privacy Shield mechanism should promptly review their personal data processing activities. (The same can be said for those who may still think that Safe Harbor applies.)

Data controllers who are subject to the data protection requirements of ADGM in Abu Dhabi and QFC in Qatar need to review the basis upon which they justify the transfer of personal data to the US. If the Privacy Shield played any role, then alternative grounds need to be identified.

Qatar Financial Centre

QFC is in a slightly different position to both ADGM and DIFC. The QFC Data Protection Regulation 2005 contemplates a distinction between transfers to jurisdictions that ensure an adequate level of protection of personal data, and transfers to jurisdictions that do not. Despite this, it does not actually maintain a list of such 'adequate' jurisdictions.

The QFC approach could be understood as involving something of a 'self-assessment' on the part of the data controller. Data controllers need to assess all the circumstances surrounding personal data transfer operations, including: the nature of the data; the purpose and duration of the proposed processing; the origin and final destination of the personal data; and any relevant laws to which the recipient is subject, including professional rules and security measures. Taking this into account, they may reach the conclusion of adequacy in respect of the recipient's jurisdiction.

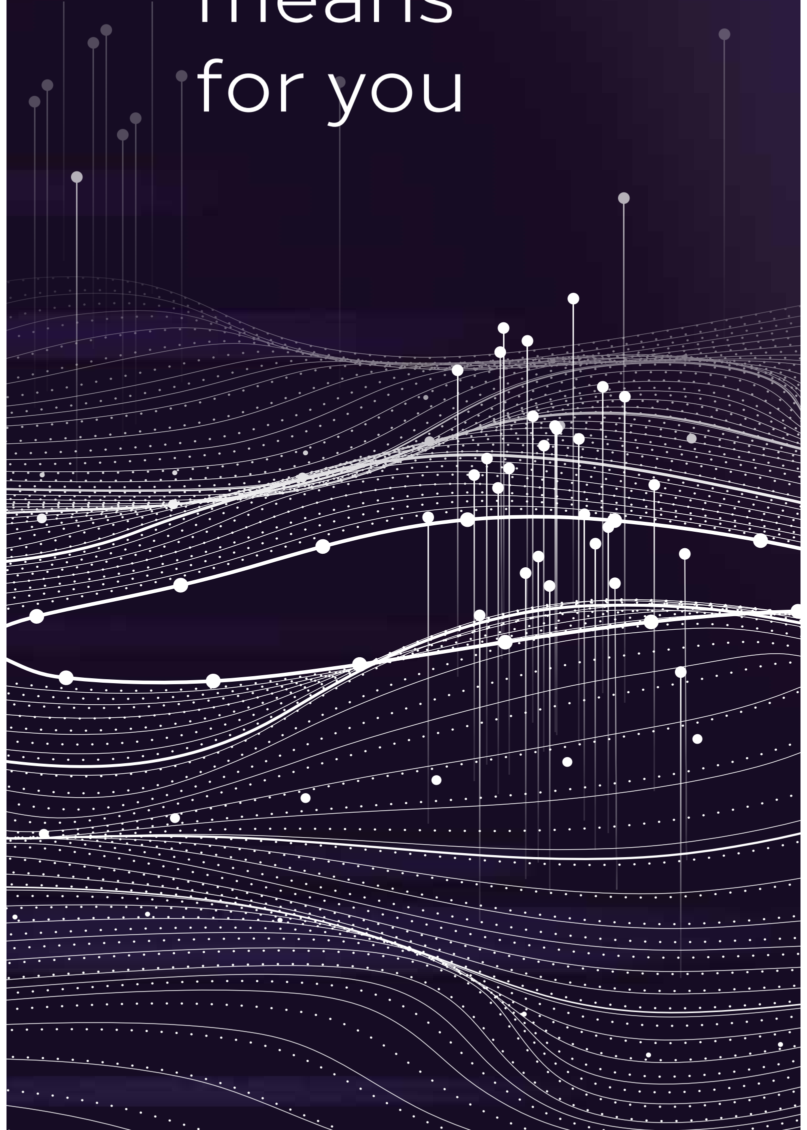
Now, following Schrems II, those QFC data controllers who considered the Privacy Shield as part of their self-assessment will need to reconsider whether all the other circumstances around their personal data transfers to the US will still support a conclusion of adequacy in respect of the recipient's jurisdiction.

What next?

The data protection landscape in the GCC continues to develop, and it is important to keep monitoring it. With regard to the Schrems II decision in particular, data controllers who are subject to the data protection requirements of ADGM in Abu Dhabi and QFC in Qatar are well advised to review the basis upon which they justify the transfer of personal data to the US. If the Privacy Shield played any role, then alternative grounds need to be identified in order for further transfers to be compliant on this point.

For further information, please contact Nick O'Connell (n.oconnell@tamimi.com) or Andrew Fawcett (a.fawcett@tamimi.com)

Getting personal: the new DIFC data protection law and what it means for you



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The Dubai International Financial Centre ('DIFC') enacted a new data protection law which will more closely align the jurisdiction with the approach to personal data protection presently taken in Europe.

What is personal data protection?

In essence, personal data is any information relating to an individual which allows for direct or indirect identification of such individual. For example, an individual's name, phone number, address, citizenship, IP address is personal information. Protection of personal data is recognised as an extension of the fundamental right to privacy.

Historically, the focus on data protection emerged primarily due to the rise in trans-border commerce and trade that led to a surge in information sharing, and the increased use of computers to process information about individuals. Such advances led to greater concern over the privacy of individuals and their ability to exercise control over their personal information. The1995 European Union Directive (Directive 95/46/EC) on protection of individuals with regard to the processing of personal data and on the free movement of such data was replaced by the General Data Protection Regulation ('GDPR'), in May 2018. The GDPR was a generational update of personal data protection law that better reflects today's digital age. The new DIFC Data Protection Law (Law No. 5 of 2020) ('New Law') is closely aligned with the approach taken by the GDPR.

DIFC data protection law

DIFC enacted its New Law which came into force on 1 July, 2020 but will be applicable to businesses with effect from 1 October, 2020. The New Law repeals DIFC Data Protection Law (Law No. 1 of 2007 (as amended) 'Old Law')). In essence, the New Law provides a three-month transition period to businesses to offer compliance. Any rights accrued, liability incurred and/or investigations or administrative proceedings commenced under the Old Law will not be affected until 1 October 2020. DIFC has also published its supporting Data Protection Regulations under the New Law ('Regulations') which came into force alongside the New Law on 1 July, 2020. Separately, non-binding guidance on the New Law ('Guide') has also been released in an attempt to facilitate compliance amongst stakeholders.

Applicability and Scope

The scope of the DIFC's data protection regime has expanded under the New Law. The Old Law was applicable to Controllers registered within the jurisdiction of the DIFC. In contrast, the New Law methodically sets its scope out as not only applying to Controllers incorporated within the jurisdiction of DIFC (whether or not processing takes place in DIFC) but also as applying to Controllers and Processors (regardless of their place of incorporation, whether elsewhere in the UAE or abroad) that process personal data in the DIFC as a part of stable arrangements other than on an occasional basis. The Guide explains that stable arrangements include legally binding or recognised agreements or relationships of an existing, valid type may be enough to require that the principles and objectives of the New Law are demonstrated in such arrangements.

The question then arises as to whether the New Law and the Regulations are applicable to remote processing service providers. In this respect, the Guide elaborates that while non-DIFC entities may be subject to the New Law and the Regulations either directly or indirectly, they are not necessarily required to register with or notify operations to the Commissioner other than by way of the relationship with the DIFC-based relevant entity, nor are they required to complete other administrative tasks. However, they may be subject to fines, warnings or public reprimand by way of such relationships or arrangements, either directly or indirectly. According to the New Law, Processing "in the DIFC" occurs when the means or personnel used to conduct the processing activity are physically located in the DIFC.

Basics and processing of consent

The New Law expands the scope of Processing activities in comparison to the Old Law and generally incorporates the principles for Processing of Personal Data as set out in the GDPR i.e. lawfulness, fairness and transparency, adequacy/ minimisation, accuracy, storage limitation and integrity/security. The conditions for lawful basis for Processing Personal Data as stipulated in the New Law are also largely based on the GDPR and include necessary processing for protection of the vital interests of the Data Subject or of another natural person; a condition which was not covered by the Old Law.

In comparison to the Old Law, there is greater emphasis on the conditions of a Data Subject's consent which, when needed, must be freely given by a clear affirmative action which shows an unambiguous indication of consent. Where Processing is based on consent, a Controller must be able to demonstrate that consent has been freely given and the Controller should implement appropriate and proportionate measures to assess the ongoing validity of the consent. In the context of an employee –employer relationship, it may be hard for the employer to establish that consent was freely given. In the Commissioner's opinion, consent is therefore unlikely to be a good basis for employers to rely on and may be subject to challenge. Employers should consider other lawful bases for processing employee Personal Data.

This position is more in line with the GDPR, although, the New Law does not address certain additional aspects covered in the GDPR such as the conditions applicable to processing of children's data. (i.e minors who cannot legally consent.)

> **The Dubai International Financial Centre ('DIFC') has enacted a new data protection law which will more closely align it with the approach to personal data protection presently taken in Europe.**

Special Categories of Personal Data

Special Categories of Personal Data (previously referred to in the Old Law as Sensitive Personal Data) includes "Personal Data revealing or concerning (directly or indirectly) racial or ethnic origin, communal origin, political affiliations or opinions, religious or philosophical beliefs, criminal record, trade-union membership and health or sex life and including genetic data and biometric data where it is used for the purpose of uniquely identifying a natural person." Such data must not be processed unless one of the conditions set out in the New Law exists (in addition to the general requirements for Processing and lawfulness).

In this respect, most notably (and in comparison to the Old Law), the New Law grants specific rights to the Controller to process Special Categories of Personal Data for Data Subjects' employment purposes including recruitment, visa or work permit processing, the performance of an employment contract and termination of employment. Such processing rights are also available to Controllers in a healthcare context.

Legitimate interests

In comparison to the Old Law, the New Law provides clarity on what constitutes "legitimate interests" for purposes of Processing (i.e. restricting the use of the legitimate interests' right to process) as follows:

- prohibition on public authorities from relying on legitimate interests as the lawful basis for Processing Personal Data;
- transfer of Personal Data by Controllers within their organisational group, for internal administrative purposes is considered a legitimate interest; and
- a Controller has a legitimate interest in Processing Personal Data if it is necessary and proportionate to prevent fraud or ensure network and information security.

Data Controllers and Processors

The New Law places compliance obligations directly on the Processors as well as the Controllers. In addition to such obligations, Controllers and Processors must enter into a legally binding written agreement governing any processing activities.

Where there are two or more Controllers jointly determining the purposes and means of processing such Controllers will be referred to as Joint Controllers and should also enter into a legally binding agreement clearly defining each of their responsibilities regarding compliance with obligations under the New Law.

The New Law casts an obligation upon the Processors to notify the Controller in cases where its processing activity infringes the New Law. Failure to do makes the Processors liable to penalty under the New Law.

Data Controllers and Processors are required to maintain a written electronic record of their processing activities. The New Law makes it mandatory to include certain information in such records. The types of information required is largely mirrored in the records' requirements contained in the GDPR and include the name and contact details of the Controller or Processor, the Joint Controller and any Data Protection Officer ('DPO'), if appointed; purposes of processing, descriptions of data, data subjects and recipient categories. The aforementioned list is not exhaustive and is only for illustrative purposes.

Data Protection Officers

Another key new feature of the New Law which previously remained unaddressed is the introduction of the GDPR concepts of DPO and Data Protection Impact Assessments ('DPIA'). As per the New Law, it is mandatory for official DIFC bodies (except for courts acting in judicial capacity) and Controllers and Processors systematically or regularly engaged in High Risk Processing Activities to appoint a DPO. Definition of High Risk Processing Activities include:

- processing that includes the adoption of new or different technologies or methods (e.g. AI or Blockchain) with materially increased risk to the security or rights of a Data Subject or rendering it more difficult for a Data Subject to exercise their rights;
- processing of a considerable amount of Personal Data (including staff and contractor Personal Data) and where such processing is likely to result in a high risk to the Data Subject, including due to sensitivity of the Personal Data or risks relating to the security, integrity or privacy of the Personal Data;
- the processing will involve a systematic and extensive evaluation of personal aspects relating to natural persons, based on automated processing, including profiling (the automated processing of Personal Data to evaluate the personal aspects relating to a natural person primarily to analyse or predict aspects concerning the person's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements), and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person; or
- a material amount of Special Categories of Personal Data is to be processed.

The Guidance issued by the Commissioner provides useful insights on the parameters of High Risk Processing Activities. Most notably, where processing involves a considerable amount of Personal Data and the risk to Data Subjects is high. the Commissioner refrains from setting any specific quantitative thresholds in respect of what constitutes a "considerable amount" of Personal Data but gives specific instances of that may qualify as processing a considerable amount of Personal Data. Such entities include a:

- Controller with several hundred staff;
- Controller with several thousand customer records;
- business which collects, stores or analyses Personal Data on behalf of its customers;
- Processor which provides outsourced business services involving Personal Data, such as HR or payroll systems or IT support services; and
- provider of hosted subscription services or self-service online services.

Another interesting feature of the New Law is that where a DPO is appointed the DPO must reside in the United Arab Emirates unless he or she is an individual employed within an organisation's group and performs a similar function for the entire group on an international basis. The DPO is required to act independently and report directly to senior management.

Data Subjects' rights

The New Law appears to have greatly expanded the scope of Data Subjects' rights in order to achieve greater consistency with the GDPR. Accordingly, the New Law grants Data Subjects a full set of rights in respect of consent withdrawal; access/rectification and erasure of data; objection to and restriction of processing; data portability; not being subject of automated individual decision making; and anti-discrimination. The anti- discrimination right is an additional right from the California Consumer Privacy Act, which states that the Controller may not discriminate against a Data Subject who exercises any rights under the New Law including: (i) deny any goods or services; (ii) charge different prices or rates, including through the use of discounts or other benefits or imposing penalties; (iii) providing a less favourable level or quality of goods or services; or (iv) suggesting either of the above to the data subject. Similar to the GDPR, the New Law is data-subject-centric.

Transferring data outside the DIFC

The requirements, in respect of transferring Personal Data outside of the DIFC to jurisdictions where adequate levels of protection are implemented, are generally based on data export requirements contained in the GDPR. The Commissioner is empowered to determine which jurisdictions implement adequate levels of protection based on certain factors which include, amongst others: considering the recipient's jurisdictional rule of law; access to Personal Data by authorities; and the existence of effective data protection regulations. A list of adequate jurisdictions has been published in Appendix 3 of the Regulations.

Similar to the GDPR, where personal data is being transferred to jurisdictions which do not provide adequate levels of protection one of the following conditions must be met:

- the Controller or Processor ensures appropriate safeguards are in place such as: binding corporate rules or the adoption of standard data protection clauses as issued by the Commissioner (this list is non-exhaustive); and data subjects have enforceable rights and remedies available to them; or
- one of the derogations listed in the New Law (which includes the explicit consent of the Data Subject, necessity for performance of contract and reasons of public interest) applies; or
- one of the limited circumstances listed in the New Law (which includes non-repetitive transfers, limited number of Data Subjects and compelling legitimate interests of the Controller) applies.

The Regulations mention that the Commissioner has approved and published standard contractual clauses that may be used for transfers to non-adequate jurisdictions outside the DIFC.

Further, a key new feature of the transfer regime under the New Law is the introduction of "binding corporate rules" to facilitate the transfer of Personal Data between members of a corporate group. A Controller or Processor can only rely upon such rules if the Commissioner has approved them and if they are only used for transfers inside the Controller or Processor's corporate group. A new list of jurisdictions meeting the adequacy criteria, as found under the Old Law, is provided in the Regulations.

Breach notifications

The impact of breach notifications are also largely based on those contained in the GDPR. Controllers are required to report Personal Data Breaches which compromise the security to the Commissioner as well as those that breach confidentiality or privacy of a Data Subject. Such notification must be made to the Commissioner as soon as practicable in the circumstances. Processors should notify the relevant Controller without undue delay after becoming aware of Personal Data breach. In certain circumstances, notification must also be provided to the affected Data Subjects.

Fines and disputes

In terms of enforcement, failure to comply with a direction by the Commissioner or a violation of the New Law may result in the imposition of fines ranging from US$10,000 to US$100,000 (depending on the nature of the contravention). The heaviest administrative fines relate to contraventions in respect of the rights of Data Subjects. The Commissioner may also issue a general fine for a violation of the New Law by an appropriate and proportionate amount, taking into account the seriousness of the contravention and the risk of actual harm to any relevant Data Subjects. Data Subjects are entitled to compensation for any damages suffered arising out of a violation of the New Law by an obligated party. The New Law also grants Controllers and Processors the right to appeal any decision or direction of the Commissioner with the DIFC courts.

Conclusion

The New Law also contains certain other provisions such as data sharing with authorities, codes of conduct, cessation of processing and certification schemes.

- Data sharing: Subject to the requirements of the New Law, a Controller or Processor must consider certain factors when responding to a request from any requesting authority (i.e. a public authority over the person or any part of its group of companies) for the disclosure and transfer of any Personal Data. Such factors include, most notably, where reasonably practicable, obtaining appropriate binding written assurances from the requesting authority.
- Cessation of processing: where the basis of processing ceases to exist the Controller is required to cease the processing due to exercise of Data Subject's rights. The Controller shall ensure that all Personal Data, including that held with the Processor, is permanently deleted or anonymised, pseudonymised, permanently encrypted or archived in a manner where it is "put beyond further use".
- Codes of conduct and certification schemes: The New Law further provides for a mechanism whereby a Controller or Processor (or any other organisation including academic organisations) may develop a code of conduct containing guidance on compliance with the requirements of the New Law and submit a draft of the same to the Commissioner for approval. The New Law additionally provides for the establishment of certification schemes for the purposes of enabling a Controller or Processor to demonstrate compliance with the New Law. Such certification can only be implemented by an organisation approved by the Commissioner.

In order to ensure compliance by 1 October 2020, Controllers and Processors should start reviewing their processing activities including, in particular, transfer mechanisms to jurisdictions outside the DIFC, considering whether or not a DPO is required to be appointed as per the New Law, ensuring compliance with requirements for High Risk Processing Activities, and ensuring their privacy notices provide complete list of Data Subject rights and fulfil the consent and other requirements set out under the New Law.

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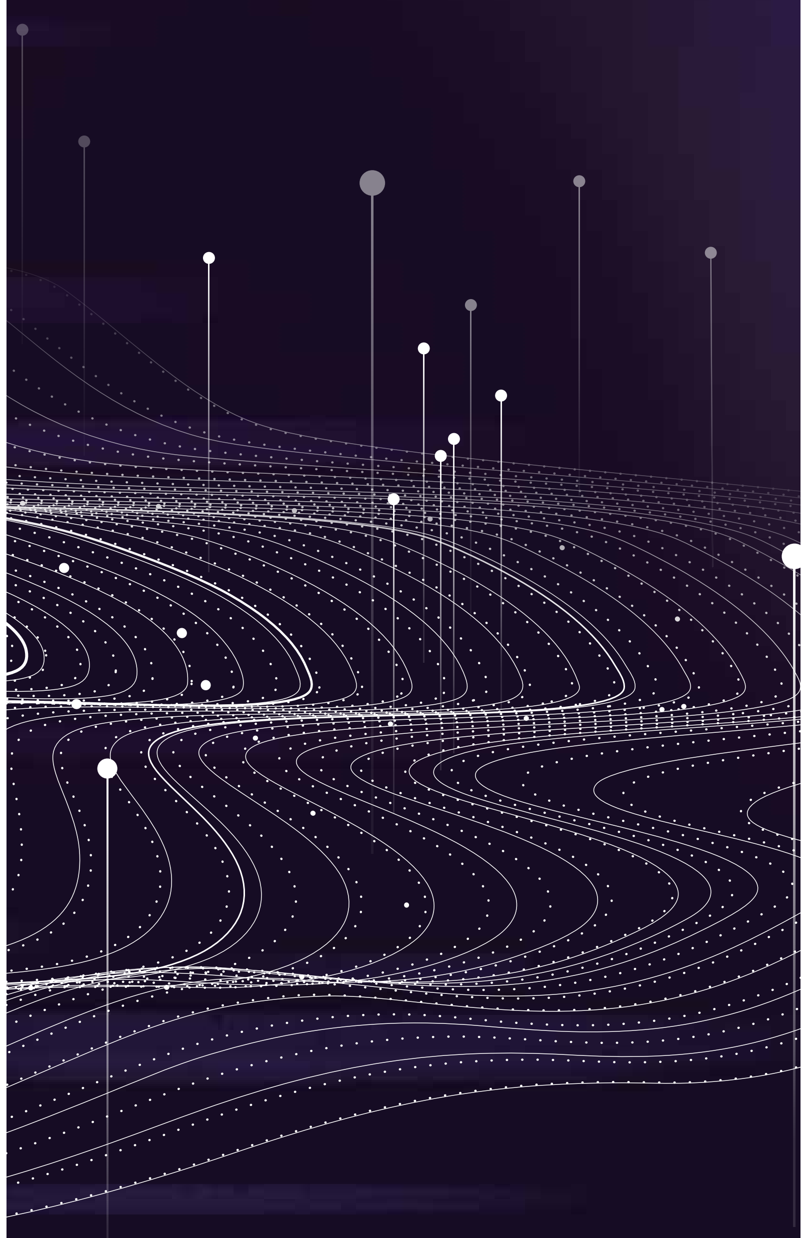
Jurisdiction Update
Egypt

Egypt's new personal data protection law



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Egypt's new data protection law has been a long time coming. Media reports over the last year or two have resulted in ambiguity as to the status of the draft law.

We are pleased to advise that Egypt's Personal Data Protection Law was passed on 13 July 2020 and published on 15 July 2020. It will come into force on 14 October 2020, and the Executive Regulations are expected by 14 April 2021.

The Personal Data Protection Law introduces a variety of compliance requirements, as well as some significant criminal penalties. Corporate clients processing personal data in Egypt, or outside Egypt in respect of individuals in Egypt, should familiarise themselves with the requirements and ensure compliance as soon as possible.

The Personal Data Protection Law defines 'Personal Data' as any data related to an identified natural person, or to a natural person identifiable, directly or indirectly, by reference to any other data, such as name, voice, picture, identification number, online identifier, or any data that identifies psychological, health, economic, cultural or social identity. 'Sensitive Personal Data' is defined as Personal Data that discloses psychological, mental, physical or genetic health, biometric data, financial data, religious beliefs, political opinions or security situation; and Personal Data relating to children is deemed to be Sensitive Personal Data.

The Personal Data Protection Law prohibits the processing of personal data except with the consent of the data subject, or where otherwise permitted by law.

Data Subjects have various rights under the Personal Data Protection Law. These include the right to:

- know what personal data is being processed by whom, and to access the same;
- withdraw consent in respect of processing personal data;
- correct, modify, delete, add or update his or her personal data;
- limit processing of his or her personal data within a limited scope;
- be notified of any personal data breach involving his or her personal data.

With the exception of the right to be notified of a personal data breach, the Personal Data Protection Law contemplates data controllers or data processors being able to charge data subjects a fee in respect of the exercise of these rights.

Egypt's Personal Data Protection Law was passed on 13 July 2020 and published on 15 July 2020. It will come into force on 14 October 2020, and the Executive Regulations are expected by 14 April 2021.

Subject to certain exceptions, the Personal Data Protection Law contains a general prohibition on the transfer of Personal Data to recipients located outside Egypt except with the permission of the (yet to be established) Egyptian data protection centre/authority ('Egyptian DPA') and where the level of protection provided is not less than that provided in Egypt pursuant to the Personal Data Protection Law. The Executive Regulations will specify the policies, standards, guidelines, and rules necessary for transferring Personal Data across borders.

The exceptions to the prohibition on transfers of Personal Data to places outside Egypt may be summarised as follows:

- explicit consent of the Data Subject to the proposed transfer:
- protecting the vital interests of the Data Subject;
- exercise of a legal right, or defence of a legal claim;
- for the performance of a contract, between the Data Controller and a third party, in favour of the Data Subject;
- exercising a special procedure relating to international judicial cooperation;
- in the performance of a legal obligation or to protect a legal interest; and
- pursuant to an international obligation to which Egypt is a party.

The Personal Data Protection Law contemplates circumstances where a Data Controller or Data Processor may, with the permission of the Egyptian DPA, allow other Data Controllers or Data Processors outside Egypt to have access to Personal Data. These include circumstances where the purposes for which they have access to the Personal Data is identical, where such access is in the legitimate interests of the Data Subjects, the Data Controllers or the Data Processors, and where the level of legal and technical protection to the subject Personal Data is not less than that to which the Personal Data would be subject in Egypt. Again, the Executive Regulations will specify the related policies, standards, guidelines, and rules necessary for transferring Personal Data across borders in this context.

The Egyptian DPA is responsible for enforcement of the requirements of the Personal Data Protection Law at an administrative level. Without prejudice to any criminal or civil liability that may apply, the Egyptian DPA may issue notices in respect of non-compliance, directing those responsible to address the instance of non-compliance within a specific period of time. If the issue is not addressed, the Egyptian DPA may impose administrative penalties, including suspension or withdrawal of licences or accreditations, publication of details of the non-compliance in the media, and making the relevant Data Controller or Data Processor subject, at their own expense, to technical supervision by the Egyptian DPA to ensure compliance with the requirements of the Personal Data Protection Law.

The Personal Data Protection Law also provides for a variety of criminal offences, with a range of penalties, including fines and imprisonment. These include:

- Collecting, processing, disclosing, providing access to, or circulating Personal Data, by any means, other than with the consent of the Data Subject, or as otherwise permitted by law (imprisonment for not less than one year, and a fine of between EGP 100,000 and EGP 1,000,000 (between about US$6,300 and US$63,000);
- Processing Personal Data other than in accordance with the Personal Data Protection Law (imprisonment for not less than three months, and/or a fine of between EGP 100,000 and EGP 1,000,000 (between about US$6,300 and US$63,000);
- Preventing a Data Subject from exercising rights granted pursuant to the Personal Data Protection Law (imprisonment for not less than three months, and/or a fine of between EGP 100,000 and EGP 1,000,000 (between about US$6,300 and US$63,000);
- Failure of a Data Controller or Data Processor to comply with obligations of the Data Controller, obligations on the Data Processor and obligations to notify and report as specified in the Personal Data Protection Law (imprisonment for not less than six months, and/or a fine of between EGP 200,000 and EGP 2,000,000 (between about US$12,600 and US$126,000);
- Failure to appoint a Data Protection Officer, or to provide the same with essential requirements to perform duties (a fine of between EGP 200,000 and EGP 1,000,000 (between about US$12,600 and US$63,000);

Sensitive Personal Data' is Personal Data that discloses psychological, mental, physical or genetic health, biometric data, financial data, religious beliefs, political opinions or security situation; and Personal Data relating to children is deemed to be Sensitive Personal Data.

- Failure of a Data Protection Officer to perform duties as specified in the Personal Data Protection Law (imprisonment for not less than six months, and/or a fine of between EGP 100,000 and EGP 1,000,000 (between about US$6,300 and US$63,000);
- Transferring Personal Data other than in accordance with the Personal Data Protection Law (imprisonment, and/or a fine of between EGP 300,000 and EGP 3,000,000 (between about US$18,900 and US$189,000);
- Failure to comply with digital marketing requirements pursuant to the Personal Data Protection Law (imprisonment for not less than three months, and/or a fine of between EGP 100,000 and EGP 1,000,000 (between about US$6,300 and U$D63,000);

These are examples of some offences and penalties; others are set out in the Personal Data Protection Law. The penalties specified are without prejudice to any harsher penalties that may be provided for in any other law. Employees of corporate entities, as well as corporate entities themselves, may be responsible for the offences, depending on the circumstances of the offence.

While the Executive Regulations have yet to be issued, corporate clients processing personal data in Egypt, or outside Egypt in respect of individuals in Egypt, should start to familiarise themselves with the requirements of the new law, and start taking steps to be in a position to ensure compliance.

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Solving national ownership restrictions in Iraq

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Investors wishing to have a local footprint and operate in Iraq are sometimes faced with national ownership requirements and other legal restrictions. The natural solution to such problems is engaging local partners or nominees. In this Article we will assess and compare the two different approaches.

Doing business with local Iraqi partners

Iraqi partners may be engaged through incorporated or unincorporated joint ventures. Incorporated joint ventures can be set up through establishing a company in Iraq or establishing a branch of a foreign entity. Company law No 27 of 1977 ('Company Law') with the amendments applicable in federal Iraq requires 51 per cent Iraqi ownership. Unlike Iraqi companies, branches of foreign companies do not suffer from the same limitations because they are governed by the law of their home jurisdiction. However, branches can only be established in federal Iraq if the parent company is at least two years old.

The semi-autonomous region of Kurdistan in north Iraq has not legislated the same amendments to the Company Law as those applicable in federal Iraq. Therefore, there is no 51 per cent Iraqi ownership requirement in Kurdistan. Companies registered in Kurdistan can only open branches in federal Iraq if they meet the federal requirements. However, companies registered in Kurdistan are still considered Iraqi nationals and are able to fully

In both federal Iraq and Kurdistan, the Company Law makes it difficult to separate management rights from ownership stakes.

own subsidiaries in federal Iraq if the federal Registrar of Companies is satisfied that they meet certain conditions.

In both federal Iraq and Kurdistan, the Company Law makes it difficult to separate management rights from ownership stakes. There can only be one class of shares and each share must have one vote. Shareholder agreements are considered amendments to the articles of incorporation and for this reason must be registered. However, the Registrar of Companies in federal Iraq and Kurdistan are not familiar with shareholder agreements and registering them would be difficult. If more control is desired the solution would be an unincorporated joint venture. Iraq does not have detailed rules governing partnerships and there aren't many mandatory restrictive rules applying to unincorporated joint ventures. In addition, non-Iraqi law may be chosen to govern the joint venture/partnership agreement.

The main advantage incorporated joint ventures offer is limitation of liability, often to a set amount of share capital. The main disadvantage of incorporated joint ventures is that they are costlier to set up and take longer than an unincorporated joint venture would. In comparison, unincorporated joint ventures offer more flexibility than their incorporated counterparts without the added costs. The trade-off is that an unincorporated joint venture agreement can only allocate liability between the partners; it cannot limit liability towards third parties and in some cases cannot avoid joint liability towards third parties.

Appointing nominees or trustees in Iraq

Nominees are more appropriate than partners in situations where full control is desired, or the Iraqi party is to receive a fixed remuneration without sharing in risks and profits. However, trusts and other nominee agreements are often viewed as violations of mandatory legal requirements and are often not drafted in a manner that can be presented to authorities as a recognisable legal concept under Iraqi law. In this context, trusts are also often confidential and contrary to what is declared to the public, thereby adding a further layer of difficulty in proving the arrangement and enforcing the intended results. Fortunately, Iraq does not have an anti-fronting law explicitly invalidating trust or nominee agreements. In addition, Iraqi law contains a legal concept that is functionally similar to a trust, called Waqif.

Waqifs, which some historians link to early common law trusts that were first developed in the crusades, are a Sharia Law concept that separates the beneficial interest in a given asset from the legal title. A Waqif has a manager who has a very similar role to a trustee and also has a beneficiary much like trusts do. Waqifs in Iraq are traditionally used for charity and estate planning. However, there is no reason preventing their adaptation to commercial purposes in a corporate context. A Waqif under Iraqi law is a right in rem much like other in rem rights short of full title and ownership. Therefore, it would be possible create a Waqif over a company's shares in the same fashion they would be pledged as a security. Even though it is not a validity requirement, the Waqif instrument may also be filed with the Registrar of Companies much like a pledge of shares would. The Waqif instrument would govern how dividends and voting rights would be applied as they are benefits of the shares put in Waqif. A Waqif can effectively be a nominee arrangement that has some foundation in Iraqi law, and it would not have to be done in secret making it easier to prove and enforce.

Like some common law trusts the owner of the assets to be put in a Waqif cannot amend or revoke the Waqif after it is created, and if no beneficiary can be found in the waqif instrument, then mandatory Cy-pres rules allocate the waqif property. However, this is where the similarities end. There is no rule against perpetuities in Iraq and some Waqifs have been in existence for hundreds of years. This is an advantage for our purposes because juridical persons are also perpetual and the Waqif would be valid for the lifetime of the beneficiary.

Courts of personal status would have jurisdiction to hear disputes of Waqif matters however they are not particularly adept at solving commercial disputes. Luckily, Iraqi law does not prohibit agreements to arbitrate Waqif disputes and an arbitration clause in a Waqif instrument would be valid. Another important consideration to bear in mind is that Waqifs are a Sharia Law concept and Iraqi law considers the rules of Waqif to be public policy and does not allow derogation from them. Sharia Law is not codified in Iraq and there are not many restrictions in Sharia Law jurisprudence that would cause problems for a Waqif in a commercial corporate context. Therefore, Waqif has the potential to be an enforceable nominee instrument but if drafted badly it would operate in a legal vacuum. The solution is to sufficiently identify an adequate source of Sharia Waqif Law that would be consulted in the case of a dispute and provide for a supplement such as the jurisprudence of modern UK English trust law to ensure a result would be reached if no precedent is found in Sharia Law.

Conclusion

Working with local partners, if possible, is the preferred approach. Incorporated joint ventures offer limitation of liability but are costlier to set up in terms of time and money; in particular if ownership stakes do not reflect management rights. Unincorporated joint ventures such as partnerships offer more flexibility and are easier to set up but they do not offer limitation of liability. If engaging Iraqi partners is not feasible or desirable, Iraqi law offers some tools to set up Waqifs which are similar to trusts. However, they have not been tested in a commercial context.

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New Insurance law in Kuwait: a brief overview

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In our previous article regarding branches of foreign insurance companies in Kuwait, we highlighted some of the expected updates in local laws, including the new Insurance Regulation Law No. 125 of 2019 ('New Insurance Law') which repealed the old law No. 24 of 1961.

We have been waited almost five years for this new law to be tabled. From the time it was tabled in September 2019, it faced several challenges for it to enter into force including: the resignation of the government of Kuwait; the problems of appointing the members of the Insurance Unit; and the lockdown imposed to curb the spread of the coronavirus, all of which led to the ongoing delay in the issuance of the Executive Regulations of the New Insurance Law required to define and clarify certain procedures and requirements found in the New Insurance Law. Now that the New Insurance Law is in force, we highlight some of its provisions below.

Under the New Insurance Law, the Insurance Department has been abolished and replaced it with a new insurance regulator known as the Insurance Regulatory Unit ('IRU'). The IRU is an independent unit with a board consisting of a chairman, a deputy head and three part-time members appointed by a resolution of the Minister of Commerce and Industry ('MOCI') for a one time renewable period of four years, as well as a representative from the Central Bank of Kuwait and a representative from the MCI. Priority for appointments to the IRU board is given to individuals experienced in insurance, financial and relevant legal matters in Kuwait. The goals of the IRU board are to: (a) develop the IRU for the benefit of insurance companies and policyholders, by organising, regulating, controlling and developing the insurance business in a fair, transparent and competitive manner and developing its instruments in line with international best practices; (b) provide protection for those involved in insurance activity/business; (c) apply policies that achieve justice, ensure fairness and transparency and prevent conflicts of interests; (d) work to ensure compliance with laws and regulations related to insurance activities; and (e) educate the public about insurance activities, benefits, risks and the associated obligations thereof.

> **There is a one-year grace period to comply with the New Insurance Law.**

Although the IRU operates under the direct supervision of the MOCI, it is financially and administratively independent, and has an independent budget legal department. The IRU also has a special committee for complaints and grievances. This offers an insured entity the opportunity to ensure that the law is rightly applied in their circumstances.

The New Insurance Law also gives the IRU the right to control and inspect insurance companies to ensure the integrity of their financial and legal obligations and that such companies pledge to ensure that sufficient insurance coverage is provided to protect policyholders and beneficiaries.

The New Insurance Law also reduces the burden of insurance companies and policyholders. Insurance companies may now renew their licence every three years instead of annually. In addition, the New Insurance Law has given the policyholders the ability and the right to exercise a lien over the insurer's property and the funds retained from the allocations in favour of policyholders in order to facilitate the execution of the judgments issued in their favour against the insurance companies.

However, the Executive Regulations that many of the provisions of the New Insurance Law refer to and rely on, still have not been issued at the time of writing. However, there remains uncertainty regarding which provisions of the New Insurance Law may be applied, including those regarding the conditions for granting licenses to branches of foreign insurance companies to operate in Kuwait, as well as the conditions, procedures and documents necessary for issuing or renewing the licence of insurance and reinsurance brokerage companies, and the conditions required to undertake risk assessment (and as adjusters), and qualify as insurance consultants and actuarial experts. It is hoped that the comprehensive and clear Executive Regulations will be issued in due course so that and legal enforcement and interpretation will not be performed arbitrarily.

The New Insurance Law also heightens some penalties imposed on insurance companies and those who violate the law, and these may include imprisonment and fine.

Finally, it must be noted that there is a one-year grace period to comply with the New Insurance Law from the date that the Executive Regulations are published. Accordingly, all insurance and reinsurance companies will have one year from the date of issuance of the Executive Regulations to make the necessary adjustments to ensure compliance with the New Insurance Law.

This article is intended to provide you with a brief overview on the New Insurance Law in Kuwait. In our next articles, we shall discuss the provisions of the Executive Regulations after additional articles have been issued.

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Jurisdiction Update
Saudi Arabia

There's something in your cart: an update on e-commerce in Saudi Arabia

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E-Commerce is continuing to grow in popularity in Saudi Arabia. While the pandemic is certainly a contributing factor, the increased efforts to regulate the sector can also take some of the credit.

Saudi Arabia's Electronic Commerce Law (Royal Decree No. (M / 126) dated 7/11/1440H; 10 July 2019) has now been enhanced by the issuance of the Implementing Regulations to the E-Commerce Law (dated 19/5/1441H; 14 January 2020).

In this article, we elaborate on aspects previously addressed in our 2019 article Add to Cart: New E-Commerce Law in Saudi Arabia , and provide new information on provisions relating to the registration of e-commerce sites, authentication service providers, and intermediary platforms.

Registration of e-commerce sites

Entities with a Saudi commercial registration that are operating e-commerce sites must register the e-commerce site with the Ministry of Commerce in accordance with the Regulations. This includes sites that display or sell products, provide or advertise products or services, or exchange data in relation to product or services.

The registration requirements include details such as the name of the applicant, commercial registration details, activities carried out via the e-commerce site, and a description of the site and its address. There is a requirement to notify the Ministry if such details change, and to cancel the registration if the operation of the site for e-commerce purposes will be discontinued.

E-Commerce authentication providers

The Ministry will license 'e-commerce authentication providers'. The exact role of such authentication providers is not entirely clear, but it is possible that 'certification' by a Ministry-approved e-commerce authentication provider will enhance the credibility of an e-commerce service provider's website and operations. Authenticated e-commerce service providers must display the proof of such authentication on their e-commerce site, although there is no apparent requirement for e-commerce service providers to subject themselves to the authentication process.

Intermediaries

The Ministry will also regulate platforms that act as intermediaries between service providers and customers. This includes any website or application that facilitates e-commerce transactions between e-commerce service providers and their customers. Examples given in the Regulations include platforms that provide online advertisement services, or that facilitate orders or payments.

The requirements that intermediaries must meet are diverse. Their application to intermediaries simply acting as a platform for others to buy and sell goods is somewhat straightforward. In contrast, where an intermediary does not provide such a sales platform, and instead simply provides advertising services or payment processing, the application of the intermediary requirements is less clear.

Information to be disclosed

An e-commerce site must disclose the service provider's full name, address and contact information, commercial registration number and tax registration number (if registered). It must also include the applicable privacy policy, as well as the service provider's mechanism for addressing customer complaints.

Information on the terms and conditions applicable to any contract to be entered between the service provider and the customer must also be provided. At a minimum, these must include:

- how the contract will be concluded;
- details of the subject goods or services;
- information on any warranties;
- the total cost to the customer, including the price of the goods or services, and all fees, taxes and additional amounts related to shipping/delivery;
- details on how payment and delivery will be effected;
- as applicable, information on termination mechanisms, requirements and costs, or information on restrictions on termination;
- information on any after sales service; and
- if applicable, information on the duration of the contract.

A receipt must be issued, and must include specific details. Along with the service provider and transaction information set out above, receipts must reflect information confirming the contract and date of execution, method of payment (and confirmation of full payment, if it has occurred), information on delivery (and scheduled dates) and tracking details, and a summary of any applicable replacement and refund provisions.

If the e-commerce site relates to a regulated activity, the service provider must provide details of the relevant licences or permits that it holds in order to practise such activity. This requirement is without prejudice to any other requirement that may apply to the specific regulated activity.

Advertising

Advertising relating to e-commerce is considered to be binding, supplementary information to the contract between the e-commerce service provider and the customer.

It must include the name and contact details of the service provider, the name of the advertised product or service, and information on the product or service that allows the customer to make an informed decision, and a clear statement that the advertisement is an advertisement. It must also include a clear mechanism by which the recipient can opt-out from receipt of such advertisements in future; and service providers are required to comply with such requests.

Advertisements must not contain false displays, statements or misrepresentations (including material infringing third party trade mark rights) that may mislead or deceive customers. They must also comply with other legal requirements applicable to advertisements.

E-Commerce is continuing to grow in popularity in Saudi Arabia. While the pandemic is certainly a contributing factor, the increased efforts to regulate the sector can also take some of the credit.

Correction of errors

Customers must have an opportunity to notify e-commerce service providers of errors in their communications with the service provider, and to correct those errors. In order to rely on this right, an error must be communicated to the service provider within 24 hours, and the customer cannot have utilised or benefitted from the service provider's product.

If specified in the terms between the parties, e-commerce service providers may correct unintended errors in communications sent to customers. To rely on this right, the service provider must notify the customer immediately upon becoming aware of the error, and such notification must occur before the product is shipped or the service commenced. In the event of such an error, the customer can choose to proceed (presumably subject to the correction), or to cancel the contract and recover the costs incurred.

Personal data considerations

E-commerce service providers are prohibited from using personal data or electronic communications with customers for unauthorised purposes, or disclosing them to third parties, except with the consent of the customer or as otherwise required by law.

The type of personal data contemplated in the Regulations includes names and other identity information, addresses and contact numbers, account and bank card numbers, and photographs, although this should not be understood as an exhaustive list.

Unless the parties have agreed otherwise, a service provider cannot retain a customer's personal data, except to fulfil the service provider's obligations to the customer. The use of customer data for any other purposes, including retention as part of an ongoing relationship or for advertising or marketing purposes, requires the customer's prior explicit consent.

There is an obligation on service providers to protect personal data of customers by applying technical and administrative measures commensurate with the nature of the data. (The National Cybersecurity Authority has also issued cybersecurity guidance applicable to e-commerce service providers and e-commerce customers.) A data breach mechanism is contemplated, and a short timeframe by which the responsible service provider must report any data breach incidents affecting personal data of customers.

Termination

E-Commerce customers are provided with a general right to terminate an e-commerce contract within seven days, provided the customer has not used the product or benefitted from the service. There are restrictions on this ability to terminate. These include: where the transaction relates to goods manufactured according to the customer's specifications; where it relates to media such as video tapes, CDs, software, computer programs, newspapers, magazines; where the customer is responsible for a defect in the product; and where it relates to the provision of accommodation, transport or food services. There are also exceptions relating to goods, the nature of which might deteriorate in the period within which termination might otherwise be permitted; goods the nature of which is such that they cannot be re-sold due to health reasons; goods or services the nature of which they might be affected by continuous price volatility (such as gold); and goods sold by auction.

In the absence of an agreement to the contrary, customers will have a right to terminate in the event that goods are not delivered within 15 days from the date of the contract, or from the date on which it was otherwise agreed they were to be delivered. There is also an obligation on service providers to notify customers in the event of unexpected delays.

Next steps

E-commerce will continue to go from strength to strength in Saudi Arabia. The E-Commerce Law and its Regulations are not the only considerations. Besides the NCA's cybersecurity guidelines for e-commerce (mentioned above), other authorities are getting involved to try to make sure that e-commerce services run safely and smoothly. One example is the CITC, the Saudi telecoms regulator, which is also responsible for aspects of the postal service. CITC is now licensing e-commerce logistics providers, seeking to ensure that those delivering e-commerce purchases are doing so safely. As the market develops, we expect that the application of the E-Commerce Law and its Regulations, and interplay between the different responsibilities of the various authorities, will continue to becomes smoother.

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A FOCUS ON DISPUTE RESOLUTION

In this edition, we have devoted significant attention to addressing the significant impact that COVID-19 has had on litigation and arbitration proceedings.

In the UAE, for example, the Abu Dhabi Courts have shifted all the courts' hearings, post COVID-19, to online hearings with the aim of minimising the spread of COVID-19. The new online court system allows parties to upload court statements to an online portal and allows lawyers to attend via teleconference. The measures implemented are an important step for the Abu Dhabi Courts to adopt, and the courts' procedures that utilise technology to continue serving justice during the current COVID-19 pandemic. As a result of the new technologies implemented, the Abu Dhabi courts have experienced minimal disruption during the pandemic and have, in many instances. become more efficient.

Arbitration too has felt the effects of the pandemic but has demonstrated that arbitral proceedings can proceed effectively and efficiently in the face of COVID-19. In 'Mitigating the impacts of COVID-19 on your arbitration', we discuss different practical strategies to ensure the smooth running of arbitration proceedings commenced before the onset of the pandemic. In 'Use of modern technology in arbitration: evolution through necessity', we provide a regional perspective on the legal and practical aspects associated with the use of technology in international arbitration. 'The use of technology to conduct ADGM arbitrations' discusses the lack of express provisions on the use of technology in the conduct of hearings in the ADGM Arbitration Regulations of 2015 and its likely impact on the conduct of remote hearings. In 'Data protection considerations in UAE related arbitrations', we discuss the different data protection regimes within the UAE and the key considerations for arbitrations connected to the UAE in light of these regimes. These articles are especially relevant today because of the surge in the use of technology in arbitration triggered by the pandemic.

As one would expect, COVID-19 has led to a spike in certain types of disputes. The invocation of force majeure clauses, in particular, has seen a significant rise this year. For example, in an important judgment (although subject to appeal), the Dubai Rental Committee recently determined that COVID-19 is a valid reason to terminate a lease agreement, as long as it is evidenced that COVID-19 has negatively affected the party who seeks the early termination of the lease agreement. In this Committee dispute, a party became unable to continue the lease for the duration of the agreement term. Nevertheless, the Dubai Rental Committee allowed the landlord to claim compensation for early termination.

We also consider the applicability of force majeure clauses in situations created by COVID-19 by looking at their treatment in this region. 'COVID-19 – Force Majeure under Saudi Law and Shari'ah' provides an insightful look at the treatment of force majeure clauses in Saudi Arabia and, on the basis of this, recommends strategies that may be adopted in dealing with contractual disputes that have arisen or are likely to arise from COVID-related conditions. In 'Tourism contractual obligations in light of the Pandemic (COVID-19) in the Sultanate of Oman', we discuss the impact of COVID-19 on the tourism industry in Oman. 'Relief for commercial tenants in Qatar under COVID-19 situation' discusses the impact COVID-19 has had on commercial leases in Qatar and the relief available to tenants under Qatari Law.

More generally, this edition of the Law Update also provides updates on issues of interest in the context of dispute resolution in the UAE and in the MENA region.

Recent developments have also cemented the UAE's status as a pro-arbitration state. The Dubai Court of Cassation recently highlighted that the UAE Civil Procedure Code permits the recognition and enforcement of foreign arbitration awards, (unless Article V of the New York Convention is applicable, or it is evidenced that the arbitration award had been nullified in the country of issue). Throughout the precedent, the Court confirmed that the New York Convention provisions prevail over the UAE local laws, including the UAE Civil Procedure Code. In 'UNCITRAL confirms UAE arbitration laws as model law-based'', we comment on the recent formal recognition by the United Nations Commission on International Trade Law ('UNCITRAL') of the UAE's three arbitration laws: Federal Law No. (6) of 2018 on Arbitration; the DIFC's Arbitration Law No. 1 of 2008 (as amended in 2013)' and the ADGM Arbitration Regulations of 2015 ,as laws based on the UNCITRAL Model Law on International Commercial Arbitration.

With respect to arbitration in the region more generally, in 'Qatari Arbitration Law: to apply or Not to apply', we discuss a recent judgment of the Qatari Court of Cassation wherein the Court held that Law No. 2 of 2017 promulgating the Civil and Commercial Arbitration Law in Qatar would not apply to arbitrations arising from contracts signed prior to the effective date of the law. In 'Another venture to no-man's land: ICSID jurisdiction cannot be established using the MFN clause in the OIC investment agreement – Itisaluna v. Iraq', we note the recent jurisdictional award rendered in the Itisaluna Iraq LLC and others v. Republic of Iraq that case and its contribution to the debate of whether a most favoured-nation ('MFN') clause contained in an investment treaty applies to the dispute resolution provisions in the treaty is explored.

We also consider the growing importance of mediation in the region. We discuss the recent ratification of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention on Mediation in 'Saudi Arabia ratifies the Singapore Convention on Mediation'. The Singapore Convention, as previously discussed in 'Mediation in the Middle East: before and after the Singapore Convention' (published in the October 2019 edition of the Law Update), establishes a framework for the cross-border recognition and enforcement of settlement agreements.

In other litigation matters, we discuss a recent decision of the DIFC Courts on the treatment of documentary credit in 'The treatment of performance bonds and guarantees by the DIFC Courts: an update'. In 'The mandatory requirement for payment of taxes prior to filing an objection' we provide an instructive explanation of the process for filing objections to tax decisions issued by the UAE Federal Tax Authority.

We also discuss, in 'Limitation period in relation to cheques', a recent Jordanian Court of Cassation decision which reiterates the importance of the statute of limitation when raising claims.

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Mitigating the Impacts of COVID-19 on your Arbitration

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By now it is clear that there are virtually no jurisdictions that are unaffected by COVID-19 or the international measures that have been put in place to try to contain and control it.

One of the areas of concern for our clients relates to their ongoing arbitrations. For arbitrations that were commenced before the current situation took hold, parties and tribunals find themselves in relatively new waters. How does one best run an arbitration that was started and planned before these new and extraordinary conditions took hold? Is it, and can it be, business as usual?

For most arbitrations, the short answer to this last question is "no". The way in which virtually everyone does business has changed and this will necessarily impact arbitrations.

The good news, however, is that arbitration was, in a way, designed for this sort of a situation. It is, or should be, flexible and responsive to parties' needs. Unlike, for example, court litigation, parties have easy access to their tribunals and are generally empowered to agree whatever procedures they consider appropriate to resolve their dispute.

But what does this mean in practice? Some of the key points you may want to consider in respect of your arbitrations that are already in progress include:

1. **Immediate deadlines** – Do you, your opponent(s), or your tribunal, have any upcoming deadlines that may need to be reconsidered? We are seeing many tribunals contacting parties to ask if they anticipate any issues with immediate deadlines due to the current situation. This is sensible. It forces all parties to consider any immediate issues they may come across. But this is not the preserve of tribunals. If you have concerns about your own or others' ability to meet any immediate deadlines, you may wish to consider raising them sooner rather than later.
2. **The procedural timetable** – Regardless of immediate deadlines, think realistically about the overall timetable that is in place and how that may be impacted by the current situation. Issues to consider include ease of access to documents and ease of

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communications between and with the client, co-counsel, experts, and, witnesses. Even if you are able to communicate by telephone or video, if people are used to doing business in person, these alternative methods of communicating can be difficult and inefficient. Consider also the jurisdictions you are in or working with: calls or videos in and between certain jurisdictions can be significantly harder than in others. Acknowledge and plan for this. Pay particular attention to deadlines that invariably require a lot of contact with people or documents, such as document production or the preparation of witness evidence. It is important to aim to be efficient, but also be realistic.

3. **The documents** – Most procedural orders will have made some provision for the use of hard copy documents. Go back to these requirements and consider if they are still workable. Even if they are, consider if they are necessary or essential in the current climate. Try and takes steps early to reduce reliance on hard copy documents. If parties were not already doing so, ensuring documents are easy to access and review in their soft copy format is essential. No party wants its tribunal to be struggling to read the submissions or evidence it relies on.
4. **Logistics** – Even if you are sticking to deadlines, consider the logistics surrounding filings. If you are submitting any hard copies, how will these be printed and how will they be shipped? Will everyone be able to receive courier deliveries and, in light of current issues, do they want to receive them? And what is the current guidance from any relevant arbitral institution? Many of the leading institutions have instituted a work-from-home policy for their staff and/or are asking parties not to send hard copies to their offices. All of these logistical practicalities need to be addressed early and with clear communication to all affected.
5. **The claims or defences** – Consider whether the current situation impacts any of the claims or defences in your arbitration. It may well not have any impact: disputes often (though not always) relate to historical rather than current issues. However, it is not impossible that the current context will impact your or your opponent's claims or defences. Each case will depend on its own facts. One area which may be impacted is damages. If parties are claiming any losses for the current period, the nature and scope of those losses may be impacted by current events.
6. **Hearings** – The current situation significantly impacts arbitral hearings. Most modern arbitration laws allow for hearings to be conducted other than in-person but it is essential to take advice on this. Also consider any relevant institutional rules. Nonetheless, it has not been common for important hearings to be carried out by telephone or video. Depending on how long the current situation lasts, parties and tribunals may need to move past this reticence. For now, though, we are seeing most substantive hearings being rescheduled for later in the year. In the interim, the international arbitration community is working together to try and develop best practices and guidance for "virtual" hearings so that they can be adopted with greater ease. But participants in arbitrations need to be practical. In many jurisdictions, video conferencing may, in practice, be far from useable. And adopting these technologies assumes equal access to the underlying technology itself. This is simply not the case. Parties and tribunals must be alive to the inequalities that one or more parties may face in the current climate simply by their not having access to the same options as others.
7. **Settlement** – Now more than ever many businesses face significant problems. It is therefore sensible to consider whether the change in circumstances means either you or your opponents are more amenable to settlement on reasonable terms.

How the current situation impacts your arbitrations will very much depend on the specifics of your case. What is clear, though, is that it is likely that any arbitration that is currently in progress will be impacted in some way. It is for the parties and their tribunals to work together to sensibly try to identify and resolve those issues in an efficient and fair way that reflects the extraordinary situation in which we all now find ourselves.

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UNCITRAL confirms UAE Arbitration laws as model law-based

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The United Nations Commission on International Trade Law ('UNCITRAL') recently added the arbitration laws of the United Arab Emirates ('UAE'), namely the Federal Law No. 6 of 2018 on Arbitration ('UAE Federal Arbitration Law'), the Dubai International Financial Centre ('DIFC') Arbitration Law No. 1 of 2008 (as amended in 2013) ('DIFC Arbitration Law'), and Abu Dhabi Global Market ('ADGM') Arbitration Regulations of 2015 ('ADGM Arbitration Regulations') to the list of jurisdictions that have arbitration laws that are based on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').

Background on the Model Law

UNCITRAL, which was established in 1966, is the core legal body of the United Nations system in the field of international trade law. UNCITRAL's mandate focuses on commercial law reform and the modernisation and harmonisation of rules on international business, including dispute resolution.

UNCITRAL issued the Model Law in 1985 and made amendments to it in 2006. UNCITRAL designed the Model Law to provide a guiding legislative framework and assist states in reforming and modernising their laws on arbitral procedure in line with the key requirements and best practices of international commercial arbitration. The Model Law covers all stages of the arbitral process, including the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, (limited) court intervention in the arbitral process, and the recognition and enforcement of arbitral awards.

The Model Law has been adopted by both civil law and common law jurisdictions from around the world: to date, 116 jurisdictions in 83 states around the world have adopted legislation based on the Model Law.

Indeed, one of the first questions that arbitration practitioners often ask when deciding where to seat or legally place an arbitration is whether the jurisdiction in question has an arbitration law that is recognised as being Model Law-compliant. While some leading arbitral jurisdictions, including the United Kingdom and the United States, have arbitration laws that are not entirely based on the Model Law per se (though they reflect many of the same principles), the Model Law has emerged as the international bellwether when it comes to drafting an arbitration law.

Some studies also suggest that the adoption of a Model Law-based arbitration law results in increased foreign direct investment into the adopting jurisdiction. For example, according to one paper by Andrew Myburgh and Jordi Paniagua (*see, Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 Journal of Law and Economics 597 (2016)), jurisdictions that adopt such a such a law *"tend to experience higher levels of investments in sectors such as construction and activities such as ICT."*

The UAE's Three Model Law-based Arbitration Laws

The judicial landscape in the UAE is notable: a predominantly civil law jurisdiction inspired by the principles of Islamic Sharia'h where identified common law jurisdictions coexist. In this regard, the UAE offers a broad and rich spectrum of legal tools. Arbitration is no different where three arbitration laws are offered to users. First, the UAE Federal Arbitration Law, which is the generally applicable federal law relating to arbitration that applies to "onshore" arbitrations, across the seven Emirates. Second, the DIFC's Arbitration Law, Law No. of 2008, as amended in 2013 ('DIFC Arbitration Law'), which applies to arbitrations seated in the DIFC, a financial free zone located in the Emirate of Dubai. Lastly, the ADGM Arbitration Regulations which apply to arbitrations seated in the ADGM, another financial free zone located in the Emirate of Abu Dhabi.

116 jurisdictions in 83 states around the world have adopted legislation based on the Model Law.

UNCITRAL's recent recognition of all three laws as Model Law-based comes in the wake of the entry into force of the UAE Federal Arbitration Law in June 2018. The UAE Federal Arbitration Law covers the entire arbitral process and reflects the key features and principles of arbitration. Indeed, in some respects, the UAE Federal Arbitration Law goes beyond the main attributes of the Model Law and incorporates unique, state-of-the-art provisions that are particularly relevant in the current COVID-19 era in which greater emphasis is being placed on the use of modern technology in arbitration. For example, Article 28.2(b) of the UAE Federal Arbitration Law provides that

> *"[t]he Arbitral Tribunal may, unless otherwise agreed by the Parties [...] hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology." Article 33.3 UAE Federal Arbitration Law likewise provides that "[h]earings may be held through modern means of communication without the physical presence of the Parties at the hearing." Article 35 specifically states that "[t]he Arbitral Tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing."*

UNCITRAL has also recognised the DIFC Arbitration Law as Model Law-based legislation. The DIFC was established in 2004 as a common-law jurisdiction with its own civil and commercial laws. It has emerged as a tested and reliable arbitral seat for both UAE-based and international disputes. Indeed, back in 2008 when it was first enacted, the DIFC Arbitration Law was the first arbitration law in the UAE to be inspired by the Model Law. Similar to the UAE Federal Arbitration Law, the DIFC Arbitration Law, which was amended in 2013 to clarify the DIFC Court's power to stay court proceedings in favour of foreign-seated arbitrations, covers the entire arbitral process and reflects the key features and principles of arbitration.

The ADGM Arbitration Regulations have also been recognised by UNCITRAL as Model Law-based. ADGM, a financial free zone in the Emirate of Abu Dhabi, the UAE's capital, was established in 2013, and it too is a predominantly common law jurisdiction with its own civil and commercial laws. ADGM law makes English common law (including the rules and principles of equity) directly applicable in the ADGM in addition to a wide range of well established statutes on civil matters. The use of the ADGM as an arbitral seat has accelerated since the Court of Arbitration of the International Chamber of Commerce ('ICC') established a representative office in ADGM in 2018. Like the UAE Federal Arbitration Law and DIFC Arbitration Law, the ADGM Regulations, which were recently complemented by the ADGM Arbitration Guidelines in September 2019, provide a comprehensive legal framework covering all stages of arbitration and incorporating the key features and best practices of the process.

> **[T]he Model Law has emerged as the international bellwether when it comes to arbitration legislation.**

Conclusion

UNCITRAL's recognition of all three laws as Model Law-based in a note by the UNCITRAL Secretariat to the United Nations General Assembly dated 1, April 2020 (A/CN.9/1020) will undoubtedly further increase user confidence and continue to cement the UAE's position as a leading multi-faceted arbitral jurisdiction in the Middle East and beyond.

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COVID-19: Force Majeure under Saudi law and Shari'ah

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Decisions taken by governments around the world to address the COVID-19 pandemic will have profound legal and financial impacts on every sector of the economy.

In circumstances where whole sectors of the economy have been subject to near total closure (as is the case with entertainment, food/beverage and educational services) or were severely impaired (as in almost every other sector) it is only to be expected that businesses will want to assess their contractual positions and understand how they can mitigate risks, seek remedies for losses and recalibrate their positions for the future.

This article will:

- explain how the concept of Force Majeure and related concepts such as "emergency circumstances" are treated under Saudi law;
- consider some specific examples of where Saudi laws address the issues;
- provide a survey of reported Saudi case law on the issues; and
- suggest practical strategies for addressing contractual disputes arising in the current circumstances.

However, before we look, in more detail, at these issues, a brief overview of the unique character of the Saudi legal system is necessary to provide context for what follows.

Saudi legal context

Saudi law is based on the application of Shari'ah law. The Shari'ah is a collection of principles derived from different sources, but principally the Holy Qur'an and the Sunnah (the witnessed sayings and actions of the Prophet Mohammed recorded as hadith). The Shari'ah rules relating to contracts are not codified in KSA in the manner known in many other jurisdictions. The general principles of contract under Shari'ah law apply to all contracts, including those where there is also relevant legislation (such as the laws and regulations applicable to force majeure as surveyed below).

The principle of sanctity of contract is very well established under Shari'ah law. The Holy Qur'an imposes upon Muslims the duty to faithfully observe their obligations. Prophet Mohammed is reported to have said "Muslims are bound by their stipulations, except a stipulation which makes lawful that which is unlawful." The binding force of contracts is asserted by jurists of all schools of Islamic jurisprudence. Under Shari'ah law, contracts which are not expressly prohibited by the Holy Qur'an or the Sunnah are permitted as binding and valid.

The principle of freedom of contract, which applies to both the substance as well as the form of contract, is well established under Shari'ah law. Shari'ah law recognises the maxim "the contract is the law of the parties": in effect, so long as something is not forbidden by the Shari'ah (or otherwise regulated by statute) it is permitted. Accordingly, parties to a contract have significant flexibility to agree the detailed terms of their engagement and this extends to the treatment of supervening events, including force majeure.

One of the challenges of conducting business in KSA is, however, that there is no principle of binding precedent under the law, so judicial decisions are based on the unique facts of any given case (including the conduct of the parties). What is important, therefore, is that the parties record their agreement very clearly and adhere to all applicable regulations.

There are several principles of the Shari'ah which are common to all contracts. The charging of interest is haram (forbidden) and provisions relating to interest (usury/riba) will not be enforced, however there appears to be some flexibility with the application of liquidated damages where the parties agree in the contract for specific remedies due to late and/or defective performance of services. Shari'ah law places an emphasis on certainty of contract and any provision which includes a high level of uncertainty (Gharar/Jahalah) will not be enforceable. Critically, for any discussion of force majeure, indirect losses (including economic loss) are typically not recoverable, the accepted Shari'ah position being that only actually incurred quantifiable direct losses are recoverable.

The broad and general nature of Shari'ah law means that Saudi courts can be expected to apply a combination of discretionary powers and established legal principles in the review and interpretation of business documents. This flexibility, combined with the absence of legal precedent which is binding on the courts and the wide discretionary powers of the court, can make it difficult to predict, with a high degree of assurance, the correct interpretation and ultimately the enforceability of contracts. Fortunately, there is a strong tradition and experience of addressing supervening events within the Saudi legal system: drawing deeply on Shari'ah principles.

Force majeure under Saudi law

Contracts and obligations affected by the COVID-19 pandemic will be governed by the relevant Saudi laws, the provisions of such contracts and Shari'ah principles. Therefore, we will address the most prominent Saudi laws that address force majeure and emergency circumstances. Then we will examine the position of Shari'ah law on these concepts respectively.

The most prominent Saudi laws that deal with force majeure and emergency circumstances

The most prominent Saudi laws that deal with force majeure and emergency circumstances

There are many Saudi laws that include provisions related to the concept of force majeure and emergency circumstances. The most prominent of these laws are the following::

1. Government Tenders and Procurement Law (1440H) 2019G, stipulates in article (74) that:

   "Extension of the contract or exemption from fine shall be in the following cases: (3) If the delay is because of the government entity or emergency circumstances."

2. E-Commerce Law (1440 H) 2019G, stipulates in article (14) that:

   "Unless the service provider and the consumer agree upon another term for handover of the asset, subject of contract, or its execution, the consumer may revoke the contract if the service provider delays the handover or the execution for a period exceeding fifteen (15) days of the date of conclusion of contract or the agreed upon date. The consumer may redeem the amount paid under the contract against the product or the service or the other costs resulted from this delay, unless the delay is caused by a force majeure".

3. Commercial Court Law, (1350H) 1931G which stipulates in article (24):

   "The agent, trustee and packer shall guarantee delivery of the goods handed over within the period stated in the consignment list, and any damage resulting from his delay shall be guaranteed by him, unless due to force majeure that cannot be evaded".

4. Saudi Labour Law, (1426H) 2005G which stipulates in Article 74 that the force majeure is one of the cases for termination of employment contracts.
5. Saudi Professional League Statute: This statute defines the force majeure as "the event that cannot be controlled or anticipated".
6. Commercial Maritime Law for the year (1440 H) 2019 G: This law addresses the consequences of a supervening event for a variety of parties.

It is apparent from the above that the Saudi legal system has not comprehensively tackled the doctrine of force majeure and does so only in certain limited and exceptional circumstances. However, the absence of a systematic codified approach certainly does not mean that the Saudi Courts do not recognise the issue. Indeed, the absence of a codified position gives Saudi judges wide discretion to investigate and determine the issues and apply the principles of the Shari'ah.

The concept of force majeure and emergency circumstances under Shari'ah laws

One of the most prominent principles governing contracts in Shari'ah law is that a contract is binding, so that both parties are obliged to meet their contractual obligations unless the parties agree to set the contract aside or a valid excuse not to perform can be sustained. The Saudi courts, when considering any contractual dispute, will refer to the contract that governs the dispute in the first instance. Most well drafted contracts contain provisions that cater for supervening events. Absent such provisions (or other laws) the Saudi courts will apply Shari'ah principles. It should be noted that even if a contract does address force majeure, where the result infringes basic Shari'ah precepts of equity, the court will be at liberty to set aside the offending provision.

It is a widely accepted tenet of Islamic jurisprudence (or 'fiqh') that "there should be neither harming nor reciprocation" and that "damage should be removed". The Shari'ah concept of an excusing supervening event is focused on "contingent excuses on occurrence of calamities" ('Jawaih – plural'). Islamic scholars consider a calamity (Ja'ihah – singular) as any event that:

- is out of the control of a party (not having been caused by their own negligence); and
- makes the satisfaction of a covenant or promise (including obligations arising under contract) either impossible or unduly burdensome.

There is a rich and extensive vein of hadith on supervening causes and their implications which can be invoked before the courts. These include locusts, war, drought, state action but this list is not exhaustive. The courts would have clear ability and duty to apply Shari'ah principles to any given set of facts, and this would include COVID-19.

Moreover, the International Islamic Fiqh Academy has concluded that if circumstances change in a way that materially increase the burden of one party and such change in circumstances was not caused by the negligence of that party, then the judge has authority to: (a) rebalance the obligations; (b) set-aside the contract entirely; or (c) grant the affected party a grace period if the circumstances can be reasonably expected to be short-lived.

A brief survey of some reported cases

Given the primacy and independence of the Saudi courts in the application of Shari'ah principles to force majeure type events it is certainly instructive to sample a cross section of reported judgments in this regard. It should, however, be noted that each judge is empowered to reach his own decision based on the facts of any case, without being bound by any reference to precedence.

1. **Judgment on financial rebalancing between parties:** Sharia'h and legal principles compiled by the Board of

Grievance, the decision No 3/T/1401, hearing No 4/1/1401, case No J/2/291 for the year 1395 H (1975G), which stated the following:

"The concept of emergency circumstances means that some emergency conditions have occurred during the implementation of the contract or events that were not anticipated or foreseen at the time of execution of the contract, have severely affected the conditions of the contract and caused huge loss to the plaintiff, exceeding the normal and customarily loss that the plaintiff may bear. In such circumstances the grieved plaintiff has the right to request that the damages caused by such events to be shared with the defendant and to participate and share the loss with him and to compensate him partially."

2. **Judgment on financial rebalancing between parties relieving the burdensome obligation (as a result of a government decision) to the reasonable limit:** the judgment issued by the Court of First Instance in the Lawsuit No J/1/2246 for the year 1414 H (1993G) and No J/1/1554 for the year 1415 H (1995G), (Judgment No D/15 for the year 1416, affirmed by the Appeal Commission No 1/T/5 for the year 1417 H (1997G), ruled that the court may lessen the burdensome obligation to a reasonable limit to relieve or reduce the damage to the affected party. The facts of the case are summarised in the fact that the Ministry of Public Works ("'the Ministry') in the Kingdom of Saudi Arabia had contracted with a German company (the 'Plaintiff') to build an Islamic centre in the State of Guinea. After the execution of the contract, a law was issued in Guinea which increased the wages of the labourers and this law applied retroactively, resulting unforeseen, additional costs to the Plaintiff. The Plaintiff filed a claim requesting relief damages and rebalancing the contract, as exceptional emergency general circumstances had occurred, which effectively represented an increase in the already calculated minimum level of salaries and wages of the employees and workers by the Guinea government and that this supervening event, that the Plaintiff had not expected, made its obligations burdensome. The Court considered the decision issued by the State of Guinea for increasing the minimum salary after the conclusion of the contract, was not expected and could not be anticipated and therefore constituted an exceptional emergency event. The Court agreed with the Plaintiff that such event resulted in an additional burden by the contractor on the Plaintiff. Therefore, *"the Circuit may lessen the burdensome obligation to a reasonable limit to relieve or reduce the damage of the affected party"*.
3. **Judgment related to invalidating a delay penalty:** in many cases the Saudi Courts invalidate a delay penalty resulting from the delay of the contractor to execute its obligations in cases where it is proven that the delay was caused by emergency circumstances beyond the control of the plaintiff. In the preliminary judgment No 3/A/D/9, year 1417 H (1997G), affirmed by the Appeal Commission Decision No 1/T/199 year 1417 H, the Court invalidated the delay penalty imposed by the defendant and judged that the Plaintiff deserved an extension to the contract for a satisfactory period.
4. **Judgment regarding revocation of lease contract and refund of given rental amount:** this precedent indicates that it is applicable in the Saudi Court that whoever rents an asset and an event outside his or her control prevents him or her from enjoyment of the leased asset for a reason that is not related to the lessee, he or she shall pay only the part of rental amount based on his or her use. In this context we cite, as an example, judgment No. 3450435, dated 30/02/1434 H in the lawsuit No. 33442221, affirmed by the appeal judgment No 34208836, dated 07/05/1434 H, in which the Court ruled in favour of the plaintiff as the Court terminated the contract and refunded the given rental amount, because the lessee was prevented from enjoyment of the leased asset by virtue of an event outside the control of the parties to the contract.

COVID-19 legal strategies

Mandatory directives issued by the government of the Kingdom of Saudi Arabia to address the COVID-19 pandemic should be considered as extraordinary supervening events. Routes to relief, rebalancing or termination are available under the Saudi legal system (in the circumstances described above) and, more importantly, under generally applicable principles of Shari'ah law.

Nevertheless, the most effective solutions in such cases are direct negotiation between the parties with the aim of reaching an amicable settlement by which the parties willingly revoke the contract or agree to renegotiate, amend the terms and conditions of the contract in a manner that satisfies the interests of all parties.

If the contract contains provisions regulating the case of force majeure or emergency circumstances and states the mechanism available for relieving the damage resulting from such calamities, the affected party may seek relief from such damage or to reduce it according to the conditions and mechanisms provided for in the contract. It should also be noted that mediation is becoming an increasingly attractive option in Saudi Arabia and internationally, and provides a constructive framework for the resolution of disputes[1]. The ratification of the Singapore Convention on Mediation Agreements is addressed elsewhere in Law Update.

An amicable solution will not always be achievable and therefore, generally as a last resort, the affected party may commence judicial action in order to secure a remedy. There are likely to be two potential routes open to an aggrieved party depending the nature and severity of the case.

1. ***Requesting legal termination of the contract because of the impossibility of its enforcement***

The spread of COVID-19 and government decisions taken to fight this pandemic may be considered as force majeure in the case of some contracts due to the impossibility of performing the obligations set out in the contract. The parties to any contract, affected by such circumstances, can apply to the court requesting the termination of the contract due to the impossibility of its execution. The judge has absolute discretionary power to consider whether the impossibility resulting from COVID-19 is partial or temporary according to the nature of the contract, its consequences and its degree of impact. The judge will accordingly order the suspension of the contract for a certain period without termination or the termination of the contract partially if the obligation in question is divisible from the remainder of the contract.

2. ***Requesting financial rebalancing of the contract***

It is clear also that the spread of COVID-19 and government decisions taken to face it, may be considered emergency circumstances that have resulted in making the interests of parties to contracts imbalanced, therefore making the execution of obligations burdensome or threatening significant loss in excess of what might be considered normal. In such cases, the combined principles of Islamic Sharia'h and the provisions of the Saudi law, enable the affected party to seek a judicial remedy ordering a financial rebalancing of the contract, by increasing the benefits associated with the burdensome obligation, by reducing the burdensome obligation or by suspending execution of the contract until the emergency circumstances cease, (where the event is temporary and expected to end within a short period).

Conclusion

It is clear from the above, that Saudi law and Shari'ah principlesrecognise the concept of force majeure and emergency circumstances. The Saudi judiciary has wide and absolute discretionary power to assess whether COVID-19 should be treated as a force majeure or emergency event and will do so having regard to the nature of each contract, the relevant circumstances and the degree and duration of the impact of the pandemic. However, a judgment finding that COVID-19 is a force majeure event for a specific contract does not mean that this judgment will be applicable to all other similar contracts, even if these contracts are by their nature similar. Each contract is unique. Each judge has his own arguments, reasons and understanding of the Shari'ah and other legal principles on which his judgments are based and, as already stated, there is no concept of binding judicial precedent.

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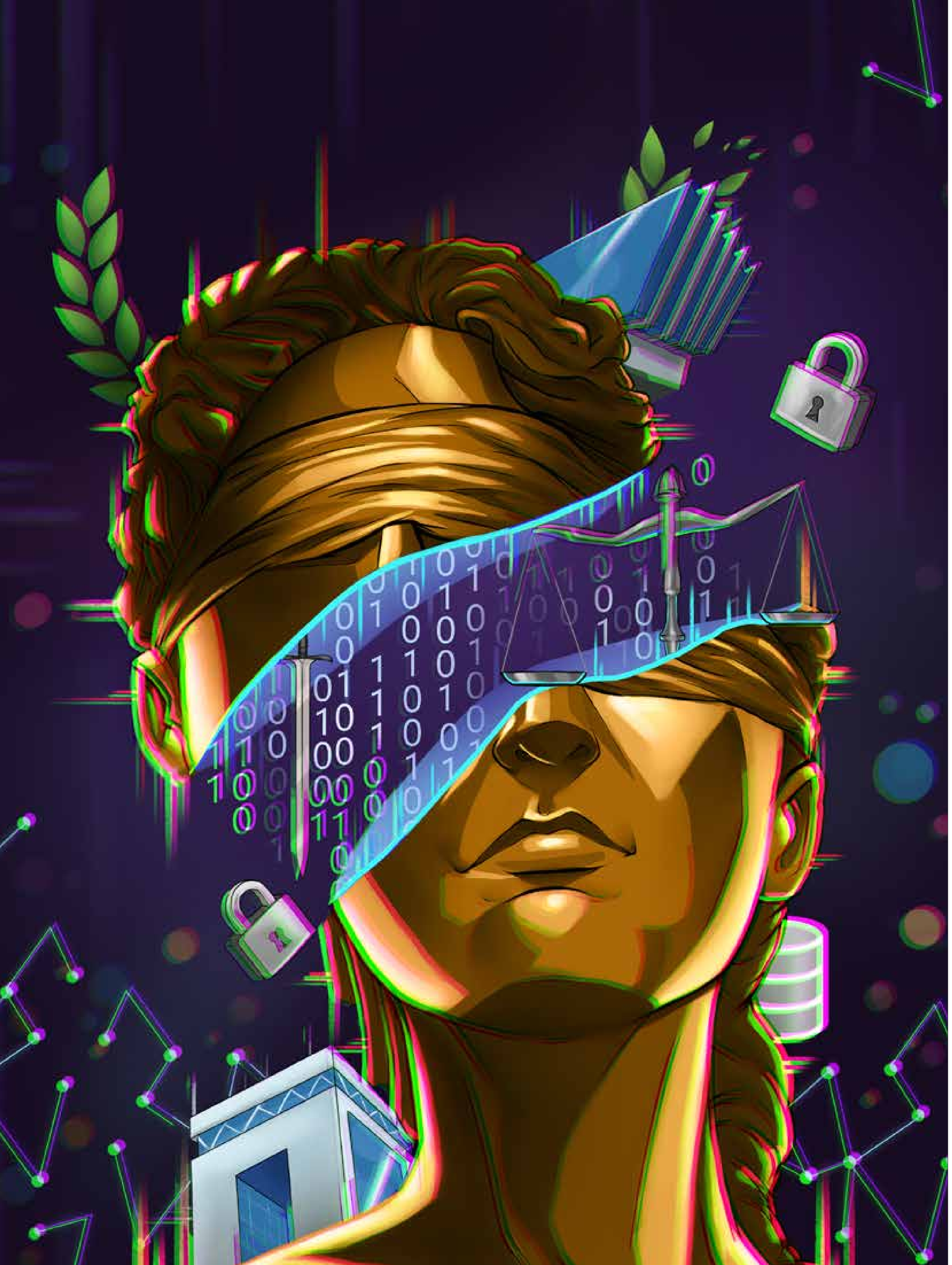
[1] https://www.tamimi.com/law-update-articles/ksa-leads-on-singapore-convention/



Data protection considerations in UAE related arbitrations

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There are four different and distinct data protection regimes within the UAE. Onshore UAE has its own (rather fragmented) data protection regime and, in addition, each of the following free zones have their own data protection regimes: (i) Dubai International Financial Centre ('DIFC'); (ii) the Abu Dhabi Global Market ('ADGM'); and (iii) Dubai Healthcare City ('DHCC').

Parties to arbitrations that have connections to the UAE or its free zones, regardless of whether those arbitrations are seated here, should be aware of the data protection regime(s) that may apply to them to ensure that no unintended breaches occur.

In this article, we briefly describe the different data protection regimes within the UAE, and we then consider some issues that parties to arbitrations connected to the UAE may wish to keep in mind as a result of the applicable data protection laws.

The Data Protection framework in the UAE

Onshore UAE

There is no single data protection law in onshore UAE. However, that does not mean that that there is no legislation relating to data protection in onshore UAE. In fact, there is a broad and relatively far reaching concept of privacy that is protected under various UAE laws and these have data protection consequences. But it does mean that practitioners and controllers of data need to be more alert to the different sources of law that they must consider when ensuring compliance with data protection issues.

In brief, federal sources of law and regulation on data protection issues include: (i) the UAE Constitution (Federal Law No. 1 of 1971) which, at Article 31, includes broad protections for privacy of communications; (ii) the UAE Penal Code (which provides, at Articles 378 and 379, for criminal liability for certain breaches of privacy); (iii) the UAE Central Bank's Digital Payment Regulation (the Regulatory Framework for Stored Values and Electronic

Payment Systems) which relates to digital payment service providers in the UAE; (iv) the Cyber Crimes Law (Federal Law No. 5 of 2012 on Combating Cyber Crimes) which, among other things, in Article 7 prohibits obtaining and dealing with certain information relating to medical data, where Articles 12 and 13 set out certain prohibitions relating to financial information, and in Articles 21 and 22, prohibits the use of information technology to violate the privacy of an individual or disclose certain confidential information; and (v) the Law Regulating Telecommunications Sector (Federal Law by Decree No. 3 of 2003, as amended) which, among other things, establishes the Telecommunications Regulation Authority (the 'TRA') (Article 6) and provides that one of the TRA's competencies is the issuing of regulations regarding the use of subscribers' personal information (Article 14(3)).

In addition, Dubai has passed some of its own laws and regulations which may impact data protection. These laws include what is known as the Dubai Data Law (Dubai Law No. 26 of 2015 on the Regulation of Data Dissemination and Exchange in the Emirate of Dubai) which requires that certain data that is held and which relates to the Emirate of Dubai is collated and managed and, in some cases, published as open data. Although the law is not itself a data protection law, it refers, in general terms, to data confidentiality and data protection. In addition, the Dubai Statistics Centre Law (Dubai Law No. 28 of 2015) protects personal data (not defined in the law) that has been obtained as confidential and limits how it may be disclosed or disseminated.

The net result is a patchwork of laws and regulations at the federal and emirate levels that seek to protect privacy through mandating and regulating how certain data is collected, stored, and shared. Breaches of the relevant UAE laws can lead to criminal and/or civil liabilities, imprisonment, and/or fines. For those involved in arbitrations that may involve data from or relating to this region, some considerations include whether any data in the arbitration:

- could be considered personal data because, for example, it relates to things such as a person's private or family life. If it is, then the person's consent may be needed before that data is dealt with;
- relates to medical records. If it does, then there may be limits on how that data can be dealt with;
- is user identification data or transaction records from digital payment service providers. If it is (and there is no definition of what constitutes user identification data), then there may be limits on how that data can be processed or shared and where and for how long it must be stored;
- is financial information and, if it is, whether it was properly accessed or obtained. If it is financial information and was unlawfully accessed in certain ways then criminal liabilities may arise depending on how that data is treated; and/or
- is subscriber information held by telecommunications' providers. If it is there may be obligations both on the telecommunications provider and any third parties who supply services to the subscribers on the telecommunications provider's behalf, to keep that information confidential and secure.

Offshore UAE

Of the UAE's many free zones, three (the DIFC, the ADGM, and the DHCC) have their own data protection regimes.

In addition, the UAE's criminal law uniformly applies across the country, including in the free zones. Accordingly, criminal liabilities relating to data protection (as discussed above) will be equally applicable in the free zones.

The DIFC's current data protection law, Data Protection Law No. 5 of 2020, came into effect on 1 July 2020. It replaces DIFC Law No. 01 of 2007, as amended.

The new law means the DIFC has the most up to date data protection law across the UAE and its free zones. A more detailed summary of the new law can be found here [link to Law Update Article in the same issue]. Key takeaways include that, when the law applies, personal data may only be processed lawfully and in accordance with the new law (Section 9). In order for processing to be lawful it must either be by consent or one of the other grounds must apply (Section 10). None of these grounds make reference to judicial or arbitral proceedings but, arguably, some of the grounds could be construed as to include judicial or arbitral proceedings. In addition, some categories of personal data (Special Categories) are afforded extra protections. So, personal data that reveals or concerns "*(directly or indirectly) racial or ethnic origin, communal origin, political affiliations or opinions, religious or philosophical beliefs, criminal record, trade-union membership and health or sex life and including genetic data and biometric data where it is used for the purpose of uniquely identifying a natural person*" must be treated with greater care. For such personal data, unless a data subject gives explicit consent to the processing of this personal data, it may not be processed unless one of eleven other grounds applies. One of these grounds is where the processing of the personal data is necessary "*for the establishment, exercise or defence of legal claims (including, without limitation, arbitration and other structured and commonly recognised alternative dispute resolution procedures, such as mediation) or is performed by the [DIFC] Court acting in its judicial capacity*" (Section 11(f)). It is not clear whether the legal claim must be one to which the data subject is a party or otherwise connected. There are restrictions on where certain personal data can be stored and/or transferred.

The ADGM's data protection law, the ADGM Data Protection Regulation 2015 (as amended) protects personal data in a similar fashion to the DIFC. Personal data is subject to relatively stringent controls and sensitive personal data is subject to extra protections. Personal data must be processed fairly, lawfully, and securely and for specified, explicit, and legitimate purposes. Again, as with the DIFC's law, the processing must either be by consent or one of the other grounds must apply. Similar to the DIFC's law, none of these grounds make reference to judicial or arbitral proceedings but, arguably, some of the grounds could be construed as to include judicial or arbitral proceedings. Processing of sensitive personal data requires additional consent

> **There is a broad and relatively far reaching concept of privacy that is protected under various UAE laws and these have data protection consequences.**

or one of the other grounds to apply. None of these grounds refer to judicial or arbitral proceedings or legal claims but, arguably, some could be construed to include these. There are also restrictions on where certain personal data can be stored and/or transferred.

DHCC has its own data protection regulation relating to patient health information (DHCC Data Protection Regulation No. 7 of 2013). The regulations introduce rules on what data can be collected: it must be necessary for a lawful purpose, though "*lawful purpose*" is not defined in the regulations; how it must be stored; and how, if at all, it may be transferred and to where.

Those involved in arbitrations should consider whether the personal data (including personal data from or relating to any of the DIFC, ADGM, or DHCC):

- is patient health information. If it is, there may be limits on how that data can be dealt with;
- is personal data. If it is, there are likely to be some restrictions on how that data is dealt with; and/or

The issues that may arise in respect of data protection are complicated and are likely to become more so. Consequences for lack of compliance can be serious.

- is sensitive personal data. If it is, then there are likely to be significant restrictions on how that data may be dealt with.

The application of UAE data protection laws

Many aspects of a "standard" arbitration require the accessing, collection, processing, storage, and dissemination of data. It is essential that all participants in an arbitration – arbitrators, parties, counsel and experts - consider their obligations in respect of data protection. Issues to consider include:

1. **The subject matter of the arbitration identity of the parties** – consider whether the subject matter of the arbitration or the identity of the parties mean that data protection issues may significant. For example, if a party to an arbitration is an individual (rather than an entity) this may give rise to immediate concerns in respect of the use of personal data in the arbitration. In addition, where the arbitration relates to health care companies, health care disputes, or health care data, there may be increased data protection obligations.
2. **Evidence in the arbitration** – consider where the evidence is coming from and whether that may trigger any data protection concerns. For example, where is the evidence that will be searched and potentially collected? Searching through hard copy company archives may pose different data protection issues as compared to searching through an employee's work computer. As a general rule, where you are contemplating searching through an individual's documents or devices, it may be pertinent to obtain advice as to any data protection issues that may need to be considered (including, without limitation to, whether employee consent has been obtained, either directly or indirectly). Similarly, consider what the evidence that you are searching for relates to and whether that may trigger any data protection concerns. Think broadly about this. For example, if a strategy in an arbitration is to cast doubt on a witness credibility and this entails searching for evidence of poor conduct on work emails, searching for and then dealing with such data may trigger some data protection considerations.
3. **Storage of and access to data** – some data, in particular sensitive personal data, may well have limits on how it may be processed, transferred, or otherwise dealt with. Some UAE laws require certain data to be kept within the UAE or relevant free zone, or if transferred out of it, transferred only to certain jurisdictions. Again, think about what this means in practice. In particular, think about issues such as where relevant servers are "located": are they inside or outside of the appropriate jurisdiction? Is there any use of cloud servers and, if there is, where is the cloud "located"? Who is accessing the relevant data and where are they based? Consider both your own storage of and access to data but also how others will do the same: where, for example, will the tribunal store protected data that is shared with it?
4. **Destruction of data** – once the arbitration has come to an end, consider carefully what obligations (if any) arise in terms of the lawful destruction of data (e.g. data protection requirements for data minimisation) and who is responsible for ensuring compliance.

Practical tips

In practice, participants in arbitrations should:

1. **think about it early and throughout** – consider data protection issues as early as possible both internally with your client and team and also, if appropriate, with your tribunal and opposing counsel;
2. **identify relevant individuals with whom to liaise early** – many clients will have individuals who are responsible for ensuring their company's compliance with relevant data protection laws. Identify these people early and work with them closely.;
3. **establish as early as possible which data protection regimes may apply to your arbitration** – take advice as early as possible as to which regime or regimes may apply to your arbitration so you can map out obligations early. With the potential for a new federal UAE data protection law in the near future, the UAE data protection landscape has the potential to either simplify or become increasingly complex;
4. **identify who in the arbitration may be a data controller under relevant laws and plan accordingly** - for example, is one or all of the tribunal a data controller and/or is the arbitral institution a data controller. If so, what does this mean for them and the arbitration?
5. **build data protection considerations into your arbitration** - consider raising data protection considerations during procedural hearings to ensure all parties and the tribunal have turned their minds to the relevant issues. In some instances, it will be appropriate to set out wording relating to data protection in procedural orders.

The issues that may arise in respect of data protection are complicated and are likely to become even more so. Consequences for lack of compliance can be serious. In particular, it is important to stay compliant with the relevant laws and regulations so you do not open yourself up to challenge via data breach notification or data subject request. In order to avoid liabilities, seek relevant advice early and continually monitor data protection issues throughout the arbitration.

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Tourism contractual obligations in light of the pandemic in the Sultanate of Oman

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Since the emergence of the novel coronavirus disease ('COVID-19') and its impact in paralysing many sectors of the economy, whether impacting trade within the country or between countries, substantial financial damage has resulted to the economies of most countries. The pandemic is the cause of a global economic recession due to the cessation of activities in various sectors and the consequent economic disruption. How quickly the various countries' economies recover, after containing the virus or any second wave, cannot be estimated with any degree of certainty. Among the sectors most seriously affected by the pandemic is the tourism sector; one of the most important sectors for those countries that depend on tourism as a key economic driver or a strategic growth sector.

International transport lines have had to slow down extensively, whether land, air or sea due to the closing of borders. Protective measures have resulted in the cessation of most means of tourist movement. Cessation of most cruise ship and airline activities, has led to the suspension of tourist delegations to countries that depend on tourism for national income, which in turn has caused numerous issues and dilemmas for hotel reservations and tourist trips contracted prior to the pandemic. Many such arrangements have not been implemented by the parties to the relevant contracts because the tourists have been unable to travel due to mandatory state policies, aimed at containing the virus by closing all its land, sea and air borders. This has raised many questions in respect of tourism contracts. Questions arise in respect of: the impact of the pandemic on these contracts; the legal basis, if any, for the annulment of such tourist contracts; and the possibility of people who are unable to benefit from the agreed services obtaining refunds or compensation, due to a foreign cause to which they have no relation or have in any way caused.

The extent to which Omani legislation regulates tourism contracts under exceptional circumstances and/or force majeure

The Omani legislature has not introduced any specific legislation regarding tourism services in the way that most Arab countries have in light of the pandemic. The inevitable consequence is that legal issues have emerged where tourist service providers claim that they have not refused to provide the service (but rather global circumstance and the procedures followed by the majority of their countries prevented them from fulfilling their obligations) while consumers claim reimbursement or later fulfilment of the contract, once the pandemic crisis has abated. Most service providers have refused both of these options granting neither refunds nor postponements on the grounds of force majeure or exceptional circumstances. The judiciary in Oman will, in the coming months, be asked to determine many issues related to tourism contracts including whether the impact of the pandemic constitutes either an exceptional circumstance or force majeure event. In the absence of specific legislation regulating tourism contracts the courts will have to relying entirely on the general contract law as set out in the wider laws of Oman.

Judicial principles governing tourism contracts in Oman under the exceptional circumstances and force majeure doctrines

Since the Sultanate of Oman has not been previously exposed to such an exceptional circumstance or force majeure event, as the outbreak of the global epidemic, there is no special legislation that regulates tourism contracts. Therefore, the Omani law has not developed any specific legal principles that can be relied upon in order to resolve the legal issues resulting from the outbreak of COVID-19 or disputes between a tourist service provider and a tourist service consumer.

Our understanding of French jurisprudence, arising out of the bovine spongiform encephalopathy ('BSE') epidemic, commonly known as mad cow disease, is that a principle called the precautionary principle was applied (which was taken mainly from French Environmental Law). This principle was adopted in the field of consumer health and security, as a complementary commitment to the obligation to ensure safety, and can also be applied to tourism services contracts. The precautionary principle equates to the principle of taking precautionary or preventive measures to avoid harm. The principle can be applied to tourism contracts affected by the Coronavirus pandemic following the World Health Organization ('WHO;) having declared the Coronavirus as a global epidemic and called on all countries to take precautionary and preventive measures to limit its spread and avoid exacerbating its impact in order to protect individuals and societies.

Application of the precautionary principle to tourism contracts, pursuant to the request of WHO, renders it necessary to take all precautions and preventative measures to avoid the risks to which the consumer of a tourism service may be exposed when availing of those tourism services. The basis of the principle is that a contract requires the services to be provided without exposing the consumer to any harm and thereby ensuring the consumer's safety. Pursuant to the WHO determination, COVID-19 is considered to be a fatal epidemic disease. The principle is supported by the Omani Consumer Protection Law and the various legal interpretations in its text. In the absence of other legal principles, the Consumer Protection Law states that travel and tourism services are subject to legal protection in accordance with Appendix 3 of Executive Regulation No. 77/2017 of the Consumer Protection Law No. 66/2014. The Consumer Protection Law does not detail the relevant tourism services so the requirements to ensure the safety of the consumer of tourism services, in accordance with the general principles of the Consumer Protection Law, apply and all the measures should be taken to remove any foreseeable risks that the consumer may face in all stages of the contract.

Consequently, and in a concept that contradicts this principle, if the tourist service provider is unable to provide a guarantee regarding the safety of the tourist service for the service consumer from COVID-19, the contract is voidable and the consumer of the service is entitled to recover what he or she paid for the service or compensation for that service after the exceptional circumstance abates. Where the reality of the situation shows that the competent authorities in the Sultanate decided to close all hotel establishments and tourist resorts as well as the land, sea and air outlets, this exemplifies the service provider's inability to guarantee the safety of the tourism service, due to the development of COVID-19 and in light of the country's inability to contain this virus despite their attempts to take all precautionary and preventive measures.

If the tourist service provider is unable to provide a guarantee for the safety of the tourist service for the service consumer from COVID-19, the contract is voidable and the consumer of the service is entitled to recover what he paid for the service or compensation for that service after the exceptional circumstance disappears.

Conclusion

Taking into consideration:

- the fact that the tourism sector is considered one of the main sectors of income in Oman, and drivers of diversification away from hydrocarbon dependency; and
- in the absence of legal texts that protect tourism contracts or judicial principles that can be relied upon in exceptional circumstances or force majeure such as COVID-19,

it may be necessary for the legislature to act, in regulating tourism contracts and their effects, and such regulation will be to protect the consumer of the tourism service. This regulation should address the preventative and legal aspects of the tourist activity and impose insurance on the risks arising from tourism contracts. It should reflect the other applicable laws in Oman and also the related texts concerning exceptional or emergency conditions or force majeure that prevent the implementation of parties' obligations, thus covering all the potential loopholes and legal flaws resulting from the tourist contract. In addition, in light of the lack of reference to the precautionary principle in service contracts, especially the tourism services contract, it will be necessary to adopt precautionary measures that guarantee the protection of the consumer of tourism services. While the Coronavirus pandemic is a new challenge before the Omani judiciary, particularly with regard to tourism contracts, it may result in new initiatives to address the legal effects of the emergence of the pandemic and act as the catalyst that drives the issuance of new legislation regulating contracts in active sectors such as the tourism sector.

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The use of technology to conduct ADGM arbitrations

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When the ADGM Regulations ('Regulations') were issued in December 2015, we rightly welcomed them as "one of the most modern and progressive arbitration laws in the Middle East" (Global Arbitration Review, February 2017). That remains the position in many respects with one arguable exception: the use of technology in the conduct of hearings, on which the Regulations contain no express provisions.

The regulation of the use of technology in arbitration under the UAE Arbitration Law

In contrast, the UAE Federal Arbitration Law, which was passed almost three years later (in 2018), does expressly address the use of technology in the conduct of hearings. For instance, Article 28 (Place of Arbitration) provides:

> *"2. The Arbitral Tribunal may, unless otherwise agreed by the Parties:*
>
> *[...] (b) hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the Parties."*

While Article 33 (Hearings and Written Proceedings) states that:

> *"[...]3. Hearings may be held through modern means of communication without the physical presence of the Parties at the hearing."*

And Article 35 (Witness Testimony)

> *"The Arbitral Tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing."*

The absence of regulation of the use of technology in arbitration under the Regulations

While the Regulations recognise modern means of communication (such as email), they contain no equivalent provisions to the foregoing provisions of the UAE Arbitration Law.

The absence of express provisions in the Regulations does not necessarily mean that technology is not permitted under the Regulations to conduct arbitrations

Considering the uncertainty around the permissibility of substituting a remote hearing for an oral hearing requested by one party in an ADGM arbitration [...], it is suggested that in any future revisions of the Regulations attention would be given to the permissibility of the use of technology in arbitrations seated in the ADGM.

seated in the ADGM. For instance, Article 32 (Determination of rules of procedure) provides that:

> *"(1) The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) In the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."*

As may be seen, the Regulations confer on the arbitral tribunal a broad discretion relating to how the arbitration is conducted. Furthermore, the Regulations require the arbitral tribunal in *"all cases"* to *"adopt procedures which are suitable to the circumstances of the particular case and which avoid unnecessary delay and expense"* (Article 32(4) of the Regulations).

Arguably, these provisions would entitle the arbitral tribunal to conduct an evidentiary hearing using video conferencing or other technological means, if it were not possible to meet in person due to the current pandemic or other compelling reasons (to *"avoid unnecessary delay"*). Indeed, in its publication entitled, 'Technical Notes on Online Dispute Resolution', UNCITRAL has observed that *"online dispute resolution can assist the parties in resolving disputes in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing"*. Further, this argument would appear to be bolstered by Article 33 (2) (Seat of arbitration), which entitles the arbitral tribunal to, unless otherwise agreed by the parties, *"meet at any place it considers appropriate for [...] hearing witnesses, experts or the parties."*

Having said that, Article 39 (Hearings and written proceedings) mandates the arbitral tribunal, subject to any contrary agreement by the parties, to decide *"whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials."* However, unless the parties have agreed that *"no hearing shall be held"*, the arbitral tribunal is required to *"hold such hearings at an appropriate stage of the proceedings, if so requested by a party."* As may be seen, the tribunal is obliged to hold an oral hearing- subject to any contrary agreement between the parties, where one party requests it. Indeed, as one leading commentator has noted, *"a tribunal's refusal to conduct an oral hearing, where it has been requested, can be a classic instance of a denial of a party's opportunity to be heard, leading to an annulment of the resulting award"*. (Chapter 25: Annulment of Arbitral Awards' in Gary B. Born, International Commercial Arbitration, (2nd Edition, Kluwer Law International, 2014), p.3235.)

That raises the question of whether the foregoing requirement for an oral hearing, where requested by one party in an ADGM arbitration, would be satisfied by a remote hearing conducted by technological means (absent any express legislative provision to that effect, e.g., Article 1072b (4) of the Dutch arbitration law (see below)). For instance, in Sweden, *"a hearing held by [video] conference is not to be regarded as oral within the meaning of paragraph 1 (2) [of the Swedish Arbitration Act]. Therefore, if a party requests oral hearing under that provision, he does not have to settle for a video conference."* (S. Lindskog, Skiljeforfarande – en kommentar, Norstedts Juridik, 2005 (unofficial English translation)).

Commentary

The use of technology is not novel in international arbitration. Parties and arbitrators often use modern means of communication to, for example, hold case management conferences, submit parties' submissions and supporting documents in electronic format, use e-storage for case files, and utilise hearing room technologies such as real time electronic transcripts. International arbitration has shifted into a more technologically-oriented culture, albeit maintaining for the large part traditional physical hearings. However, physical hearings have recently become potentially problematic for arbitrators, counsel and parties in light of the current pandemic and the resultant restrictions.

The social distancing measures and travel restrictions have challenged parties and arbitrators to adopt new measures in their proceedings, and to adapt to a new reality of conducting arbitrations. This includes the need to conduct evidentiary hearings using video conferencing or other technological means, instead of the more traditional hearings. The current pandemic could shift the way hearings in international arbitration are conducted, such that they become routine.

Considering the uncertainty around the permissibility of substituting a remote hearing for an oral hearing requested by one party in an ADGM arbitration (under Article 39 of the Regulations), it is suggested that in any future revisions of the Regulations, attention would be given to the permissibility of the use of technology in arbitrations seated in the ADGM. It would constitute a timely revision of a thoroughly modern arbitration law, thereby allowing it to keep pace with contemporaneous global changes.

There are examples in other jurisdictions. For instance, Article 1072b (4) of the Dutch arbitration law provides that:

> *instead of a personal appearance of a witness, an expert or a party, the arbitral tribunal may determine that the relevant person have direct contact with the arbitral tribunal and, insofar as applicable, with others, by electronic means. The arbitral tribunal shall determine, in consultation with those concerned, which electronic means shall be used to this end and in which manner this shall occur.*

As noted earlier, one does not need to look too far afield, considering the regulation of this issue by the UAE Arbitration Law.

Conclusion

When we welcomed the advent of the Regulations a few years ago, we expressed the hope that they *"also may serve as a bellwether for other initiatives, including the long-awaited enactment of a UAE federal arbitration law."* While the Regulations admirably served that function, it now appears that the UAE Arbitration Law may, in turn, serve as a bellwether for the regulation within the UAE of the use of technology in the conduct of arbitrations seated in onshore and offshore UAE.

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Saudi Arabia ratifies the Singapore Convention on Mediation

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The authors have previously drawn readers' attention to the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention') in Law Update. In October 2019, we discussed the receptivity and prospects of mediation in the Middle East before and after the Singapore Convention. In January 2020, we looked at some of the provisions of the Convention.

In this article, we provide coverage of the latest developments in mediation in the Kingdom of Saudi Arabia, as the Kingdom ratified the Singapore Convention on 5 May 2020.

The Singapore Convention's Ratification by the Kingdom of Saudi Arabia

The Singapore Convention was adopted on 20 December 2018 by Resolution 73/198 during the seventy-third session of the General Assembly of the United Nations. On 7 August 2019, Singapore hosted the signing ceremony where 46 countries signed what would be commonly known as the Singapore Convention. 46 countries, including the world's two largest economies, the United States and China, and three of the four largest economies in Asia, China, India and South Korea, signed the Singapore Convention on the day it opened for signature, while another 24 countries attended the signing ceremony to show their support for the Singapore Convention. In accordance with Article 14(1) of the Singapore Convention, the Contracting States agreed that the Singapore Convention would enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.

With Singapore, Fiji and Qatar being the first three states to deposit their respective instruments of ratification on 25 February 2020 (Singapore and Fiji) and 12 March 2020 (Qatar), the Singapore Convention, which to date boasts 53 signatories, will enter into force on 12 September 2020. The Singapore Convention will enter into force in the Kingdom of Saudi Arabia on 5 November 2020 in accordance with Article 14(2) (being six months after the Kingdom deposited its instrument of ratification).

[1] *https://www.tamimi.com/law-update-articles/mediation-in-the-middle-east-before-and-after-the-singapore-convention/*
[2] *https://www.tamimi.com/law-update-articles/ksa-leads-on-singapore-convention/*

The necessary enabling Royal Decree No (96) was issued on 16 Sha'ban 1441H corresponding to 9 April 2020 which provided for the following reservation: "The Singapore Convention shall not apply to settlement agreements to which the Kingdom of Saudi Arabia or any of its governmental agencies is a party, or any person acting on behalf of those governmental agencies."

As a result, international mediation settlement agreements falling within the scope of application of the Singapore Convention, subject to the Kingdom of Saudi Arabia's foregoing reservation, may be enforced directly by the courts of the Kingdom from 5 November 2020.

The prospects of the Singapore Convention in the Kingdom of Saudi Arabia

The ratification's timing is significant. The global economy, which was already in choppy waters, is now wracked by the COVID-19 pandemic. On the horizon, the business community also has to grapple with the burgeoning realities of climate change coupled with a political landscape where inequalities of opportunity are generating historic social shifts. Against this background of current and future turmoil, an international instrument which bolsters an effective form of alternative dispute resolution is to be welcomed.

The COVID-19 pandemic has stress-tested not only the detailed economic bargain underpinning most commercial agreements, typically manifested in the risk/reward allocation and the assignment of particular rights, obligations and responsibilities to the various parties, but it has also laid bare where the parties' wider interests may not be fully aligned.

Not unreasonably, the clear trend in recent instructions has focused on the rights of parties under an array of unpredictable scenarios, and in particular the application of force majeure provisions coupled with the ultimate creditworthiness of a prospective judgment or award debtor. In this uncertain landscape, users of ADR services will however quickly want to re-appraise their dispute resolutions mechanisms towards what could become a more risk-mitigating option by accommodating mediation.

> **The Singapore Convention shall not apply to settlement agreements to which the Kingdom of Saudi Arabia or any of its governmental agencies is a party, or any person acting on behalf of those governmental agencies.**

In many jurisdictions an attempt to resolve a dispute amicably is becoming an essential tactical ingredient in any overall dispute resolution strategy, with failure to do so adversely often affecting cost awards. Even without the Singapore Convention, it was open (and remains open) to parties who have an existing arbitration agreement contained in their commercial agreements to resort to mediation as a pre-arbitration or pre-litigation step.

The mediation step – looking to rebalance agreements based on interests rather than standing punctiliously on rights is going to become part of the emerging "new normal". Undoubtedly, a balanced approach must be maintained, and while mediation offers a process of engagement, it can never overcome deeply entrenched hostility and distrust: emotional intelligence coupled with a degree of imagination and creativity are some of the key attributes of a successful mediation. Mediation is not a soft option. It implies a degree of openness which has to be analysed very carefully in the context of what is often a default contentious position; be it arbitration or litigation. The process is intended to be confidential but disclosures made in an attempt to better align interests must always be calibrated against the implications of disclosure of existing rights and future relations. The output of what could be a successful process; a settlement agreement will also need to be crafted with as much care and attention to detail as any other commercial document. Elsewhere we analyse the treatment of force majeure under Islamic Sharia'h law. At basic level, Islamic Sharia'h law is about equity, so it should be no surprise that the courts have the ability to rebalance the economic basis of a contract presented to them. In this regard, mediation offers an opportunity to the parties to perform this exercise on their own terms.

Regional bodies are already playing their part, embracing the spirit and intent of the Singapore Convention in the Kingdom of Saudi Arabia. On 7 May 2020, the Saudi Centre for Commercial Arbitration ('SCCA'), a non-profit provider of professional alternative dispute resolution services (established in 2014), launched a programme providing remote mediation with enforceable outcomes. The Emergency Mediation Program ('EMP') aims to deliver the highest level of reliability for resolving disputes in accordance with institutional rules that ensure neutrality and optimal efficiency. EMP provides parties with the ability to convert their own settlement agreement into an executory deed ('Sak Tanfizi') to add certainty and thereby resume business activities quickly. An amicable resolution, backed by a settlement agreement convertible into a final and enforceable title, will likely enable parties to prevent commercial disputes from escalating to what could be a more time consuming and less cost effective and attritional arbitration or litigation.

The prominence of mediation in the Kingdom of Saudi Arabia is expected to be also bolstered significantly by the recently enacted Commercial Courts Law (Royal Decree No. M/93 issued on 15 Sha'ban 1441H corresponding to 15 April 2020); a comprehensive recasting of Saudi commercial law and procedure. The new Commercial Courts Law includes provisions imposing mandatory conciliation and mediation under certain instances provided for in the Implementing Regulations (Ministerial Resolution No. 8344 issued on 26 Shawwal 1441 H corresponding to 18 June 2020) such as disputes involving commercial contracts among merchants whenever the original claim value exceeds SAR 1,000,000 (approximately US$267,000).

Conclusion

The Singapore Convention aims to provide an international platform for the enforcement of commercial settlement agreements that one would hope to be tantamount to the success of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly known as the New York Convention. In times of economic uncertainty, steps being taken as regards international and regional mediation will greatly assist businesses in innovating their approach to dispute resolution: cost effectively and in a manner which sustains rather than undermines existing relationships. Based on these latest developments, stakeholders and users will certainly want to reassess their dispute resolution provisions and consider devising an appropriate toolkit for effectively settling disputes. By being the fourth state to ratify the Singapore Convention, the Kingdom of Saudi Arabia is undoubtedly at the forefront of such a movement.

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[3]*COVID-19 – Force Majeure Under Saudi Law and Shari'ah*

Use of modern technology in arbitration: evolution through necessity

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Introduction

The COVID-19 global pandemic has affected all industries around the world. The legal industry and, in particular, international arbitration are no exception. Yet, while state courts, including in the Middle East, have suspended operations and shut their doors until the crisis abates, international arbitration has confirmed its status as a flexible and adaptable alternative dispute resolution method. In the face of the ever-increasing restrictions on the movement of people and institutional shutdowns in Spring 2020, arbitration practitioners demonstrated the resilience and flexibility of international arbitration by continuing to resolve disputes remotely with the assistance of various technological means.

This article will touch upon a number of legal and practical considerations associated with the use of technology in international arbitration with a post-COVID-19 outlook.

Certain Legal Considerations

Counsel, arbitrators, and institutions had already introduced, implemented and used new technologies in international arbitration before the emergence of the COVID-19 pandemic. Unfortunately, despite the overwhelming benefits and for a variety of reasons, introduction of technology has been happening only at a piecemeal pace. However, as a result of the necessity brought about by the sudden resurgence of the COVID-19, it should come as no surprise to the arbitral community that the utilisation of technology at all levels of the international arbitration system has rocketed in the past few months. In this regard, and in order to ensure the legitimacy of the arbitral process and the subsequent successful recognition and enforcement of arbitral awardss, it is essential to ascertain the basis on which the use of technology in international arbitration, including the use of electronic documents, online platforms, and, of course, virtual hearings may be permitted.

1. ***Explicit reference to the use of modern technology in the parties' arbitration agreement***

While the matter of referring to the use of modern technology may be expressly prescribed in the parties' arbitration agreements, such reference was, in practice, relatively rare before COVID-19. In pursuance of the consensual nature of arbitration, parties could also agree on such use prior to or during the arbitral proceedings. Subject to mandatory provisions of the applicable legislation, such discretionary agreements may take the form of a general consent to use technology or a detailed framework identifying use of certain technology and programmes and/or prohibiting the use of others, which one or all parties consider, for example, unreliable or insecure.

The authors have noted an unsurprising increase in the explicit reference to the use of modern technology as part of the parties' arbitration agreement, often in anticipation of the protracted effects of the current health crisis. In this regard, the authors draw the users' attention to the importance of having such references carefully drafted in order to avoid any conflict with or inhibition of the effect of arbitration rules, in circumstances where the parties have agreed to refer their current or prospective dispute to institutional arbitration.

2. ***Reference to the use of modern technology in arbitration rules***

Prior to the COVID-19 pandemic, a large number of arbitration rules issued by the world's leading international institutions contained provisions expressly allowing the use of technology in arbitral proceedings, primarily due to consideration of time and cost efficiency. For example, the International Chamber of Commerce ('ICC') Arbitration Rules of 2017, which are regularly used in disputes pertaining to the Middle East, grant arbitral tribunals discretion to decide, in the absence of a parties' agreement, on "using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court" (see Appendix IV – Case Management Techniques).

Also, in regards to hearings, Article 28(4) of the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules of 2010, that are typically used for administration of proceedings in ad hoc arbitrations, grant arbitral tribunals the power to direct that fact and expert witnesses "be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference)." A similar provision is found in Article 29.4 of the Qatar International Centre for Conciliation and Arbitration ('QICCA') Arbitration Rules of 2012.

Arbitration practitioners should recall, research, and, if possible and appropriate, use as many electronic tools and online services that are readily available with the arbitral institutions and the multitude of technology services providers.

Similarly, many arbitration centres located in the Middle East have already prescribed in their arbitration rules the possibility of technology assisted arbitral proceedings, for example:

- Article 19.2 of the Dubai International Financial Centre – London Court of International Arbitration ('DIFC-LCIA') Arbitration Rules of 2016:

  "[…] As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three). […]"

- Article 16.3 of the Bahrain Chamber for Dispute Resolution – American Arbitration Association ('BCDR-AAA') Arbitration Rules of 2017:

  "[…] In establishing procedures for the case, the arbitral tribunal and the parties may consider how technology, including electronic communications, might be used to increase the efficiency and economy of the proceedings."

- Article 20(2) of the Saudi Centre for Commercial Arbitration ('SCCA') Arbitration Rules of 2018:

  "[…] In establishing procedures for the case, the Tribunal and the parties may consider how technology, including electronic communication could be used."

Where the arbitration rules are silent on the use of technology and in the absence of parties' agreement, arbitral tribunals may be able to rely on the rules' general provisions. Such provisions typically grant the arbitral tribunal discretion on how to administer the arbitral proceedings, which should include decisions on how to implement and utilise modern technology, provided the parties are treated fairly and have an opportunity to present their case.

In this regard, Article 17 of Dubai International Arbitration Centre ('DIAC') Arbitration Rules of 2007 provides as follows:

> *"17.1 The proceedings before the Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Tribunal may determine.*
>
> *17.2 In all cases, the Tribunal shall act fairly and impartially and ensure that each party is given a full opportunity to present its case."*

It is important to highlight that, pre-COVID-19, certain arbitration centres in the Middle East have even been offering online arbitration services. For example, the SCCA based in Riyadh, is offering an Online Dispute Resolution ('ODR') Protocol for disputes with a minimum amount of SAR 200,000 (approximately US$53,000).

It should also be mentioned that during the COVID-19 pandemic, several arbitration institutions, for example, the ICC, the SCCA and the Cairo Centre for International Commercial Arbitration ('CRCICA') published recommendations and guidance notes aimed at assisting arbitral tribunals and the parties with a view to mitigating the effects of COVID-19 by reminding them of the already available tools and methods and providing guidance on the existing technology available for remote handling of arbitral proceedings, including the conduct of "virtual" hearings.

3. ***Arbitration Laws***

Many modern arbitration laws, applicable procedural laws that contain default provisions for the arbitral process in which the arbitration has its seat or legal place and which provides a framework for dispute resolution through arbitration in a jurisdiction, contain provisions and references allowing and encouraging the use of modern technology. In the Middle East, for example, the United Arab Emirates (the 'UAE') and Jordanian arbitration laws contain the following clauses expressly granting authority for Arbitral Tribunal to employ technology in arbitral proceedings:

- Article 28(2)(b) of UAE Federal Law No. 6 of 2018 On Arbitration which came into force in June 2018 (the UAE Arbitration Law) provides:

  "The Arbitral Tribunal may, unless otherwise agreed by the Parties: […] hold arbitration hearings with the Parties and deliberate by modern means of communication and electronic technology. […]"

- Articles 17(b) and 21 of Jordanian Law No. 16 of 2018 on Amending the Arbitration Law which came into force in May 2018 provide:

  "The Arbitral Tribunal may employ the modern means of communication for taking any arbitration-related action. [...]

  The Arbitral Tribunal may admit to hear the testimony of the witnesses using the various means of technological communications, including the televised or closed circuit based communications. [...]"

The majority of arbitration laws in the world and, specifically, in the Middle East do not expressly provide for arbitral tribunals' authority to utilise technology. In such cases, the arbitral tribunal may: (i) take comfort in relying on provisions of a relevant arbitration law that grants it general discretion and wide powers with respect to administering arbitral proceedings and/or, depending on the jurisdiction where the arbitration has its seat or legal place; (ii) conclude that the implementation of technology in the proceedings is allowed by implication because it is not expressly prohibited.

One of the reasons for such an omission is, of course, the fact that certain arbitration laws have not been updated for a long time, in certain instances, for several decades. Another reason may be the absence of the relevant provision(s) in the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 ('UNCITRAL Model Law'), a model law effectively adopted with various degrees of adjustment by more than 83 jurisdictions around the world, including Egypt, Bahrain and the UAE.

One caveat to the above is an increasing use of provisions in arbitration laws prescribing entry into arbitration agreement by *"electronic communication"* as satisfying the writing requirement as, for example, in Article 7(4) of the UNCITRAL Model Law or Article 9(3) of the Kingdom of Saudi Arabia Royal Decree No. M/34 of 2012 Concerning the Approval of the Law of Arbitration (the 'KSA Arbitration Law').

Considering the recent dramatic increase in the use of modern means of telecommunication in international arbitration and, thus far, largely relative positive feedback within the arbitral community as to its viability, it seems reasonable to expect that post-COVID-19 arbitration agreements, institutional rules, and arbitration laws, particularly in the Middle East will increasingly encourage, allow, and/or require the utilisation of various means of technology. This would add certainty in regards to the validity of technology assisted arbitration proceedings and the recognition and enforcement of resulting arbitral awards.

Certain practical considerations

In addition to establishing the legal bases authorising technology's use in international arbitration, arbitration practitioners should also recall, research, and, if possible and appropriate, use as many electronic tools and online services that are readily available with the arbitral institutions and the multitude of technology services providers.

1. ***Digital platforms***

One of the technological aspects that seems ripe for change in international arbitration is the method of exchanging correspondence, written submissions, and other documents between the arbitral institutions, arbitral tribunals, and the parties. It is no secret that the majority of such exchanges takes place via email communications, which are possible to intercept or forge. Furthermore, in cases of written submissions or document disclosure, large and/or multiple files are either split into batches and sent over several emails to the recipients or provided via a hyperlink using one of the online file sharing services. Moreover, in certain instances, the document exchanges occur without password protection or encryption.

In these circumstances, arbitral institutions and practitioners are increasingly recognising a need for establishing online platforms that would make such exchanges more systematic, reliable, and secure. Possibly the biggest progress in this area, thus far, has been achieved by the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC'). In September 2019, the SCC introduced the SCC Platform; a secure digital platform for communication and file sharing between the SCC, the parties, and arbitral tribunal. Additionally, in May 2020, the SCC announced extending the use of its SCC Platform for ad hoc proceedings, including free of charge use during the COVID-19 crisis.

In the Middle East, for example, the DIFC-LCIA Online Filing system allows practitioners to *"[f]ile Requests for Arbitration, Responses, applications for expedited formation of the tribunal, applications for expedited appointment of a replacement arbitrator, and applications for the appointment of an Emergency Arbitrator."* Similarly, the BCDR-AAA offer practitioners the options for filing Online Forms for a Request for Arbitration, Response, Request for Joinder, Response to a Request for Joinder and Application for the appointment of an Emergency Arbitrator.

2. ***Virtual Hearings***

Probably the most topical practical issue in international arbitration over the last several COVID-19-affected months was the carrying out of so-called virtual hearings, i.e. hearings held remotely over the internet with arbitrators, counsel, parties, fact and expert witnesses and transcription services providers participating over various online communication platforms. While the overall feedback of the participants in such hearings have been somewhat positive, it should be recognised that it has been ultimately a temporary, ad hoc, solution driven by the necessity of holding hearings in order to continue the arbitral proceedings and issue the partial or final award in a timely manner. Most of the participants were joining the virtual hearing from their homes, which may not necessarily be the most convenient, equipped, and/or confidential locations. In many instances, an effective hearing requires installation of a second or third internet channel to ensure availability of a high quality, stable, and back-up connection and several screens and/or laptops to allow unencumbered access to the hearing video, documents, live transcript, and internal communication between counsel and parties or members of the arbitral tribunal. Evidently, such a cumbersome and time consuming setup at home of each arbitration practitioner does not represent a scalable solution.

Nevertheless, recognising the potential for cost savings, resulting travel flexibilities, and the possibility of other extraordinary events, the number of virtual hearings to be held going forward will certainly increase. In this regard, it would be prudent for arbitral institutions, hearing venues specialising in dispute resolution, legal services' providers to consider investing in physical space, IT equipment, software solutions, and video and sound devices that streamline, facilitate, and improve participation at virtual hearings.

Conclusion

One of COVID-19's silver linings in regards to international arbitration lies in the dramatically increased use of technology by the arbitral community. Such use, of course, should always be carefully evaluated for compliance with the parties' arbitration agreement, the applicable arbitration rules, and/or arbitration laws, particularly in cases of parties' disagreements on the use of certain or any technology, when introducing innovative technological solutions into the process, and bearing in mind that not all jurisdictions in the Middle East have the same levels of development and sophistication when it comes to the internet and IT infrastructure.

This notwithstanding, as jurisdictions around the world and the Middle East are incrementally easing COVID-19-related restrictions on the movement on individuals, international arbitration institutions and users are slowly returning to their offices. Hopefully, having learned many valuable IT and technical skills in the first part of 2020, they will not resume operating in the office 'in the good old fashion way', but will embrace new technology lobbying its introduction into arbitration agreements, draft arbitration laws and proposals for updating arbitration rules.

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Relief for commercial tenants in Qatar under COVID-19 measures

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During this critical time where many business operations have been limited and businesses across the world are taking steps to mitigate the effect of COVID-19 on economies, many commercial tenants are unable to keep their premises open or operational due to restrictive measures taken by respective governments to curb the spread of the pandemic. Yet, many commercial tenants are still bound by costly terms of their commercial leases.

In Qatar, although many master developers have agreed to waive or reduce fees and/or rents in order to ease the burden on their commercial tenants, this has not been the case across the board. This article focuses on the impact COVID-19 has had and is continuing to have on commercial leases and the potential relief available to tenants under Qatari Law.

The position in this article is subject to change if the Qatari legislature may intervene to regulate certain aspects of this important sector in light of the economic impact of COVID-19.

Force majeure

Force majeure is an event that is outside of the control of one or both contracting parties that renders the performance of their contractual obligations impossible. It essentially frees both parties from liability or obligation under a commercial contract. In the absence of a valid force majeure clause in the contract, one may turn to the applicable Qatari laws governing force majeure.

Article 188 of Qatar Law No. 22 of 2004 on the Civil Code ('Qatar Civil Code') governs the conditions of a force majeure event and its consequences. Article 188 provides that in contracts binding on both parties, where performance by one party is made impossible due to an extraneous cause beyond the party's control, such obligation(s) and correlating obligation(s)should also be extinguished and the contract should be deemed rescinded ipso facto. On the other hand, should the impossibility of performance be partial, the creditor may either enforce the contract to the extent of the obligations that may be performed,

Force majeure is an event that is outside of the control of one or both contracting parties that renders the performance of their contractual obligations impossible. It essentially frees both parties from liability or obligations under a commercial contract. In the absence of a valid force majeure clause in the contract, one may turn to applicable Qatari laws governing force majeure.

or demand termination of the contract. In a nutshell, there are two conditions that are considered essential for of the application of force majeure: (i) the unpredictability of the event at the time of entering into the contract; and (ii) the fact that it could not be avoided. Needless to say, if the impossibility was due to the fault of the defaulting party, there would be no force majeure.

It is worth noting that a competent court in Qatar has the discretion to decide, on a case-by-case basis, depending on the facts and evidence submitted before it, whether the conditions of force majeure have been met so that it may release the affected party from its obligations.

Currently, due to the courts' suspension in Qatar as part of the measures applied by the Government of Qatar to curb the spread of COVID-19, there are no legal precedents on the matter of COVID-19. However, we believe that it is highly likely, in the current circumstances, that a Qatari court will rule COVID-19 to be a force majeure event that may release a commercial tenant from its obligations under the relevant lease agreement if that Qatari court believes that the facts of the relevant case are sufficient to meet the conditions of force majeure. Such a decision may be based on multiple factors involved in the case, for example, the overall effect of COVID-19 on the commercial tenant's business, full or partial operation of the commercial tenant's premises, closure or inaccessibility of premises due to restrictions put in place by the Government or otherwise.

Other remedies for commercial tenants under Qatar law

Although force majeure may be the first option that comes to mind, there are provisions under the Qatar Civil Code that specifically relate to lease agreements and provide relief to commercial tenants in certain circumstances. Article 602 of the Qatar Civil Code provides for a specific remedy for tenants who can no longer use the leased property due to an act of a public authority which causes considerable deficiency in the use of the property. Under Article 602, a tenant may terminate the lease or request an adjustment of the amounts owed under the lease.

To seek relief under this provision, it is essential to lodge a claim with the Rents Dispute Committee that has jurisdiction to hear such claims and the discretion to either terminate the lease or adjust the lease amounts in light of the circumstances.

At this critical time, it is important that our clients, whether landlords or tenants, are aware of the provisions of their lease agreements and the provisions of the relevant laws. This awareness would allow them to take the proper legal action in order to minimise the effects of COVID-19 on their business.

For further information, please contact Hani Al Naddaf (h.alnaddaf@tamimi.com).

JORDAN: THE WAY FORWARD

The Jordanian Government, under the patronage of His Majesty King Abdullah II, has introduced a national vision and strategy for Jordan 2025. Aiming to achieve a more integrated social and economic framework, the Jordanian Government has been diligent in implementing legislative reforms with a focus towards greater private sector participation and the rejuvenation of specific sectors.

This edition will touch upon a number of those developments, including the introduction of a new PPP Law, the codification of a comprehensive Real Estate Law, the unification of investment authorities under the Investment Law, and the creation of alternate modes for investment, including Venture Capital companies and cross border offerings.

As part of these efforts, we, at Al Tamimi & Company, were honoured to be appointed to act on one of the largest PPP Projects in Jordan, as well as to assist the Government's Steering Committee and the European Bank for Reconstruction and Development in the ongoing review and reform of the capital markets' legal regime in Jordan.

That is not to say that Jordan has been without its challenges. The COVID-19 pandemic and the turbulence in the region continue to adversely impact our national economy and upcoming projects. Further, the activation of the Defense Law in response to the COVID-19 outbreak, has directly affected the way companies and the public sector do business. Whilst the economic strains continue to be felt worldwide, imposed curfews and lock-down measures have also led to greater utilisation of online and remote working solutions. As will be seen in the upcoming articles, the Jordanian Government had previously begun to utilise online sources (including, the creation of a security registration platform); the current realities have, however, further kick-started such initiatives and we are now beginning to see the operation of online portals for registration of companies, court submissions, and compliance with regulatory filings.

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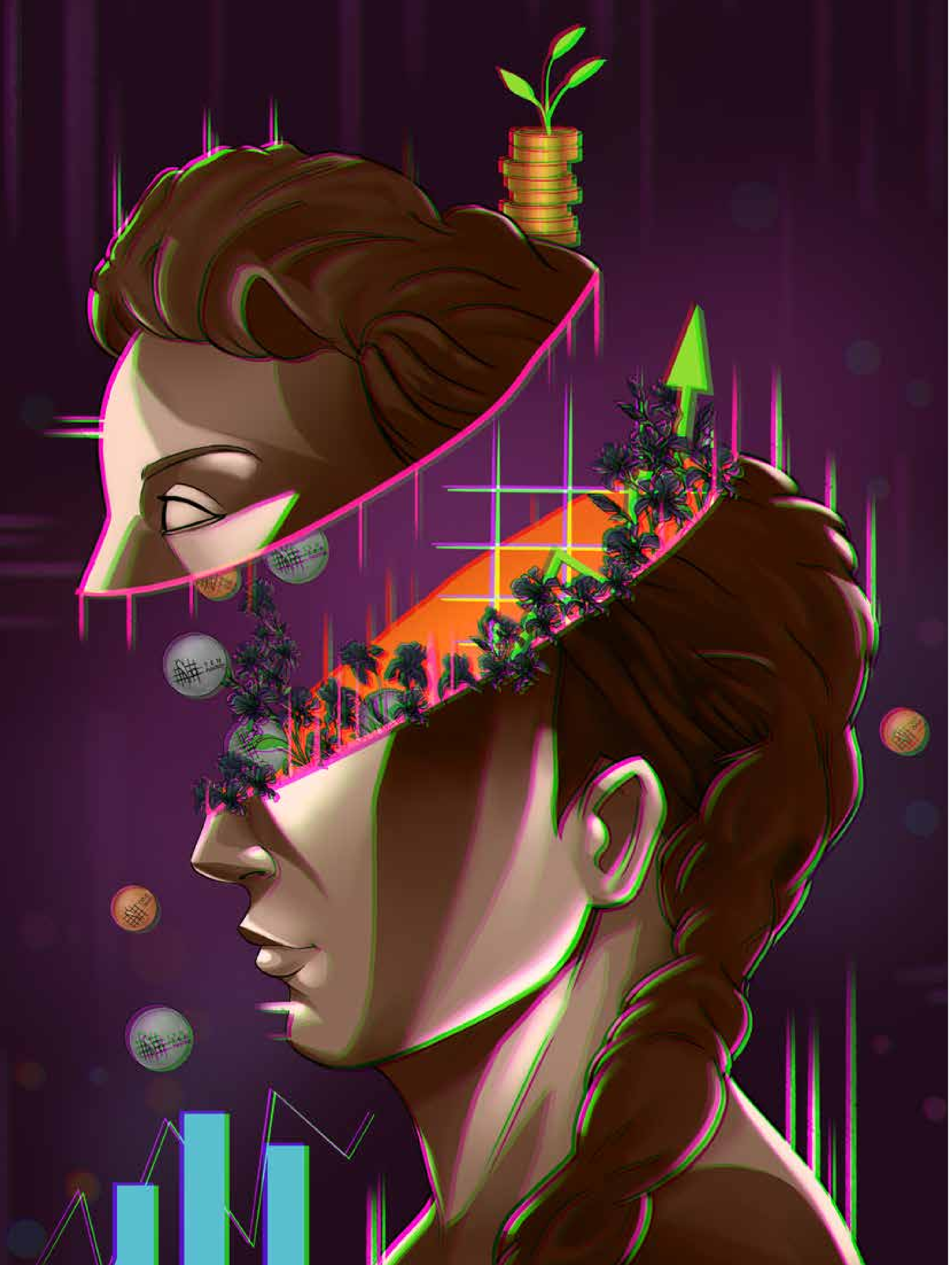

Incentivising investment: Jordan's new Public Private Partnership Law

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Public Private Partnerships and the 2020 PPP Law

Public Private Partnerships ('PPP's') comprise government ventures or private business ventures, the funding and operation of which are executed by means of a partnership between a governmental entity and one or more parties operating in the private sector.

In 2019, the Jordanian government proposed a new draft law to repeal and replace the Public Private Partnership Law No. (31) of 2014 ('Repealed PPP Law') with the Public-Private Partnership Law No. (17) of 2020 ('PPP Law'). The PPP Law has now been approved in accordance with due process and is legally in force. This was perhaps done in consideration of the increasing significance and magnitude of PPP Projects in Jordan, as the PPP Law introduces more scrutiny and comprehensiveness to the overall PPP framework, as well as allocating a special fund to finance PPP Projects. The PPP Law is focused on reformulating PPP governance to make it more attractive for private investors, more extensive for Governmental Parties to utilise, and more efficient for the public to benefit from.

The purposes for legislating the PPP Law

Among the stated purposes for the legislation of the PPP Law is the adoption and application of best global practices to facilitate real partnerships between private and public sectors, shifting towards a more modern and certain partnership regime. Another purpose behind the PPP Law is the offering of superior services to Jordanian nationals through the established partnerships. To do so, the PPP Law aims to find an effective and transparent foundational framework for the spreading, specification, tendering and execution of PPP Projects, as well as provide a sustainable and successful financing mechanism to fund the study, development, preparation, tendering, assignment and execution of PPP Projects. Additionally, the PPP Law aims to specify the mechanisms for attaining governmental support in relation to PPP Projects, and provide a foundational mechanism to specify and administrate "Financial Commitments" (defined as the direct and indirect long-term financial effects of a PPP Project on the public budget) and emergency requirements which could arise from PPP Projects.

In 2019, the Jordanian government proposed a new draft to repeal and replace the Public Private Partnership Law No. (31) of 2014 ('Repealed PPP Law') with the Public-Private Partnership Law No. (17) of 2020 ('PPP Law'), which has now been approved in accordance with due process and is legally in force.

Regarding governmental involvement in PPP's, the PPP Law additionally aims to establish a PPP Projects Unit to offer help and technical assistance to governmental parties prior to and during the various stages of executing PPP Projects.

The PPP Law: a substantial change in PPP governance

The PPP Law restructures PPP governance into a more certain, stakeholder-friendly manner. Article 3 of the PPP Law outlines the objectives of PPP's, not dissimilar from those in the Repealed PPP Law albeit more comprehensive in scope and more definitive in terminology. An example is the substitution of the requirement of feasibility, undefined in the Repealed PPP Law, with the requirement of realising "Value Added Against Money", defined in the PPP Law as an additional economic revenue earned by the Project Company in favour of the "Contracting Party" which, for the purposes of the PPP Law is the Governmental Party to a PPP Agreement. The PPP Law maintains the minimum threshold for an entity to qualify as a Governmental Party, requiring a governmental shareholding percentage of not less than 50 per cent therein.

Article 4 of the PPP Law establishes a National Register for governmental investment projects at the Ministry of Planning and International Cooperation.

Article 6 of the PPP Law establishes the "Higher Committee" pursuant to a decision by the CoM. The responsibilities of the Higher Committee include, but are not limited to, the illustration of the general policy for PPP Projects and the specification of prioritised sectors and activities in that respect, the selection of qualified PPP Projects after reviewing initial reports pertaining to said project from the Ministry of Planning and International Cooperation, the Ministry of Finance, and the PPP Projects Unit, and the issuance of Instructions necessary to implement the PPP Law's provisions.

The PPP Projects Unit

Article 7 of the PPP Law establishes the "PPP Projects Unit", a body replacing the PPP Unit established under the Repealed PPP Law. The PPP Projects Unit is accountable to the Prime Minister and operates largely to develop and oversee the standard PPP framework. The PPP Projects Unit is also authorised to provide technical assistance to Governmental Parties in relation to the preparation of feasibility studies and Financial Commitments Reports. Said feasibility studies, along with the PPP Project Unit's recommendations, are then forwarded to the Minister of Finance. The PPP Projects Unit also revises PPP Agreement drafts and forwards them to the Higher Committee along with its recommendations, as well as submitting to the Higher Committee guidelines for endorsement in relation to PPP Agreements and their procedural dynamic.

Other accountabilities pertaining to the PPP Projects Unit include, but are not limited to, updating the relevant Register with approved PPP Projects, documenting studies, documents, reports and agreements in relation to said projects, publishing a report on each said Project upon perfection of its financial closure, and drafting Regulations to govern the implementation of the PPP Law and instructions to regulate the PPP Projects Unit's operation, and forwarding them to the Higher Committee. Article 9 of the PPP Law outlines the authorities and accountabilities of the PPP Projects Unit's Director, as appointed by the Prime Minister.

The special fund for financing PPP Projects

Article 8 of the PPP Law establishes a special fund under the PPP Projects Unit's authority, the purpose of which is funding the preparation of PPP projects. The special fund comprises amounts allocated by the government for PPP projects, as well as gifts, grants, facilities, donations and any other resources deposited into it, subject to the Council of Ministers' approval for amounts received from non-Jordanian persons. The special fund shall be used to fund studies and reports pertaining to PPP projects, contracts entered into with consultants, the consultancy of experts, tendering processes, and costs which may arise after PPP agreements are signed. A Regulation shall be issued pursuant to the PPP Law which regulates all matters pertaining to the special fund, including the formation of a supervision committee.

The Technical Committee

Article 10 of the PPP Law establishes the "Technical Committee", the role of which involves the holistic, financial management of PPP projects and the costs associated with them including, but not limited to, the assessment, overseeing and monitoring of Financial Commitments, the tracking of any public budget allocations for the benefit of immediately payable instalments and Financial Commitments arising during the execution of PPP projects and the governmental assistance required in relation to said projects, and the comparison between approved PPP agreements and their amended versions to ensure that no fundamental change occurs which alters the risk distribution, Financial Commitments, or suggested governmental assistance of the agreements' respective PPP projects.

Pursuant to Article 10 of the PPP Law, the Minister of Finance shall forward the Technical Committee's recommendations to the Higher Committee, along with his recommendations on the forwarded materials. The Minister of Finance shall also set the total cap in relation to Financial Commitments which the Ministry of Finance is able to allocate to cover any Financial Commitments arising from PPP projects.

The PPP Law restructures PPP governance into a more certain, stakeholder-friendly manner.

The Higher Committee shall, based on the recommendation of the Minister of Finance, issue Instructions pursuant to the PPP Law to regulate all matters pertaining to the Technical Committee, including the members and meetings thereof.

General provisions, liabilities and restrictions under the PPP Law

Article 11 of the PPP Law makes liable any party in favour of which a PPP project is procured to establish a company with the objective of executing the project ('Project Company').

Article 12 of the PPP Law allows any private party to submit a direct proposal for a PPP Project to any Governmental Party, sanctioning enlistment of the proposed project in the Register and its execution in accordance with the due process (referenced in Article 20(a) of the PPP Law to be issued via a Regulation pursuant to the PPP Law which specifies the stages of PPP Projects and the respective commitments pertaining to the involved Governmental Party and Contracting Party). Compared to its equivalent in the Repealed PPP Law, Article 12 of the PPP Law offers a clearer, less bureaucratic and less restrictive direct proposal process to the party submitting said proposal, facilitating the enlistment and execution of PPP Projects to cater for investment opportunities and the development potential associated with such partnerships.

Article 16 of the PPP Law makes any amendment or change of a fundamental effect to a PPP Agreement subject to the approval of the CoM based on the recommendation of the Higher Committee. Article 16 specifically targets amendments affecting the risk distribution with respect to the PPP Project, or the assumptions made in said Project's feasibility study. Additionally, an obligation is imposed to terminate a PPP Project and reinitiate the tendering process if an amendment to such project increases the total costs associate with it by 20 per cent or more. This is a more restrictive provision than its predecessor in the Repealed PPP Law, Article 14(a)(2), which allows the Council of Ministers to approve an amendment causing a total cost increase of 20 per cent or more, subject to the percentage of change not exceeding 50 per cent in any case.

Article 17 of the PPP Law prohibits the President or any member of the Higher Committee, the Technical Committee, the PPP Projects Unit, the Governmental Party, the Contracting Party or the committees formed to execute PPP Projects, to participate in a direct or indirect manner in any PPP Project. This restriction applies to the aforementioned members' spouses, children, first cousins and second cousins. This prohibition shall remain effective for a period of one year following the termination of membership or work in the aforementioned positions. Any respective member within the aforementioned categories must notify the President of the Higher Committee of any direct or indirect benefit which may accrue in favour of them, their spouse, children or first cousins, prior to commencement of the tendering stage of the relevant PPP Project. The President of the Higher Committee shall accordingly exempt any such member from working on the particular PPP Project under which this provision is triggered.

"The updated PPP framework potentiates numerous opportunities to fortify Jordan's capital market, enhance the services provided to its nationals, and encourage investment and participation in the PPP sector, whether legal, economic or political.

Article 19 of the PPP Law excludes from the effect of the PPP Law any PPP Projects the tendering stage of which commenced prior to the enforcement date of the PPP Law. For PPP Projects which, at such time, are at the preparation stage but have not yet commenced the tendering stage, the PPP Projects Unit shall review the procedures undertaken in relation to such projects and accordingly submit its recommendation to the Higher Committee, which shall then take the course of action it deems appropriate.

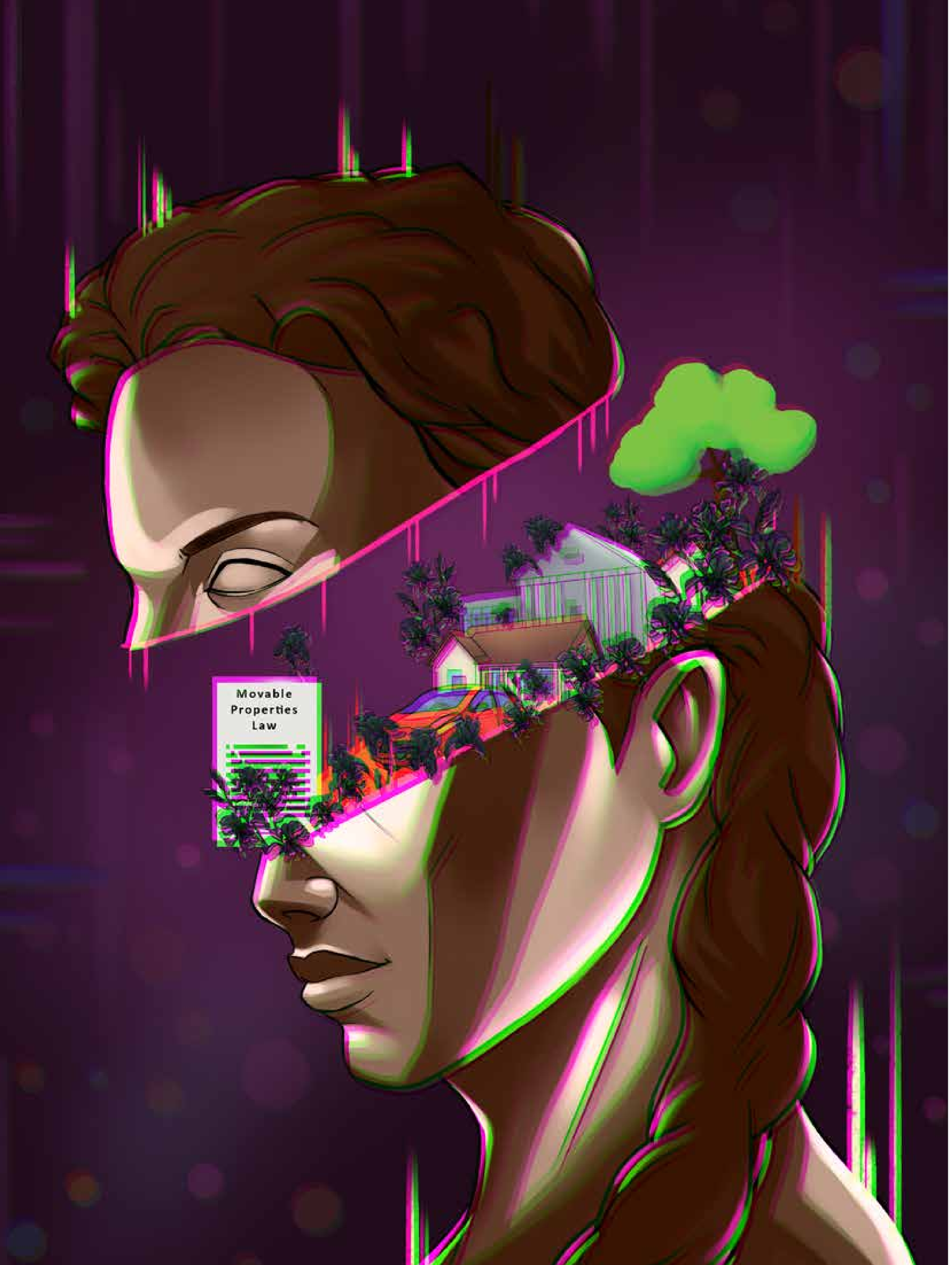
Article 20 of the PPP Law assigns to the CoM the drafting of the necessary Regulations to apply the provisions of the PPP Law including, specifying the stages of PPP Projects and the respective commitments pertaining to the involved Governmental Party and Contracting Party, setting the standard tendering procedure in relation to PPP Projects, the stages and procedures pertaining to PPP Projects the capital costs of which are less than the amount set by the CoM for these purposes, the primary provisions and conditions to be included in PPP Agreements, and the conditions and mechanisms in relation to executing PPP Projects submitted through direct proposals.

Conclusion

The PPP Law, given the growing commercial significance of PPP Projects, presents a tool of opportunity for the Jordanian government to collaborate with private investors for developmental projects. The fundamental restructuring of the Repealed PPP Law implies a necessity to find a more organised, compartmentalised framework, playing to the advantage of public, private and stakeholders involved in the PPP sector. A recognition of the value of PPP Projects can be seen in the allocation of a special fund to maintain PPP budgets. The Higher Committee and the PPP Projects Unit present more centralised, specialised and supervisory bodies than their predecessors, the PPP Council and the PPP Unit respectively. These new legislative controls, along with the other provisions the PPP Law propounds, create a potential for a dramatic evolution in the PPP sector.

The updated PPP framework potentiates numerous opportunities to fortify Jordan's capital market, enhance the services provided to its nationals, and encourage investment and participation in the PPP sector, whether legal, economic or political.

For further information, please contact Dana Abduljaleel (d.abduljaleel@tamimi.com).



The New Movable Properties Law: the start of a new regime

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The Jordanian Government issued The Law of Security of Rights in Movable Properties number 20 for the year 2018 ('Movable Properties Law') which provides a legislative structure for registering, perfecting and enforcing security over moveable assets in Jordan. Pursuant to the Movable Properties Law, Regulation number 125 for the year 2018 on the Regulation of the Registry of Interests of Movable Properties ('Movable Properties Regulation') was issued to regulate the publication of movable properties and came into force in November 2018.

The new regime established a publicly accessible electronic registry, managed by the Directorate of Central Trade Registration at the Ministry of Industry, Trade and Supply ('Registry'). The Movable Properties Law provides a mechanism to secure a creditor's priority over movable assets via its publication in the Registry. The priority of the pledger will be determined as of the time and date of such publication in the Registry. The Registry also offers future lenders the security and assurance before entering into loan agreements as the publicly searchable Registry makes for an easier due diligence assessment on the borrower's past pledged assets.

The objective of the Movable Properties Law is to ensure priority over any security that is published on the Registry. It has caused radical shifts in many industries and has provided a sense of surety and assurance to lenders who have registrable rights over movable assets. Prior to the enactment of the Movable Properties Law, lenders did not have a proper guarantee on any pledged movable assets that were not in their physical possession. The Jordanian Civil Code number 43 for the year 1976 (the 'Civil Code') previously was the only law that provided for a security process over movable assets by way of a possessory pledge. This mechanism required either the lender or a custodian (the 'Adel') to take physical possession of the pledgor's secured movable property until such time as the debt may be settled. It is important to note that the Movable Properties Law offers various developments to the existing law, however, it does not repeal nor replace possessory pledges under the Civil Code.

The old security regime

The old security regime had its shortcomings as in many industries such as the construction industry and the energy industry, parties may wish to allow the debtor to retain possession of the pledged assets in order to carry out the business for which the debt was procured. In such cases, it became common practice for the below structure of a constructive possession to take place in order for the lender to attempt to secure their movable properties to the extent possible:

1. the debtor (i.e. the mortgagor) enters into a possessive mortgage agreement with a mortgagee, the security agent (commonly a bank) on behalf of the lender and any other secured party in the loan agreement. Such agreement provides for the appointment of a Adel where the mortgagor agrees to enter into what is called a "Adel Appointment Agreement'".
2. The Adel Appointment Agreement is executed between the mortgagor, the mortgagee and the Adel. The mortgagor acknowledges that he or she has handed the possession of the mortgaged property to the Adel, and the Adel consequently acknowledges that he or she has handed back the mortgaged property to the mortgagor on an la'arah basis (leasing without compensation). This allows the mortgagor to retain possession of the pledged assets (such as machinery).

The aforementioned mechanism provided for a complicated method of creating a security that, at best under Jordanian law, is uncertain in effectiveness and lacked practical enforcement procedures. Moreover, under the Civil Code a pledged security must be identifiable or fixed, therefore, future assets did not fall under the creation of security under the Civil Code.

The new security regime

Many industries welcomed the law together with its regulation as it specified the logistics relating to what a registrable moveable property is and what procedures need to be taken in order for a security interest to be registered and published in the Registry.

February 24 2020 marked a crucial date for both the Movable Properties Law and the Registry, as this was the deadline date for all existing, yet previously pledged assets to be published in order to establish their priority as an existing security. This date marked the difference between what constitutes a new or existing security. In order for any security pledged under old security regime to establish its priority it needed to be registered as an existing security and published by the February 24 2020 on the Registry. Any creditor that failed to register his or her rights over movable assets on that date risked losing their priority if another creditor published his or her rights over the same security by this deadline as no further existing security may be published. Subsequently, any security interest created after the deadline date would constitute a new security under the Registry.

> **The new Movable Properties Law brings Jordan one step closer to a more efficient and progressive system of ensuring secured rights over movable assets which is closer to other advanced legal systems.**

What constitutes a registrable movable property?

The Movable Properties Law provides for a wide-ranging list of assets that constitute registrable movable assets. The law includes transactions and contracts that include a guarantee to perform an obligation via the creation of a collateral right over a debt, right or movable asset of the following:

1. mortgages other than possessory mortgages;
2. the sale of a movable property provided that the transfer of this property is deferred until the price is paid; and
3. the sale of a movable property subject to a refund or repurchase thereof, when the obligation is fulfilled.

The subject of the guarantee may be any movable money whether material or proprietary, debts or rights, existing or future, whether they are owned or due for warranty or its content, which includes the following:

1. debts, whether due or deferred;
2. bank accounts, including a deposit account and a current account;
3. written transferrable instruments upon delivery or endorsement that prove the entitlement to an amount or ownership of goods, including commercial papers, certificates of deposit, shipping documents and depository receipts over merchandise; and
4. trees prior to cutting them and minerals prior to extracting them.

The right of a security arises to guarantee one or more obligations, whether it was prior to the date the security right was created, bound with it, or later on it, and the obligation may be specific or identifiable. Thus, the Movable Properties Law tried to resolve the shortcomings of the Civil Code as it included the ability to pledge future assets which under the Civil Code were not available and was restrictive in that it only encompassed assets that are fixed and identifiable. Whilst the Movable Properties Law, as provided above, expressly contemplates security over present and future assets, debts, and rights; the Movable Properties Law further provides that, in respect of the creation of the security interest, reference shall be had to the laws establishing said security i.e. the Civil Code and the Trade Law. Therefore, it remains to be seen how the publication of security interests over future assets, debts and rights will be treated in light of the Moveable Properties Law.

The Movable Properties Law does not apply to any of the following transactions and contracts:

1. assignment of rights for the purposes of debt collection;
2. creating rights in order to guarantee obligations on material or proprietary movable property that require registration under other legislation; and
3. purchase of debts that are part of a project ownership transaction.

Under the Movable Properties Law, it is not permissible to create a security right for any of the following:

1. movable assets owned by banks, with the exception of the equipment needed to finance its purchase;
2. useable objects intended for personal or household purposes except to finance their purchase;
3. public funds, endowment funds, funds of foreign embassies, and entities that enjoy immunity;
4. privileges and licenses granted by the state;
5. the dues of the insured or the beneficiary under an insurance contract, unless these dues are the returns of the guarantee; and
6. alimony, wages, salaries, and labour compensation.

Requirement for publication

The Movable Properties Law establishes certain key requirements in order to create and enforce the right of a security between its parties, the following need to be present in order for a right to be established:

1. Parties must enter into a written guarantee in the form of a regular or official bond or an electronic agreement or to have a condition in the contract that establishes a secured obligation.

2. The guarantor must be entitled to establish a right over the security.
3. The security agreement must include a general or specific description of the secured obligation, and the obligation may be described by setting the upper limit for the obligation or the secured amount.
4. The security agreement should include a general description or a specific description of the warranty, provided that the description is specific if the warranty is used for personal or household purposes.
5. The beneficiary (lender) to pay the obligation required or adhere to it.

In order for a party to secure their rights over a movable property, such right must first be published in the Registry. In order to publish any rights over assets the guarantor's written consent is required, as the guarantor may instructor authorize the lender or an agent of the lender to publish such a right on the Registry. Publication shall take place once a completed electronic form is present in the Registry is filled, provided that it includes the following basic information:

1. the guarantor's information which includes his or her name according to official documents and his or her national number. If the guarantor is a Jordanian person, his or her passport number and its expiration date is required. If the guarantor is a non-Jordanian, then his or her assigned unified personal number if any is required. If the guarantor is a Jordanian legal entity, then the registration number and the national number of the establishment is required. If the guarantor is a non-Jordanian legal entity, then the registration number of the entity is required;
2. the name of the beneficiary, his or her information and address;
3. description of the guarantee; and
4. the period of validity of the security interest (expiration date of the guarantee).

Asserting a security against third parties under the Movable Properties Law

Once a right is created and registered under the Movable Properties Law it shall become effective against third parties; no subsequent security rights over the published property shall be established except by publishing such rights in the Registry.

"The Movable Properties Law resolves the shortcomings of the Civil Code as it includes the ability to pledge future assets which under the Civil Code was not available and was restrictive to only encompass assets that are fixed and identifiable.

Enforceability

Perhaps one of the main improvements that the Movable Properties Law has established is the enforcement mechanism over published securities. Prior to the enactment of the Movable Properties Law the enforcement of possessory pledges had their own procedures, whereby they had to be sanctioned by the court and then sold via public auction; self-help remedies were not a viable option under Jordanian Law.

The Movable Properties Law introduced new procedures for enforcement of security over movable assets. These include the ability to contractually agree to the direct and voluntary execution as against the security. Such contractual rights further include: (i) rights of set-off in cases where the account bank is the holder of the security or a right to make demands against a third party bank holding the pledged account; (ii) rights to cash amounts or possess the goods subject to a guaranteed tradable instrument; and (iii) the collection of debts (including expenses) from third parties. Further, the Movable Properties Law includes the option to apply for an order to repossess and sell the assets privately.

As mentioned above the Movable Properties Law is new and untested, therefore it is still unclear how its enforcement options will be applied and interpreted. However, the law does provide for more secured options on enforcement.

Conclusion

The Movable Properties Law brings Jordan one step closer to a more efficient and progressive system of ensuring secured rights over movable assets which now brings it more into line with other sophisticated legal systems.

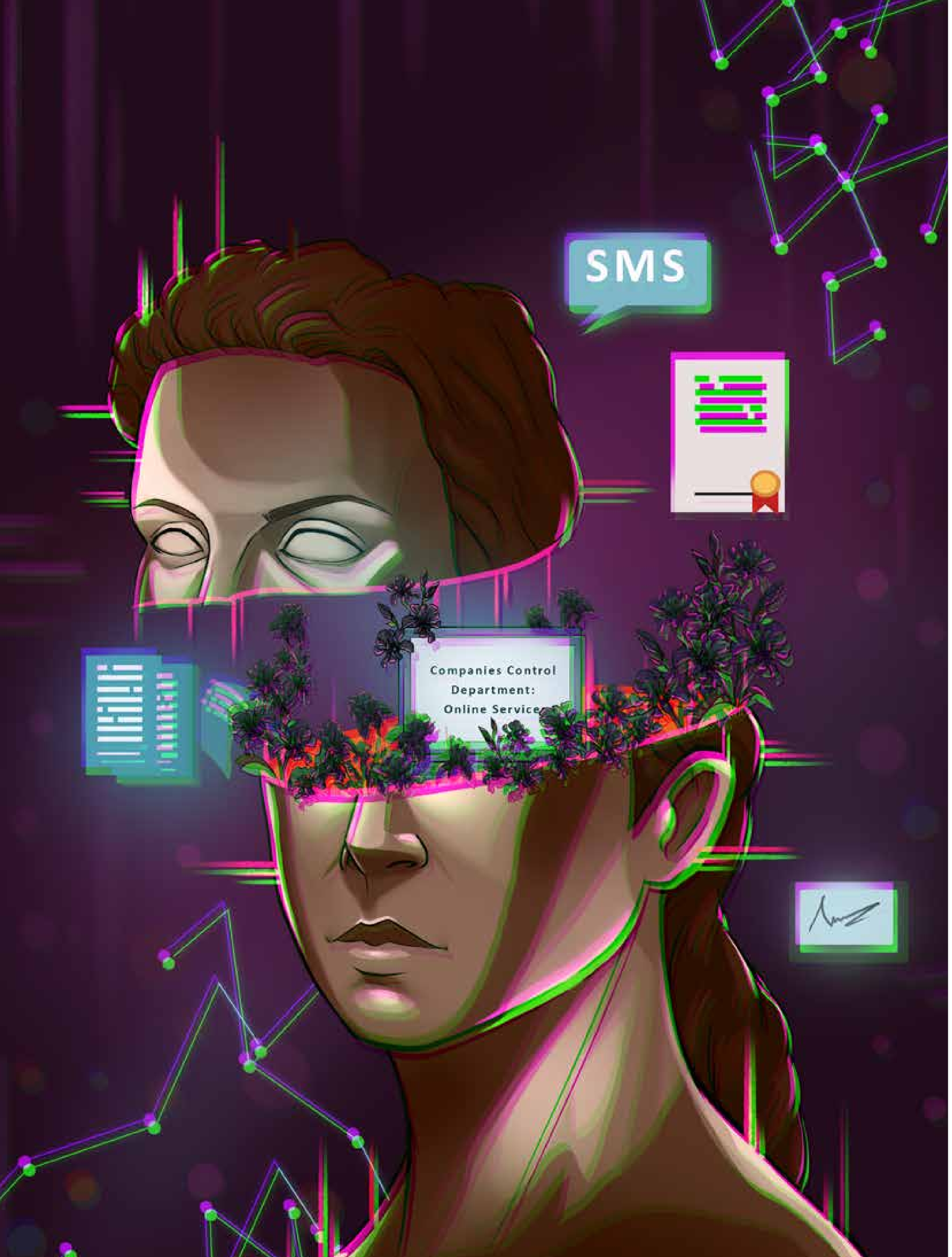
The Movable Properties Law, together with the creation of the Registry, shall provide lenders with more comfort and security in understanding the mechanism of ensuring their security interest, as they now appraised of which movable assets may be registered, the method in which their interest in movable properties may be secured. The Movable Properties Law offers lenders a sense of transparency regarding their priority over pledged assets as this information is easily accessible in the public Registry which clearly stipulates which assets the borrower has previously pledged. This shall hopefully make it easier for Jordanian companies and individuals to procure financing and enhance the progression of Jordan's lending market.

Moreover, it has introduced many new concepts that have built and improved on the existing law, and has commendably provided a method to ensure security interest over pledged assets without the need for a lender to hold physical possession of the property.

However, the Movable Properties Law is not without its deficiencies; it is still unclear as to what treatment shall be bestowed on pledges over future assets. Although, it expressly considers security over future assets and rights, it continues to stipulate that the creation of the security interest shall be established by the old regime. Therefore, it remains to be seen how the publication of security interests over future assets, debts and rights will be treated in light of the Moveable Properties Law.

The Movable Properties Law also establishes certain self-help remedies that may hopefully accelerate and ensure the enforcement of published securities. With that said and keeping in mind that the Movable Properties Law is still new and untested, we will still need to await and see how it will be implemented in Jordanian Courts and how it will be employed in practice as enforcement remains unclear under the Movable Properties Law. Therefore, it could be a while until we experience how this new security regime shall actually be reflected in practice.

For further information, please contact Dana Abduljaleel (d.abduljaleel@tamimi.com).



Unprecedented times and the need to adapt: the Companies Control Department is finally online!

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The effect of COVID-19 on the global economy has called for significant changes to the manner in which people and corporations conduct their business. In Jordan, prior to COVID-19, corporate procedures (registration, corporate filings and amendments to corporate documents) were primarily conducted in person by attending to the Companies Control Department ('CCD') at the Ministry of Industry, Trade and Supply ('MIT'). Such procedures were often lengthy. Despite the availability of technological alternatives offered by the CCD, enforcement conditions, and greater trust and reliance on wet-ink signatures meant that many of such online resources were not fully utilised.

Unprecedented times called for the need to adapt and the Jordanian government responded. With the arrival of COVID-19 to Jordan, leading to enforced lockdowns, quarantine and the suspension of day-to-day business, the CCD was left in a position where technological and digitalised alternative measures had to implemented. In line with the introduction of the Defense Law No. (13) for the year 1992 ('Defense Law'), a number of provisions of the Companies Law No. (22) of 1997 and the instructions and regulations issued pursuant thereto were suspended.

The CCD implemented several significant changes as follows: a) allowed for General Assembly and board meeting to be held online; b) created electronic links to various governmental institutions to make the process of retrieving information easier; and c) implemented an online platform offering a wide-range of services to facilitate transactions and procedures.

To date, the CCD's online platform offers the following services:

1. registration of companies;
2. certificate issuance;
3. financial data deposit;
4. foreign financing access;
5. deposit of minutes of the founding general assembly meeting;
6. deposit of minutes of the ordinary general assembly meeting;

7. filing for the extraordinary general assembly meeting;
8. depositing the minutes of the board of directors meeting;
9. legal amendments services;
10. heir insertion services;
11. share transfer services;
12. SMS services; and
13. electronic signature services.

Holding general assembly, ordinary and extra-ordinary board meetings

Companies intending to hold general assembly meetings may do so via online media, subject the adherence to specific guidelines issued by the CCD. To date, the process involves sending an email to the CCD requesting its r approval to hold the meetings. However, the CCD intends to activate an online platform to further ease this process. At present, the Companies Controller has published a circular detailing a temporary mechanism for the submission of forms, minutes of meetings and all other related documentation.

1. Electronic links

In an effort to facilitate procedures and reach higher efficiency, the CCD now offers various electronic links with different Governmental bodies and ministries. Such electronic links were established by the CCD and the Ministry of Labour, the Greater Amman Municipality (for the purposes of issuing and renewing vocational licenses), the National Aid Fund, the Drivers and Vehicles Licensing Department amongst others. Moreover, an electronic link has been implemented with operating banks in Jordan, to allow investors to directly contact a preferred bank for the purposes of opening a company account and depositing the share capital. Username and Password credentials are generated for entities involved in providing services that require licensing requirements, as well as entities for which prior approval is required in order to conduct specific business activities.

2. CCD online platform services

Registration of Companies

The CCD launched the electronic company's registration portal to enable service recipients to submit company registration requests electronically, without the need to attend to the CCD at the first stage. An investor will, however, be required, following an initial review, to sign the registration application, submit all documents and acquire the required approvals. On completing the requisite procedures, an investor will receive a certified copy of the registration certificate either in person or via registered mail. The portal also enables investors to register the following types of companies, with regular activities, exempt companies, civil companies and non-profit organisations such as limited liability companies, private shareholding companies, public shareholding companies, working foreign branch, non-working foreign branch amongst others. The portal provides investors with the ability to submit all company data in line with the type, capital, economic activities, partners and company representatives thereby allowing the CCD to perform an automatic audit of the request and obtain any other required approvals from the official authorities, and communicate with the applicants through email and SMS services.

To simplify the procedures and facilitate the investors in availing of the services, the portal has been linked, as mentioned above, with the Social Security Corporation and the Internal Tax and Sales Department as service delivery partners, and with the Social Security Corporation and the Civil Status Department as support systems for the service.

Issuing 'To Whom It May Concern Certificates' and authenticated copies of submitted documents

This electronic service enables the applicant to obtain the required documents and certificates electronically or manually via registered post. This service also includes the issuance of attested certificates of any previously submitted documents.

The government's move towards digitalisation could be seen as a '*blessing in disguise*' as Jordan prepares for new ways in which to conduct business post pandemic.

Submitting financial statements

The Financial Statements Deposit Service allows companies registered in the Kingdom to deposit their financial statements at the CCD through the electronic portal for the following companies:

- non-profit limited liability companies;
- exempt limited liability companies;
- limited liability companies;
- non-profit institutions;
- joint non-profit companies;
- private non-profit joint-stock companies;
- private joint stock companies;
- exempt private joint stock companies;
- public joint stock companies; and
- foreign operating companies

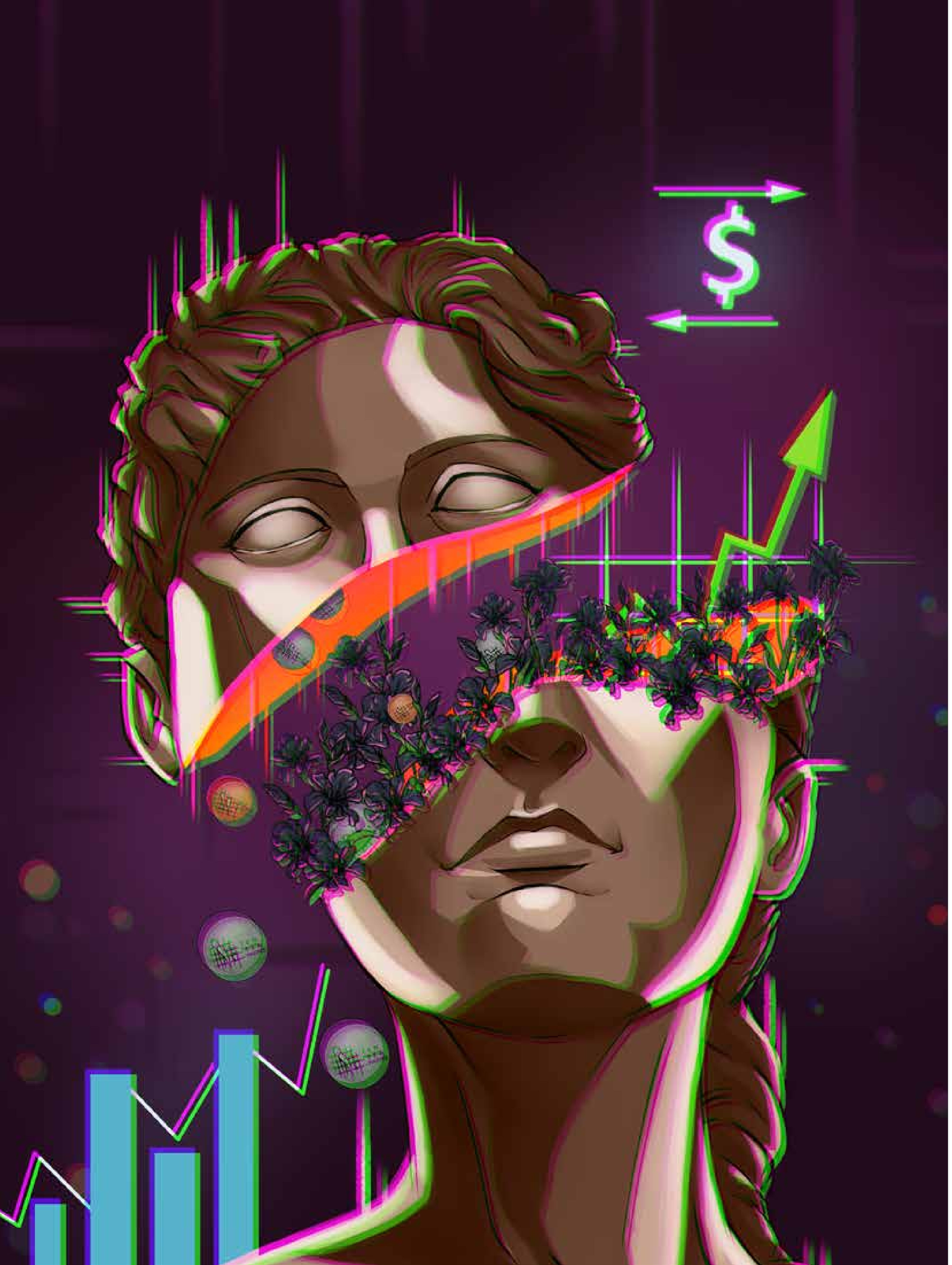
Legal amendments

The CCD has, through offering the legal amendments service, assisted existing and running companies registered with the CCD, in the process of making legal amendments to their constitutional documents; such as the name of company, shareholding details, company standing, borrowing limits, term of the company, management method and period, activities and various other details pertaining to the running and maintenance of the company. This service is currently only available to a limited number of companies including limited liability companies.

Conclusion

The abovementioned changes in relation to the CCD are a mere indicator of the positive changes that will continue to be implemented across the entire public sector. The unprecedented global effect that the world has experienced due to the COVID-19 pandemic, has shone a light on the dire need for technology advancements and the importance of inter-connected systems for day-to-day operations. Although COVID-19 led to catastrophic events and consequences nationally and internationally, the government's move towards digitalisation could be seen as a 'blessing in disguise' as Jordan prepares for new ways in which to conduct business post pandemic.

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



The new instructions for regulating financial services companies dealing with foreign exchanges for the year 2020

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In recognition of the investment appetite for developing markets and CFD offerings Jordan has been opening up for its financial service providers to not only deal in local stocks, but to also have the opportunity to trade in offshore foreign markets. In this respect, the Jordanian Securities Commission ('JSC') has introduced legislation to regulate the influx of new licensees seeking to deal with those markets.

In Jordan, stocks and financial instruments are regulated by the JSC. Such dealings are split into two categories: either dealing in local markets; or dealing in foreign markets. This article focuses on the regulation of financial services companies dealing with foreign markets ('FX Licence') and the recent instructions introduced for this purpose and we highlight the main amendments and additions included as opposed to the previous instructions (which were released in 2017).

Interestingly, the Instructions for Regulating Financial Services Companies Dealing with Foreign Exchanges for the year 2020 (the 'New FX Instructions) were introduced following a period of suspension of granting any new FX Licenses by the JSC. In this respect, realising that the risks relating to granting a multitude of licenses in high risk financial areas could be detrimental, and, in turn, due the complexity of the dealings there may be difficulties in the regulation of the same such that the risk might be increased. In light of these risks, the JSC was determined to improve its safeguards and create a more robust legal environment prior to continuing to allow the grant of additional FX Licenses.

The New FX Instructions entered into force on the 2, January 2020, and replaced the Instructions for Regulating Financial Services Companies Dealing with Foreign Exchanges for the year 2017 ('Old FX Instructions'). The

New FX Instructions introduced several prominent changes and amendments in relation to dealing with foreign markets. The main updates are outlined below.

The main amendments the New FX Instructions

The New FX Instructions introduced a new definition for Foreign Intermediary as any foreign intermediary who deals with any person licensed by the JSC ('FX Licensee'), whereby the foreign intermediary must be licensed and regulated by the authorised certifying regulator in the home country of the Foreign Intermediary. The New FX Instructions stipulate that, in the event that a FX Licensee deals with a Foreign Intermediary, the said intermediary must be certified and included in the JSC's list of authorised Foreign Intermediaries in order for the FX Licensee to be able to enter into agreements and/or agency contracts with the said licensed Foreign Intermediary.

Furthermore, any agreements between the FX Licensee and the Foreign Intermediary must include the following:

- the certification of the Foreign Intermediary from the relevant authorised party;
- outline of the mechanism for receiving and giving instructions;
- specifics regarding the governing law and jurisdiction of the agreement;
- details regarding the commissions and fees;
- disclosure of all material aspects of transactions;
- all KYC information relating to the clients; and
- details of financial agreement between the FX Licensee and the Foreign Intermediary.

It is a prerequisite for a company to obtain a financial services licence ('Licence') prior to becoming an FX Licensee. Both licenses must have a minimum threshold covering the share capital of the FX Licensee, in addition to granting the JSC an unrestricted and irrevocable guarantee for a specific amount.

The New FX Instructions impose additional share capital adequacy requirements, which include, but are not limited to:

- increasing the minimum share capital for Financial Intermediary for Third Parties to 3,000,000 JOD (Approx. US$4,230,000) from 1,000,00 JOD (Approx. US$1,400,000);
- increasing the minimum amount of the guarantee from 350,000 JOD (Approx. US$490,000) to 500,000 JOD (Approx. US$700,000);
- increasing the minimum share capital for Investment Management to become 3,000,000 JOD (Approx. US$4,230,000) instead of 1,000,000 JOD(Approx. US$1,400,000);
- and increasing the minimum amount of the guarantee from 250,000 JOD (Approx. US$350,000) to 500,000 JOD (Approx. US$700,000).

Additionally, the New FX Instructions increased the list of FX Licensee prohibited actions to include the following:

- opening account for minors;
- opening mutual accounts which serve more than one beneficiary;
- opening more than five sub-accounts for the same beneficiary in order to deal with foreign markets;
- payments to beneficiaries in cash; and
- dealing with virtual currencies or any other items prohibited by the JSC or by the Central Bank of Jordan.

In light of the current international shift towards safe investment and risk awareness, the New FX Instructions include a prohibition on the FX Licensee which stipulates that the said licensee is not permitted to mislead a customer into believing that the investment is guaranteed nor will it ensure a quick, high return of profit.

Additionally, it is stipulated that if a FX Licensee wishes to market the services or products in any way, it must include precautionary phrases clearly outlining the high risks involved in dealing with foreign stock markets in all advertisements, and such precautionary phrases must also be included in the FX Licensees' website and social media accounts.

The New FX Instructions grant the JSC the right to appoint an external auditor, other than the one appointed by the FX Licensee, if the JSC deems it necessary. The said audit shall be performed at the expense of the FX Licensee.

Finally, the New FX Instructions state that the FX Licensee must reconciliate its position pursuant to the New FX Instruction within six months from date of its entry into force. Additionally, the FX Licensee must reconciliate its position in relation to the minimum share capital requirements within three years as of the date of entry into force of the New FX Instructions.

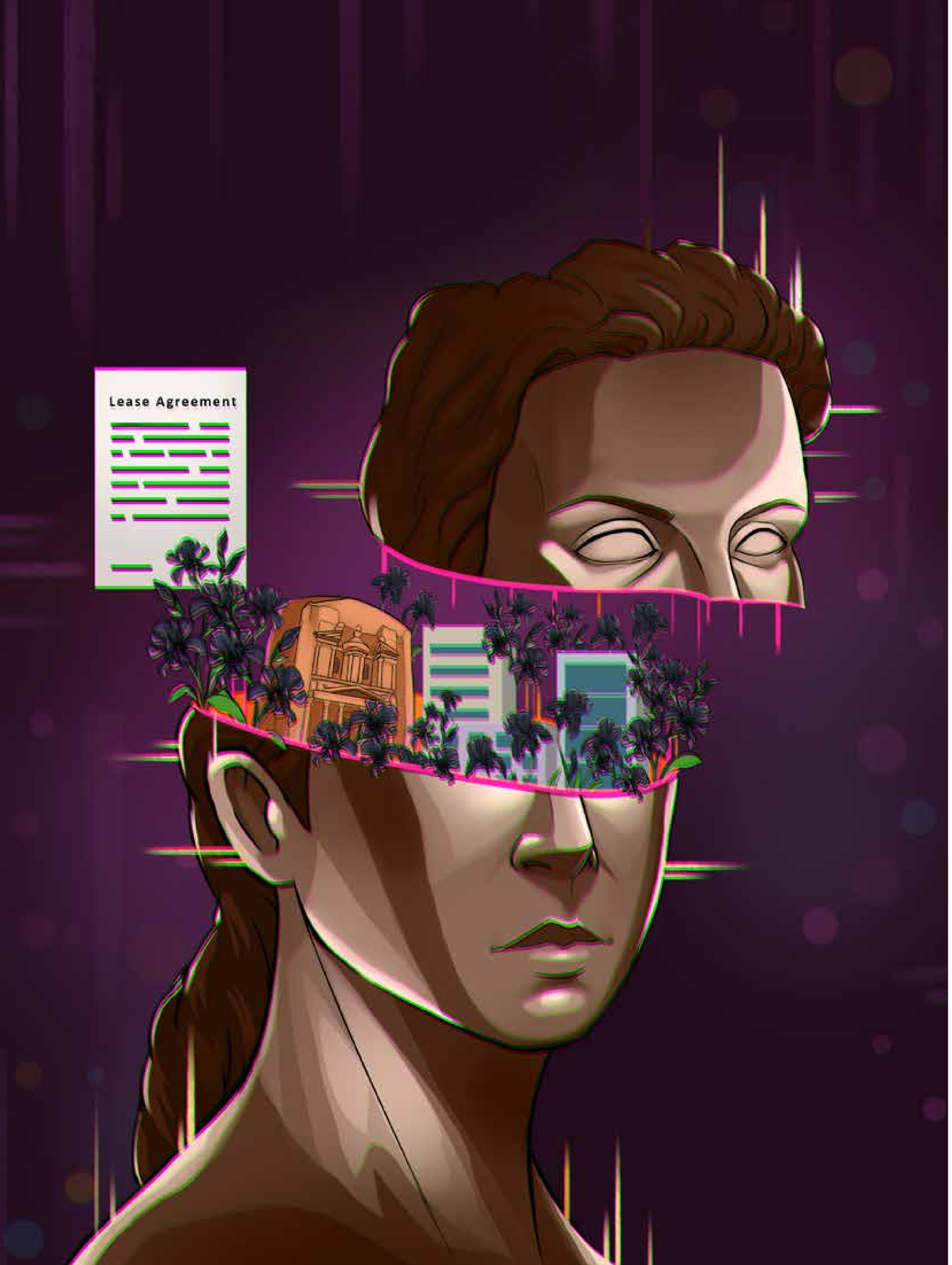
Summary of General Requirements for Obtaining an FX Licence

The outline of the requirements to qualifying as a FX Licensee are as follows:

1. the applicant must be a Financial Services Provider licensed by the JSC;
2. the minimum share capital for the licensee must be between JOD 30,000 (Approx. US$42,000) and JOD 3,000,000 (Approx. US$4,200,000) depending on the nature of the service to be conducted by the licensee;
3. the application must be submitted in the required form, accompanies by, amongst others, the following:
    - the memorandum and articles of association;
    - an organisation chart of the company including a specialised unit for dealing with foreign stocks and markets;
    - the working procedures for all dealings and proposed business to be conducted with foreign stocks and markets;
    - corporate governance procedures;
    - risk management and risk appetite procedures;
    - AML and CTF procedures and audits, in addition to KYC requirements;
    - proof that the money used for conducting the services is from a legitimate source and that the applicant is the true beneficiary of the company and the share capital;
    - an undertaking stating the validity and accuracy of the provided documentation and information; and
    - any other information that the Commission deems necessary.

In light of the above developments, it is hoped that increased regulation of foreign market, will enhance the safety as well as the integrity of foreign dealings, while providing a platform in Jordan for licensed entities to deal in markets on a broader scale. Additionally, our dialogue with the JSC has evidenced that financial service providers have been applying for the FX Licence pursuant to the New FX Instructions, however no new licenses have been granted as of yet.

For further information, please contact Dana Abduljaleel (d.abduljaleel@tamimi.com).



Foreign and legal persons' ownership and leasing of property under the New Ownership of Real Estate Law

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In superseding and revoking 14 separate laws and regulations for a more unified framework, the new Ownership of Real Estate Law No. (13) for the year 2019 ('Real Estate Law') provides for the first unified and comprehensive legislation for real estate property matters. While broad in its coverage, the Real Estate Law, is nonetheless supplemented by laws specific to certain regions in the Kingdom, including the Aqaba Special Economic Zone, the Petra Region Tourism Development Law and the Investment Law.

This article outlines the key Real Estate Law provisions on ownership and leasing of real property by foreign and legal persons.

Registration for enforceability

Any disposition, contract, or transaction concerning real estate property in the Kingdom of Jordan must be registered with the Directorate of Registration ('DOR') and the Department of Land and Survey ('DLS').

Failure to register any such disposition, contract or transaction with the DOR will result in its invalidation, and consequently, the unenforceability of rights and obligations in connection thereto.

Prerequisite permit for valid ownership

To acquire legal ownership of real estate located in Jordan, a foreign or legal person must first secure a permit from the DLS. Upon receipt of an application, the DLS will forward such application to the appropriate authorities for such authorities' approvals, as applicable (see Location- and Size-Based Restrictions and Requirements below). The application process for said permit is outlined under instructions issued for that purpose, and amended from time to time, by the director of the DLS (the 'Director'). A permit will only be granted for the purchase of the specific real property identified in the application. Noting that, the aforementioned DLS has absolute discretion in determining whether or not the permit will be granted or rejected. A decision reached by the relevant authorities on an application for a permit will be final, binding, and non-appealable.

One-year validity

Upon receipt of a permit, a permit holder must secure ownership of relevant property prior to such permit's expiration, (which is a year from its issuance), in order to safeguard the validity of its legal title. Otherwise, any such transaction will be deemed void unless written consent for an extension is obtained from the DLS.

Location-and size-based restrictions and requirements

The Real Estate Law imposes several location- and size-based restrictions and requirements on real property ownership of foreign and legal persons as listed below:

- a foreign person is prohibited from owning real estate in border, archaeological or historical regions;
- a legal person, whether national or foreign, may own real estate in organisational regions to conduct its business in line with its constitutional documents;
- for ownership of an area not exceeding five Dunums, provided the applicant does not own any other real estate properties in Jordan (regardless of the existence of any immovable assets), a permit for ownership will be granted by the Director. If said applicant owns other real estate property in Jordan, the Minister of Finance's approval will be necessary (upon recommendation of the Director);
- for ownership of an area between five) and thirty (30) Dunums, the grant of a permit will require approval from the Minister of Finance ('Minister') (upon the recommendation of the Director);
- a legal person, may own for investment purposes real estate property that is not located within organisational areas, provided that such legal person operates its business in line with the purpose(s) articulated in its registered constitutional documents. In this third case, similar to the second case, the approving body will make its decision in light of the plot area. For an area not exceeding 50 Dunums, a permit is approved by the Director in the first instance; and
- for an area exceeding 50 Dunums, however, the Council of Ministers approval will be necessary (upon the recommendation of the Minister and the Director, respectively).

Project timelines; penalty for delays and non-transferability

Subject to monetary penalties, a foreign or legal person must complete the project for which they have requested ownership, within four years if the ownership permit is granted for residential purposes, and within six years if the ownership permit is granted for any other purpose, as of the date of said property's registration (such time periods, 'Applicable Time Periods').

An owner of a project may apply for an extension to the Applicable Time Periods for a justified reason. The Minister of Finance (upon the recommendation of the Director) will approve an owner's request for the requested extension. The total duration may not exceed, in all cases, a total of eight years for residential purposes, and twelve years for any other purpose, as of the date of property registration.

Monetary penalties for delayed completion of a project will amount to two per cent of the estimated value of the real estate for each year of ownership (or any part thereof). The Real Estate Law allows the Minister of Finance to further exempt owners from such penalties upon reasonable grounds.

Non-transferability

A foreign person, whether natural or a legal, may not dispose or otherwise transfer its ownership in registered real property prior to the lapse of the Applicable Time Periods.

"The Real Estate Law has introduced several provisions to regulate the framework of foreign natural and legal person's ownership of real estate property in Jordan for the purpose of reducing risks and to improve organisation of said ownership.

Exceptionally, the Minister may, upon the recommendation of the Director and on the basis of a submitted written request from the owner for justified reasons, permit prior transfer of real property.

Lease agreements

The Real Estate Law supplements the amended Jordanian Landlords and Tenants Law No. (22) of 2011. First, a foreign person, whether natural or legal, wishing to rent an area greater than ten Dunums and for a term greater three years must first obtain a permit from the Minister of Interior, subject to the penalty of lease nullification. In contrast, domestic persons are exempt from said restrictions. Second, under no circumstance (irrespective of a lessor/lessee's identity), will a lease term be deemed valid for a period longer than 99 years.

Easements: access and right of way

In respect to easements, while the Real Estate Law remains subject to the Civil Law, the Real Estate Law explicitly grants the Director a wide discretion in granting a right of way or a right to utilise clean water facilities, in addition to other forms of easements it deems appropriate, on any property (servient estate) in favour of another property (dominant estate) in Jordan. The owner of the servient estate, however, must receive fair and adequate compensation. The amount of said fair and adequate compensation is estimated by a committee of three experts, where said experts are appointed by each of the Director and the two parties to the dispute, respectively

Conclusion

The Real Estate Law has introduced several provisions to regulate the framework of foreign natural and legal person's ownership of real estate property in Jordan for the purpose of reducing risks and to improve organisation of said ownership. Additionally, the Real Estate Law has been introduced to unify the regulation of real estate in Jordan thus far has been scattered in several laws and regulation prior to the Real Estate Law entering into effect.

For further information, please contact Yafa Abourah (y.abourah@tamimi.com).

Free Zone incorporation in Jordan

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The incorporation of companies in Jordan is governed by the Companies Law No. (22) of 1997 (the 'Companies Law') and shares similarities, in terms of its process, with many international regimes. It involves the drafting of a memorandum and articles of association, the formation of a Board of Directors (for Public Shareholding Companies ('PLC's') or a Management Board (for Private Shareholding Companies ('PSC's') and Limited Liability Companies ('LLC's')), the identification of shareholders and their contributed capital, the assignment of Power of Attorney ('PoA') authorisations, and the registration of the company under its respective vehicle at the Ministry of Industry, Trade and Supply (the 'MoITS') by submitting all the required documentation, including the aforementioned, and paying the respective fees.

The facilitation of company registration requires legal expertise for the purposes of identifying and ensuring the submission of all relevant documents and payments. Navigation within the MoITS also proves challenging to persons lacking the requisite experience, and company registration is therefore usually assigned to lawyers with a comprehensive knowledge in corporate law and the practical aspects of company registration. This expertise is also needed for a developing trend, corresponding to the rising investment opportunities and returns on conducting business in Jordan, of incorporating free zone companies.

The incorporation of Free Zone Companies

The incorporation of companies as free zone entities is governed by the Investment Law No. (30) of 2014 (the 'Investment Law'). A "Free Zone" is, as such, defined as a section of land within Jordan specified and separated, which is specifically dedicated to the attraction of investment and commercial activities, including the storage of goods. Free Zones are excluded from the governance of customs and the enforcement thereof, thereby allowing the consideration of products in such Free Zones, in the eyes of the law, as being located outside of Jordan for the purposes of implementing the Investment Law. A Free Zone Company (a 'FZC') is deemed a "Registered Company" for the purposes of the Investment Law, defined therein as a person registered at the "Investment Commission" established pursuant to the Investment Law.

The advantages of a FZC

The principal advantages of Free Zone incorporation provide incentives to comply with the criteria imposed for such registration. Firstly, and perhaps most importantly, FZC's enjoy tax reductions and exemptions with regard to their: (a) income tax; and (b) general sales tax ('GST'):

1. Income tax

Pursuant to Article 14 of the Investment Law, FZC's are exempted from income tax on profits for exporting goods and services outside Jordan, transit trade, sale and assignment of commodities within the boundaries of Free Zones, and the provision and supply of services within Free Zones. This exemption is in lieu of an income tax amounting to 20 per cent imposed on legal persons incorporated in the "Regulated Areas" of Jordan, wherein no exemptions are provided, as under the Income Tax Law No. (34) of 2014 ('Income Tax Law'). Income tax also amounts to 0 pe rcent on salaries and allowances of non-Jordanian persons working on projects established in Free Zones, pursuant to Article 14 of the Investment Law'

2. GST

Pursuant to Article 12 of the Investment Law, a FZC shall be subject to GST of 0 per cent on all services provided for consumption in a Free Zone. Additionally, any forklifts and transportation vehicles accommodating a minimum of 10 passengers, including the driver, which are sold to FZC to transport employees to and from the work establishments of the FZC in Free Zones, shall be exempt from GST pursuant to a Regulation issued for this purpose. However, any goods consumed in Free Zones for purposes other than carrying out the FZC's economic objectives, shall be subject to GST. Additionally, and pursuant to Article 7 of the Law on General Sales Tax No. (6) of 1994 (the 'GST Law'), goods and services sold to duty-free markets shall be subject to a GST of 0 per cent.

Secondly, FZC's are, by virtue of the law, subject to facilitated importation procedures; pursuant to Article 14 of the Investment Law, a FZC shall be exempted from customs fees and all other fees and taxes levied against goods exported from the Free Zone and beyond the local market, as well as all goods imported into the Free Zone, including materials, equipment, machines, preparations and construction materials involved in constructing, establishing, preparing and furnishing all projects undertaken by the FZC in a Free Zone; this includes materials necessary for the constant maintenance of said projects, but does not include service charges.

Other privileges enjoyed by FZC's, as under the Investment Law, include exemptions from licensing fees for buildings and installations in Free Zones, as well as the permission to transfer foreign currencies and profits generated in Free Zones, as regulated by the legislations in force.

> **Where registration in Free Zones is not feasible for an investor, another opportunity to enjoy financial and operative privileges lies in the Aqaba Special Economic Zone (the 'ASEZ'), regulated by the Aqaba Special Economic Zone Authority (the 'ASEZA').**

Limitations, restrictions and alternatives

The registration of companies as FZC's, however, is limited to certain locations and subject to the satisfaction of the criteria set forth and regulated by the Investment Commission. Article 29 of the Investment Law allows a FZC to benefit from all facilitations and exemptions offered under the Investment Law without any obligation or necessity to undertake any other procedures to secure such enjoyment, but the Investment Law simultaneously subjects any such registered FZC to the checks and verifications implemented by the Investment Commission. It is then for investors to conduct an analysis on whether or not it is feasible for their ventures to be registered and operated in Free Zones, and legal advice significantly contributes to such analysis.

Where registration in Free Zones is not feasible for an investor, another opportunity to enjoy financial and operative privileges lies in the Aqaba Special Economic Zone ('ASEZ'), regulated by the Aqaba Special Economic Zone Authority ('ASEZA'). The ASEZ provides relatively low-cost land, appropriate for the conduct of business and accompanied by labour force availability, facilitating the establishment and operation of businesses for investors. Financial incentives for investments in the ASEZ are also offered, including, as with Free Zones, tax reductions and exemptions. Other incentives for investment in Jordan which apply to Free Zones and the ASEZ, as well as other Regulated Areas, are laid out in the Regulation on Investment Incentives No. (33) of 2015 ('Investment Incentives Regulation'), furthering the benefits of business investments in Jordan and thereby increasing the returns.

Conclusion

To conclude, the exponential availability of investment opportunities in Jordan has necessitated the undertaking of innovative and incentivising measures to ensure the distribution of such investments across Jordan and the utilisation of labour in different areas. This, in part, founded the purpose for legislating the Investment Law, allocating Free Zones in Jordan, and establishing the Investment Commission to regulate and enhance the growing Jordanian investment sector, particularly pertaining to large foreign investors approaching potential profitability in the region. This has remodelled corporate structuring by adding new procedures and vehicles for company incorporation, and effectively fortifying Jordan's market as such.

For further information, please contact Hakam Al Shawwa (h.alshawwa@tamimi.com).

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 681
8 Dhū al-Qa'dah 1441H
30 June 2020

FEDERAL DECREES

90 of 2020	Replacing two members of the Board of Directors of the Telecommunications Regulatory Authority.
91 of 2020	Promoting a member of the diplomatic and consular corps.
92 of 2020	On a Director General assignment for Emirates Center for Strategic Studies and Research.
93 of 2020	Promoting the Deputy Chairman of the Board of Trustees of Emirates Center for Strategic Studies and Research to the rank of Minister.
94 of 2020	On the adjournment of the 1st Session of the 17th Legislative Term of the Federal National Council.

REGULATORY DECISIONS OF THE CABINET

48 of 2020	Fixing the remuneration of members of tax dispute resolution committees.

MINISTERIAL DECISIONS

- From the Ministry of Finance

76 of 2020	On accounting standards for finance leases.

- From the Ministry of Climate Change & Environment

152 of 2020	On the formation of the Veterinary Product & Company Registration Committee.

ADMINISTRATIVE DECISIONS

- From the UAE Central Bank

6 of 2020	Approving UAE standards.

- From the Securities and Commodities Authority

16/RM of 2020	Amending SCA Board Resolution 36/RM of 2019 on general clearing member activity.
-	Certificate of approval of amendment of the Articles of Association of DAMAC Properties PJSC.
-	Certificate of approval of amendment of the Articles of Association of Dubai Insurance Co. PSC.

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 683
8 Dhu al-Hijjah 1441H
29 July 2020

FEDERAL DECREES

95 of 2020	On the establishment and organization of the Frontline Heroes Office.
96 of 2020	Appointing a judge in the Federal Courts.
97 of 2020	Appointing the UAE Ambassador to Argentina.
98 of 2020	Terminating the duties of the UAE Ambassador to Singapore.
99 of 2020	Terminating the duties of the UAE Ambassador to Japan.
100 of 2020	Appointing a UAE consul-general in Mumbai, India.
101 of 2020	On the transfer and appointment of a UAE ambassador.
102 of 2020	Appointing a UAE consul-general in Shanghai, China.
104 of 2020	Appointing State ministers.
105 of 2020	Appointing the Minister of Federal Supreme Council Affairs.
106 of 2020	Appointing the Secretary-General of the Cabinet.
107 of 2020	Appointing the Assistant Secretary-General of the General Secretariat of the Cabinet.
108 of 2020	On a UAE Central Bank board reshuffle.

REGULATORY DECISIONS OF THE CABINET

50 of 2020	On the Schedule of Strategic Goods appended to Federal Law No. 13 of 2007 on goods subject to import and export controls.
51 of 2020	Approving the List of Terrorists and Terrorist Organizations.
52 of 2020	On the National Sustainable Agriculture Label.

MINISTERIAL DECISIONS

- From the Ministry of Health & Prevention

288 of 2020	Amending the Unified Healthcare Professional Qualification Requirements.

ADMINISTRATIVE DECISIONS

- From the UAE Central Bank

03/COMMEMORATIVE COIN/2020	Issuing a commemorative gold coin and commemorative silver coin to mark the UAE hosting Expo 2020.

- From the Securities and Commodities Authority
  - Certificate of approval of amendment of the Articles of Association of Islamic Arab Insurance Co. (SALAMA) PJSC.
  - Certificate of approval of amendment of the Articles of Association of Arabian Scandinavian Insurance Co. PLC.
  - Certificate of approval of amendment of the Articles of Association of Dubai Investments PJSC.
  - Certificate of approval of amendment of the Articles of Association of First Abu Dhabi Bank PJSC.
  - Certificate of approval of amendment of the Articles of Association of Al Fujairah National Insurance Co. PJSC.

Webinars

Thursday, 4th June

Beyond COVID-19: Lessons learned from the crisis, lasting changes and future opportunities for Higher Education in MENA

Speaker: Ivor McGettigan

Monday, 8th June

Beyond COVID-19: Lessons learned from the crisis, lasting changes and future opportunities for K-12 in MENA

Speaker: Ivor McGettigan

Thursday, 11th June

Digital transformation: How will tech reshape the business and service delivery models of Higher Education

Speaker: Ivor McGettigan

Sunday, 14th June

Protecting your family in times of crisis

Speakers: Richard Catling and Nawal Abdelhadi

Tuesday, 16th June

The new tech landscape in K-12

Speakers: Ivor McGettigan and Fiona Robertson

Tuesday, 16th June

New DIFC Data Protection Law

Speakers: Martin Hayward and Krishna Jhala

Thursday, 18th June

Joint webinar with Outer Temple Chambers

Consequences of LIBOR replacement in Middle East banking market

Speakers: Mark Brown and Matthew Heaton

Monday, 22nd June

COVID 19: The impact and responses in Oman

Speakers: Ahmed Al Barwani and Richard Baxter

Tuesday, 23rd June

Dollars and sense: Financing options for education providers in the new world order

Speakers: Ivor McGettigan and Mamoon Khan

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Sectors

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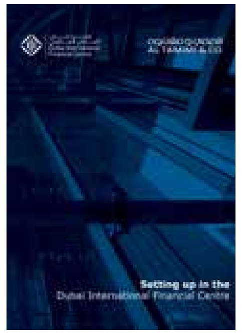
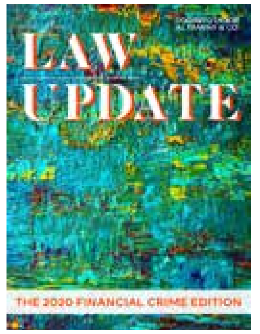
Al Tamimi & Company is at the forefront of sharing knowledge and insights with publications such as Law Update, our monthly magazine that provides the latest legal news and developments, and our "*Doing Business*" and "*Setting Up*" books, which have proven to be valuable resources for companies looking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





Accolades

Regional Footprint

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

Bahrain
Manama

Egypt
Cairo

Iraq
Baghdad
Erbil

Jordan
Amman

Kuwait
Kuwait City

Oman
Muscat

Qatar
Doha

Saudi Arabia
Al Khobar
Jeddah
Riyadh

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