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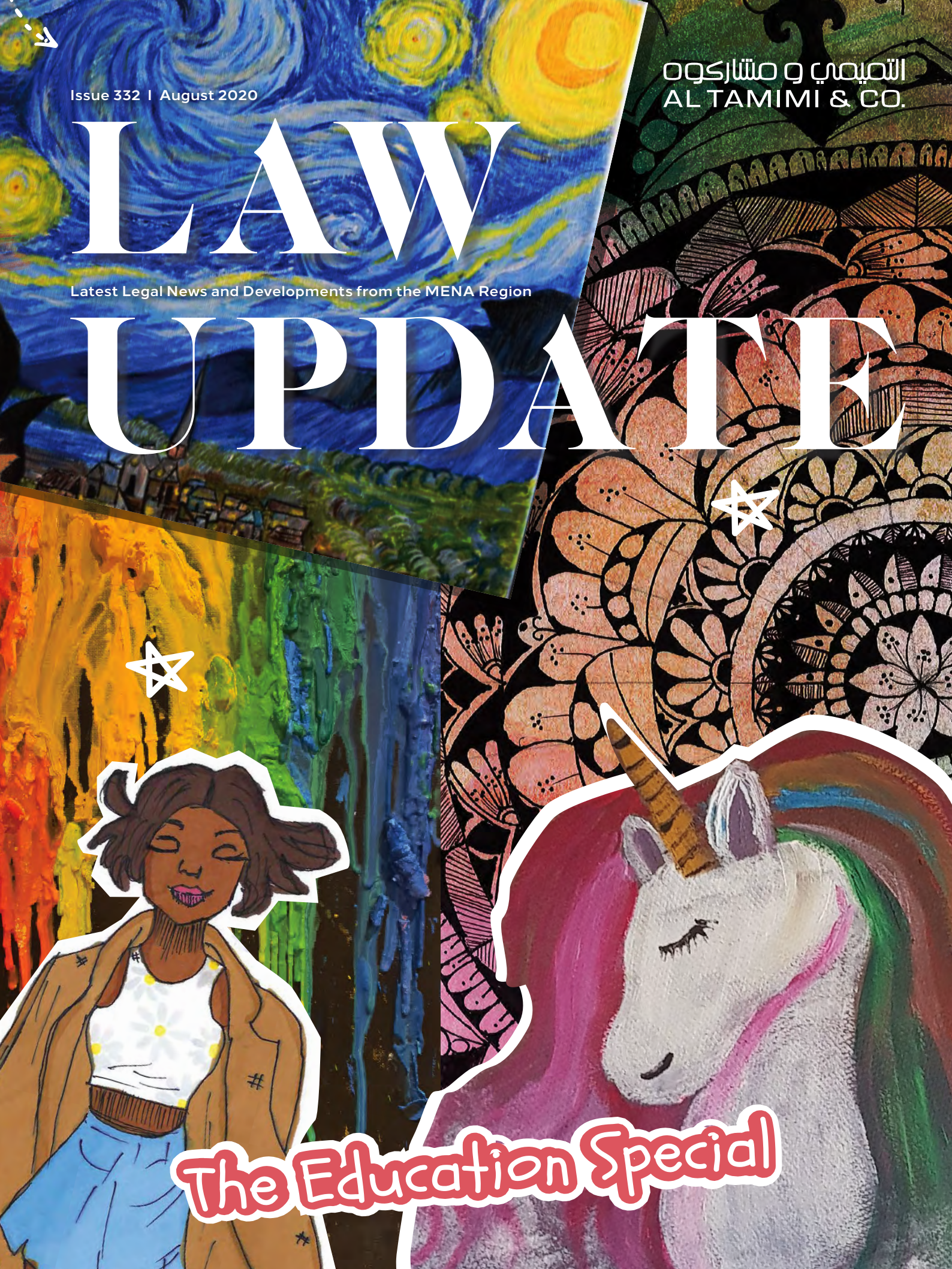
LAW UPDATE

Latest Legal News and Developments from the MENA Region



The Education Special

The Education Special

Mahika, II
d/o Jayati Sengupta, Team Leader (Secretarial Services), Transport & Insurance

In this Issue..

Welcome to our August issue of Law Update, I hope you and your families are keeping well.

This month we focus on the Education sector – a timely subject, with students returning to school after a long period of online learning and summer vacation. With COVID-19 posing significant challenges for many industries, Ivor McGettigan, Head of our Education Sector, and the regional team, take a 360 look at the impact of COVID-19 on one of the most affected areas of the economy. In his Opening Statement (page 49), Ivor provides an overview of his team's thoughts on the consequences of COVID-19 for education in the region and investigates a number of fields including, amongst others, digitalisation, the pros and cons of relying on technology as an educational tool, and the increasing appeal of PPP in the region's education sector. Also, keep an eye out for all the wonderful works of art included in this edition – there's a special meaning behind them which Ivor also explains in his Opening Statement.

Ivor and the team also report back on their recent EdWeb 2020 webinar series, which saw our team, joined by experts from around the world, sharing their views on the future of the education sector; a brief overview follows (page 74) with summaries of the ideas, thoughts and suggestions emerging from this webinar series. We look forward to the next edition of the EdWeb 2020 series, which will start in November.

Turning to our General section, our teams across the region cover a number of current topics which I'm sure will be of interest.

In the UAE, our experts take a look at the new form of crypto assets, now known as virtual assets, and reflect on how the amended regime now streamlines regulated activities (page 17).

Our Commercial Advisory lawyers reflect on the amendments to the UAE's Commercial Agencies Law, the enactment of which has been described as the most significant change to the UAE Commercial Agency Law in the past ten years (page 25).

In our article on the Ministry of Housing's 2020 Regulation on Jointly Owned Property ('JOP'), which came into force on 9 September, our Real Estate lawyers cover the key 'need to know' points. The new rules represent the first significant overhaul of the JOP regulations in over 17 years. This change is particularly significant for real estate developers, since failure to comply with the new disclosure requirements could provide a purchaser with the right to terminate a sale and purchase agreement (page 45).

Also in this edition, our Real Estate team explores the new restrictions on GCC nationals' rights to own properties in Bahrain and Oman (page 41).

Comparing local law with free zone law, our UAE Litigation team examines remedies for shareholders under the company laws of the UAE and the Dubai International Financial Centre ('DIFC') and confirms that a prejudiced shareholder is not entitled to sue on behalf of the company (page 35).

Finally, a landmark judgment on ship arrests under UAE Law provokes some interesting considerations, including whether it could be argued that the ship arrest procedures, set out in Maritime Law, should prevail over those laid out in the Civil Procedures Law (page 13).

I hope you find this issue informative. Should you have any queries about any of our topics, please do not hesitate to reach out.

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CON-TENTS

Judgments

General

The Education Special

Form v. Substance: the requirements for an enforceable commercial agency agreement in the UAE

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

In a recent Dubai Court of Cassation judgment (Dubai Court of Cassation Judgment 731 of 2019 dated 15 December 2019), the court considered whether a distribution contract between two parties, which had been registered as a commercial agency fell within the scope of the UAE Commercial Agencies Law (Federal Law 18 of 1981, as amended). In this article, we consider the court's judgment and its implications for commercial agency agreements in the UAE.

The facts of the case

In 1992, the Appellant (a local UAE company) successfully registered a commercial agency with the Ministry of Economy based on a distribution contract between it and the Respondent's exclusive agent. The Respondent, who was not a party to the distribution contract, was named as the principal. The Respondent's exclusive agent was wound up in 2015.

In 2016, the Respondent filed a complaint before the Commercial Agencies Committee requesting the deregistration of the registered agency on the basis that the registration of the agency was null and void as there was no duly attested commercial agency contract with the Appellant. Furthermore, it argued that the agreement, documents, and correspondence relied upon by the Appellant did not expressly provide for the appointment of the Appellant as a commercial agent but rather as distributor for the Respondent's products pursuant to

a contract (entered into between Appellant and the Respondent's agent (which had been wound up in 2015), and not directly with the Respondent). The Respondent also argued that the form of contract used by the Respondent was a distribution contract and not a commercial agency contract within the meaning of the Commercial Agencies Law.

The Commercial Agencies Committee did not recognise the Appellant as the Respondent's commercial agent and therefore ordered that the commercial agency be deregistered. The Committee held that there was no notarised and legalised commercial agency agreement between the Respondent and the Appellant when the agency was registered with the Ministry of the Economy. Further, the Committee referred to Article 954 of the UAE Civil Code (in relation to the ceasing of legal capacity of the agent and principal) and held that the contract used for the registration of the commercial agency automatically terminated when the Respondent's agent (the company) was wound up.

The Appellant challenged the decision on the basis that he had spent many years distributing the Respondent's products and that the Respondent continued to deal with the Appellant for 14 months before filing the deregistration application, notwithstanding that the Respondent's exclusive agent (who had a contract with the Appellant) was wound up in 2015.

The Appellant further argued that the relationship was formalised through registration of the agency at the Ministry of Economy, including registration of the product range in question with the Ministry of Health, Municipality, and the Pharmacies & Supplies Department in Abu Dhabi, based on a letter issued by the Respondent's exclusive agent.

Commercial Agency Law and the Dubai Courts' findings

The UAE Commercial Agency law provides the legal framework for all types of agency relationships under UAE law. Pursuant to Article 1 of the Commercial Agencies Law, "commercial agency" is defined as *"the representation of a principal by an agent for the distribution, sale, offer or provision of a commodity or service inside the UAE against a commission or profit."* As a result of this definition, "commercial agencies" can represent a broad variety of relationships. However, commercial agent status can only be obtained by UAE citizens and the name of the commercial agent must be recorded in the Register of Commercial Agents maintained by the Ministry of Economy and Commerce. Article 4 of the Commercial Agencies Law also provides that *"for a valid agency at the time of registration, the agent shall be directly bound with the principal by a written and notarised contract."*

Article 3 of the Commercial Agency Law provides that commercial agency activities are not permitted to be practised inside the UAE except by commercial agents registered in the specified register maintained for this purpose by the Ministry. Any commercial agency not registered in the above register shall not be considered, nor legal proceedings involving the same shall be heard. Any dispute concerning the performance of a commercial agency, whether the claim is for specific performance or damages, arising in tort, must be based on a written and notarised commercial agency contract registered on the relevant register of the Ministry of Economy.

The Dubai Court of Cassation also referred to Article 2 of the Commercial Agencies Law in its judgment which sets out who can practise commercial agency activities. The court also held that any commercial agency not registered in the above register should not be considered by any court in legal proceedings involving the same. A valid agency at the time of registration should exist (Article 4 as mentioned above), and the agent shall be directly bound with the principal by a written and notarised contract. Article 6 of Commercial Agencies Law adds that *"Any agreement to the contrary shall not be recognised."* Article 22 of Commercial Agencies Law provides that the penalty for carrying on the business of a commercial agency contrary to the provisions of this Law shall be a fine of not less than AED 5,000 (approximately US$ 1360).

In view of the above, the court held that for a commercial agency to be recognised and enforceable, the agent must be a UAE national who is directly bound with the principal by a written and notarised agency contract that has been entered on the relevant register of the UAE Ministry of Economy. Legal proceedings involving a commercial agency may not be heard and considered: (i) without a written contract; or (ii) with a written but un-notarised contract ;or (iii) with a written and notarised contract that has not been registered on the relevant register in the UAE. Such legal proceedings would be in contravention of the Commercial Agencies Law.

This judgment highlights the importance of having a registered and notarised commercial agency agreement with the Ministry of Economy in order to successfully enforce said agreement.

The Court held that the agreement (presented by the Appellant) should not be construed as creating an agency relationship between the parties. The fact that the Respondent used the Appellant to carry out, on their behalf, various formalities in the UAE in connection with the registration of the Respondent's products in the UAE did not mean that the Appellant was a commercial agent for the Respondent's products. According to the particulars of the agency registration certificate provided by the Appellant, the principal was a third party and not the Respondent. There was nothing on record to indicate that the Respondent had awarded the Appellant a commercial agency or had delegated the third party (the agent) to do so. As a result, Commercial Agency Committee's decision to not recognise the Appellant as a commercial agent of the Respondent was correct. The action was therefore dismissed.

Conclusion

This judgment highlights the importance of having a registered and notarised commercial agency agreement with the Ministry of Economy in order to successfully enforce said agreement and confirmed that a distribution agreement entered into between the principal's exclusive agent and a third party will not be considered a commercial agency. In the UAE, it is typical for exclusive commercial agents to appoint distributors however, these distributors cannot be registered as commercial agents. This judgment confirms this. The judgment also clarifies the role of the Commercial Agency Committee which considers commercial agency disputes. At the time of writing, the Commercial Agency Law was amended (Federal Law No. 11 of 2020 amending Certain Provisions of Federal Law No. (18) of 1981 Regulating Commercial Agencies). The amending law however, does not change the role of the Commercial Agency Committee.

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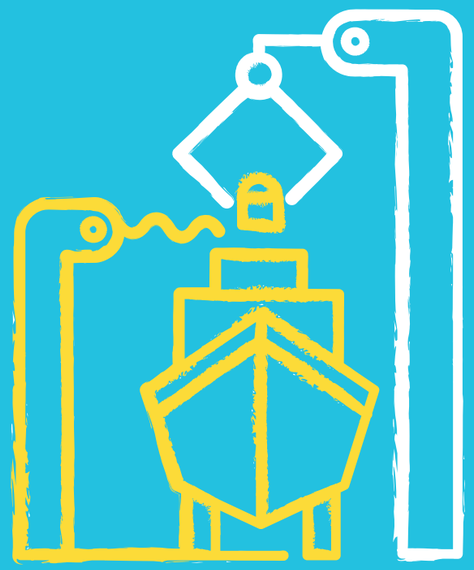
Landmark judgment on ship arrests under UAE Law



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This article is a review of a landmark judgment by Khor Fakkaan's Court of Appeal (Appeal Number 44/2020 Commercial) regarding ship arrest procedures under UAE Law. This judgment's importance stems from the fact that the Khor Fakkan Court of Appeal accepted the validity of the arrest order claim over a vessel based on the UAE Maritime Law, notwithstanding that this claim was cancelled by Cabinet Resolution No. (57) of 2018 concerning the Executive Regulations of Federal Law No. (11) of 1992 of the Civil Procedures Law.

Nature of the claim

On 10 June 2019, a shipping company ('Claimant') agreed to sell one of its vessels to another company ('Defendant') based on a vessel purchase Agreement ('MoA'). The purchase price of the vessel was in the amount of US$11,700,000 ('Purchase Price') and to be paid via an escrow account. Furthermore, it was agreed that the Defendant would pay 20 per cent of the Purchase Price to the Claimant in advance prior to the delivery of the vessel and the remaining balance. amounting to 80 per cent of the Purchase Price, to be paid within three days of delivering the vessel to the Defendant.

On 9 October 2019, the Claimant received 20 per cent of the Purchase Price amounting to US$ 2,340,000. Therefore, the Claimant arranged for the ownership of the vessel to be transferred to the Defendant and according to the MoA, the vessel was delivered to the Defendant at Khor Fakkan Port on 23 October 2019. However, the Claimant still had not received 80 per cent of the Purchase Price of the vessel.

Therefore, on 25 January 2020, the Claimant filed arbitration proceedings in London against the Defendant claiming back either ownership of the vessel, or alternatively, the 80 per cent of the Purchase Price amounting to US$9,983,921.91 owed to them.

Moreover, on 28 January 2020, the Claimant obtained an arrest order over the vessel ('Vessel') which was at Khor Fakkan Port. The Claimant based the ship arrest application on the MoA.

The validity of arrest order claim

Cabinet Resolution No. (57) of 2018 concerning the Executive Regulations of Federal Law No. (11) of 1992 of the Civil Procedures Law, which came into effect in February 2018, ('New Civil Procedures Law'), requires creditors who obtained attachment orders over their opponents' real estate and movable assets to file the validity of debt claims (the substantive claims) no later than eight days as of the issue date of the attachment orders, with the competent court to prove the right to their claims. Otherwise, the attachment orders will be null and invalid, unless the validity of debt claims have been filed before the attachment is granted.

However, the Old Civil Procedures Law required the creditors to file the validity of debt claims and validity of attachment order claims within eight days from the date of executing the attachment orders before the competent court in order to prove their right and validate the attachment orders over real estate and movable assets of their opponents. Nonetheless, the New Civil Procedures Law cancelled the validity of attachment order claims.

Therefore, as the Claimant filed the validity of debt claim in London (arbitration proceedings in January 2020), and was not required to take any further action in the UAE under the New Civil Procedures Law and it was therefore deemed the arrest order over the Vessel should stay until a final award is issued in the arbitration proceedings.

Nevertheless, the Claimant filed a validity of arrest order claim with Khor Fakkan's Court of First Instance requesting the Court to stay the validity of arrest order claim in the UAE until a final award is issued in the validity of debt claim in London.

The Claimant established its claim on the following grounds:

1. although the New Civil Procedures Law does not require the validity of arrest order claims to be filed by the creditors, this law does not refer in its preamble to the Maritime Law. Therefore, the Maritime Law should apply in relation to the ship arrest procedures;
2. the Maritime Law is a private law, however, the Civil Procedures Law is a general law, thereby, the rules of private law should prevail over the general rules;
3. the Maritime Law deals with the ship arrests' procedures, however, the Civil Procedures Law deals, in general, with precautionary attachments over the debtor's real estate and movable assets (i.e. land, properties, bank accounts, vehicles, etc). Therefore, the ship arrest procedures which are set out in the Maritime Law should be applied in ship arrests.;
4. based on Articles 120/1 off the Maritime Law, the Court of Khor Fakkan should have jurisdiction to decide upon the validity of the arrest order claim as it issued the arrest order over the Vessel. This Article states: *"The judgment shall include confirmation of the arrest, an order for sale and the conditions thereof, the day appointed for the conduct thereof, and the starting price. The order may be appealed against in accordance with the provisions laid down by law within fifteen days from the date judgment is pronounced, otherwise the appeal shall lapse. The Court shall speedily determine the appeal."*
5. article 121 of the Maritime Law requires judgments which are issued in the validity of debt claim to confirm/ validate the arrest orders over the

arrested vessels. However, the validity of the arrest order claim depends on the outcome of the validity of debt claim that was filed in London. Therefore, the validity of arrest claim should be accepted based on Articles 120 and 121 of the Maritime Law and the Court should stay the validity of arrest order claim until a final award is issued in the validity of debt claim in London (arbitration proceedings). Article 120 of the Maritime Law provides: *"The notice of arrest shall contain a summons to attend before the relevant civil court in the area of which the arrest is effected for adjudication on the validity of the debt, of whatever amount"*.

6. once the validity of debt claim in London is proven, the Court should validate/confirm the arrest order over the Vessel and order the sale of the Vessel in accordance with the Court's procedures based on Article 121 of the Maritime Law.

The Court of First Instance

The Defendant filed, with the Court, a statement of defence in response to the validity of arrest order claim arguing the following:

1. the Court of Khor Fakkan does not have jurisdiction to hear the validity of the arrest order claim, as it was agreed to refer any dispute arising out of the MoA to the arbitration in London. Alternatively, the Court does not have jurisdiction to hear the validity of arrest order claim, as the Claimant and Defendant are not domiciled in the UAE;
2. the Claimant's debt is not classified as a maritime debt, so the arrest order was not issued in accordance with the Maritime Law;
3. the Defendant does not have the capacity to be sued in this claim as it transferred 80 per cent of the Purchase Price to the escrow account and it submitted to the Court a remittance advice showing that it had transferred 80 per cent of the Purchase Price to the escrow account.

Therefore, the Defendant requested the Court to dismiss the validity of arrest order claim and release the Vessel.

The Claimant responded to the Defendant's statement of defence as follows:

1. the arbitration clause in the MoA does not give the arbitral tribunal the jurisdiction to issue arrest orders over the Vessel. The Court of Khor Fakkan should have the jurisdiction to decide upon the validity of the arrest order over the Vessel based on Articles 120/1 of the Maritime Law, as it is the said Court which had issued the arrest order over the Vessel. Moreover, based on Articles 21 and 22 of the UAE Civil Procedures Law, the Court has the jurisdiction to hear the validity of arrest order as the Vessel is within the UAE's territorial waters;
2. the Claimant's debt is considered a maritime debt, as it relates to a dispute over the ownership of the Vessel and/or in connection with the co-ownership of the Vessel. Moreover, the MoA relates to the use and/or exploitation of the Vessel which is also considered a maritime debt;
3. the Court does not have the jurisdiction to decide on the Defendant's arguments in which it alleged that it paid 80 per cent of the Purchase Price, as such defence should be determined by the arbitration proceedings in London in the validity of debt claim. In any event the Claimant submitted evidence that shows that it has not received 80 per cent of the Purchase Price.

Hence, the Claimant requested the Court to ignore all of the Defendant's arguments and stay the validity of arrest order claim until a final award is issued in the arbitration proceedings in London.

The judgment of the Court of First Instance

On 3 February 2020, Khor Fakkan's Court of First Instance issued its judgment and decided to stay the validity of arrest order claim until a final award is issued on the validity of debt claim in London (the arbitration proceedings). The Court based its judgment on the following grounds:

1. the Court has the jurisdiction to decide upon the validity of arrest order claim based on Article 22 of the Civil Procedures Law;
2. the Court has the jurisdiction to validate/confirm the arrest order over the Vessel and sell the Vessel in accordance with the Court's procedures based on Article 121 of the Maritime Law once the validity of debt claim in London is proven;
3. the Defendant has the capacity to be sued in this claim, as it is evidenced in the claim that the Defendant has not paid the full Purchase Price of the Vessel to the Claimant;
4. the Claimant's debt is classified as a maritime debt, as it relates to the dispute over the ownership of the Vessel and/or in connection with the co-ownership of the Vessel based on Article 115/M/N of the Maritime Law;
5. it is evidenced that the Claimant filed the arbitration proceedings based on the MoA and the Defendant did not challenge the arbitration proceedings.

Therefore, the Court decided to stay the validity of arrest order claim until a final judgment is issued in the validity of debt claim in London based on Article 102 of the Civil Procedures Law which provides: *"The court shall order a stay of the proceedings if in its opinion it should defer judgment on the subject matter pending determination of another question on which the judgment is dependent; as soon as the cause of the stay has ceased, either of the parties may recommence the action."*

The Court of Appeal

The Defendant filed an appeal before the Khor Fakkan Court of Appeal, challenging the judgment of the Court of First Instance, while repeating all the arguments it had raised before the Court of First Instance. Hence, the Defendant requested the Court to dismiss the validity of arrest order claim and release the Vessel.

Article 121 Maritime Law requires judgments which are issued in the validity of debt claim to confirm/validate the arrest orders and order for the sale of the arrested vessels. Therefore, although the New Civil Procedures Law had cancelled the validity of attachment order claims which were required by the Old Civil Procedures Law, it is advisable that the creditors ask the court to validate/confirm the arrest order over the arrested vessels (based on Article 121 of the Maritime Law) when they file the validity of debt claims to avoid having their claims dismissed on a technicality.

The Claimant also reiterated all its arguments which were raised before the Court of First Instance and confirmed that the appealed judgment was issued in accordance with the law. Therefore, the Claimant requested the Court to dismiss the appeal and uphold the judgment of the Court of First Instance.

Judgment of the Court of Appeal

On 22 June 2020, the Court of Appeal dismissed the Defendant's appeal and upheld the decision of the Court of First Instance. The Court of Appeal ruled that the judgment of the Court of First Instance was issued in accordance with the law and it responded to all of the Defendant's arguments. Therefore, the Court of Appeal adopted the Court of First Instance's findings and referred to it as a part of its judgment. Moreover, the Court of Appeal added the following reasons to its judgment:

1. the Court has the jurisdiction to decide upon the validity of arrest order claim based on Article 22 of the Civil Procedures Law;
2. the Claimant's debt is deemed as a maritime debt based on Article 115/D, as the vessel purchase agreements relate to the use or exploitation of the Vessel;
3. the validity of arrest order claim is specifically mentioned in Article 121 of the Maritime Law, and this law is a private law and its rules should supersede the general rules.

Since the validity of the arrest order over the Vessel depends on the outcome of the validity of the debt claim in London (the arbitration proceedings), the validity of arrest order claim should be stayed until a final award is issued on the validity of debt claim based on Article 102 of the Civil Procedures Law.

Conclusion

It could be argued that the ship arrest procedures which are set out in the Maritime Law should prevail over the attachment procedures which are laid out in the Civil Procedures Law in ship arrest claims. Moreover, Article 121 of the Maritime Law requires judgments which are issued in the validity of debt claim to confirm/validate the arrest orders and order the sale of the arrested vessels. Therefore, although the New Civil Procedures Law cancelled the validity of attachment order claims which were required by the Old Civil Procedures Law, it is advisable that creditors ask the court to validate/confirm the arrest order over arrested vessels (based on Article 121 of the Maritime Law) when they file the validity of debt claims to avoid having their claims dismissed on a technicality.

It should be noted that the Court of Appeal judgment is final. It is also worth mentioning that the Defendant challenged the arrest order over the Vessel by way of filing a grievance and an appeal, however, the grievance and appeal were both rejected.

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Virtual asset activities

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Over the last couple of years Abu Dhabi Global Market ('ADGM') has positioned itself as a destination of choice for dealing in virtual assets (previously known as 'crypto assets' in ADGM parlance). As part of ADGM's ongoing commitment to update and improve its regulatory framework, the Financial Services Regulatory Authority ('FSRA') of the ADGM, earlier this year, announced the enactment of various amendments to the FSRA's regulations and rules concerning the authorisation and supervision of virtual asset activities within the ADGM.

What are these amendments?

Change of terminology

"Virtual Assets" is a an updated term for what was previously known as "Crypto Assets". The need for such change was to ensure that the use of the terminology in the ADGM is aligned with the terminology used by the Financial Action Task Force, the inter-governmental body established to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and related threats to the integrity of the international financial system.

This change, however, does not amend the underlying concept of crypto asset and the term "Virtual Asset", continues to be defined as what "Crypto Asset" was prior to the amended regime coming into effect. Similar to the term "Crypto Asset", "Virtual Asset" is defined as *"a digital representation of value that can be digitally traded and functions as: (1) a medium*

of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have a legal tender status in any jurisdiction. A Virtual Asset is: (a) neither issued nor guaranteed by a jurisdiction, and fulfils the above functions only by agreement within the community of users of the Virtual Asset; and (b) distinguished from Fiat Currency and E-money".

Regulated activity

The pre amendment regime provided for a bespoke activity of "Operating a Crypto Asset Business", which dealt with activities relating to crypto assets such as arranging, managing, providing custody of crypto assets as one single activity, independent of other existing similar regulated activities, in the context of investments. The amended regime has now moved the elements of that activity to already existing regulated activities of a similar nature. The activity of "Operating a Crypto Asset Business", no longer exists. For example, a person wishing to manage virtual assets in the ADGM, is no longer required to apply for an authorisation of Operating a Crypto Asset Business, but instead will need to apply for an authorisation for "Managing Assets", where the scope of managing assets, as a regulated activity is widened to include managing virtual assets.

However, this does not mean that a person holding a financial services permission for "Managing Assets", by default, can manage virtual assets as well, in the ADGM. This means, an applicant who intends to deal with virtual assets is required to apply for the relevant regulated activity, in the context of virtual assets, as opposed to in the context of investments or other assets. The activity of such an authorised person would be limited to conducting activities in relation to virtual assets. Such permission does not automatically extend to conducting activities in relation to specified investments or financial instruments, by virtue of its financial services' permission. Therefore, a person intending to conduct activities in relation to specified investments or financial instruments, in addition to those in relation to virtual assets, is required to obtain an additional authorisation from the FSRA.

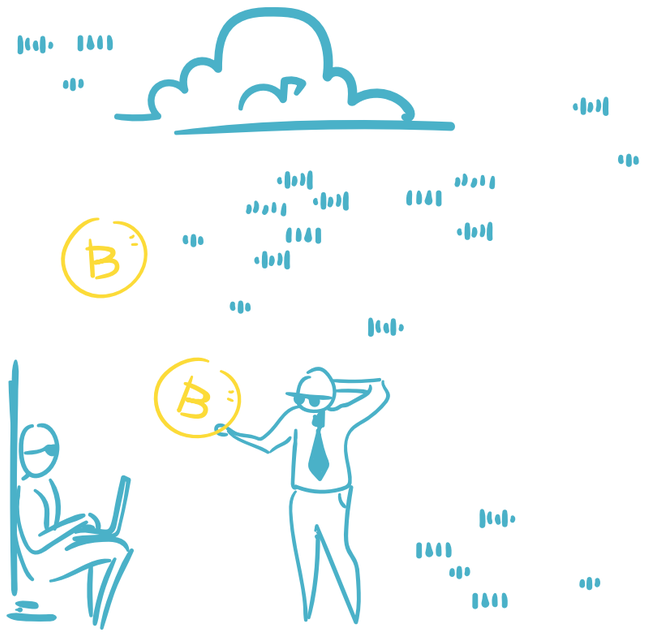
The fact that the bespoke activity has been split and moved to the underlying regulated activity, which was, pre amendment, limited to dealing with investments and financial instruments, does not mean that FSRA has accorded virtual assets a similar status to that of investments and financial instruments. The FSRA continues to view virtual assets as commodities.

FSRA expects to see substantive operational commitment within the ADGM, including operations, relating to commercial governance, compliance, technology and human resources. Considerations, around these would vary according to multiple factors, most importantly the nature of virtual asset activity proposed to be conducted within the ADGM.

Who does the amended regime apply to?

The amended virtual asset regime applies to:

- applicants applying for financial services' permission to carry on a regulated activity, involving virtual assets, in the ADGM;
- persons authorised to carry on a regulated activity, involving virtual assets;
- recognised investment exchange permitted to carry on regulated activity of operating a multilateral trading facility dealing in virtual assets within the ADGM; and
- applicants and authorised persons dealing with stable coins.



"Virtual Assets" is an updated term for what was previously known as "Crypto Assets".

Overview of the amended regime

Application process

This means, while the activities of dealing with virtual assets have been moved to the relevant regulated activities, which also deal with investments and financial instruments, as the case may be, the application process for dealing with virtual assets is slightly different and more rigorous. Applicants for virtual asset activities are expected to be prepared to engage heavily with the FSRA throughout the application process, which includes:

- due diligence and discussion with the FSRA, involving explanation of the proposed business model, demonstration of proposals to meet the requisite regulatory standards and providing in-depth technology demonstrations across all aspects of proposed virtual asset activities;
- submission of relevant forms and fees, following the discussions with the FSRA and the FSRA having reasonable comfort that the applicant's processes, capabilities and technologies are at a sufficiently advanced stage;
- granting of in-principle approval, which approval will be granted after FSRA has considered the relevant forms and supporting documents and is of the view that the applicant meets all relevant rules and requirements;
- granting of final approval, where the conditions prescribed under the in-principle approval are met to the satisfaction of the FSRA, within the stipulated timeline. While, generally, this is the last step before the relevant activities could be commenced, in the context of virtual assets, this is conditional upon the FSRA being further satisfied in relation to the applicant's operational testing and capabilities and completion of a third party verification of the applicant's systems where applicable; and
- operational launch testing and third party verification of the proposed virtual assets to the satisfaction of the FSRA.

Fees

While the virtual asset activities have now moved to the respective underlying activities, fees for authorisation of virtual asset activities continue to be similar to those that existed under the pre amended regime.

Similar to the pre amended regime, if an applicant or an authorised person intends to conduct multiple regulated activities in relation to virtual assets as part of its authorisation, the fees, including authorisation and supervision fees, payable by such person will be cumulative and shall be considered across the following:

1. intermediary activities i.e. non-custody intermediary activities;
2. providing custody in relation to virtual assets; and
3. acting as a multilateral trading facility.

Where the relevant persons intend to undertake regulated activity involving investments and financial instruments along with virtual assets, the fees attributable to the combined activity are likely not to be cumulative. However, this is something that will be determined by the FSRA on a case-by-case basis. In such cases, it is recommended that clarifications be sought from the FSRA, in the early stages, where determination of fees is a concern, to the overall application.

Regulatory approach

The regulatory approach continues to be similar to the pre amended regime:

- requiring authorised persons to be in compliance with a code of business rules applicable to activities in relation to virtual assets, with applicable additional rules to persons providing custody and multilateral trading facilities relating to virtual assets;
- limiting the use of virtual assets to 'accepted virtual assets' as determined by the FSRA, in order to prevent potential higher risk activities relating to illiquid or 'immature' virtual assets;
- requiring capital in connection with virtual asset activities to be held in fiat form;
- requiring compliance with the relevant anti-money laundering rules and regulations, noting the warnings issued by the International Monetary Fund, the Financial Action Task Force, the Bank for International Settlement and the International Organisation for Securities Commission, to investors and market participants, highlighting the risks associated with digital assets including virtual assets;
- expecting applicants and authorised persons to meet particular requirements in terms of their technology systems, governance and controls, noting that the FSRA does not seek to regulate virtual asset technologies directly; and
- requiring authorised persons to have processes in place that enable them to disclose, prior to entering into an initial transaction, all material risks to their clients in a manner that is clear, fair and not misleading.

Operational issues

Historically, virtual asset applicants or established entities dealing with virtual assets have faced difficulties and increased scrutiny while opening and operating bank accounts, primarily because of the potential risks associated with virtual asset space. The FSRA has engaged in extensive discussions with local and international banks regarding the purpose of providing them with an overview of ADGM's virtual asset framework with a view to demonstrating its stringent authorisation requirements, in the hope that those banks with a risk appetite to bank virtual assets will glean comfort from the regulatory oversight of the FSRA and the issuance of an in-principle approval to entities demonstrating that they have a clear roadmap of development of their business moving towards final approval and the issuance of a financial services' permission.

Conclusion

The amended regime streamlines the regulated activities to accommodate additional class of assets i.e. the virtual assets and thereby generally aligns the nature of activities across various classes of assets.

While the amendments seem to be substantive, because of the movement of elements between the activities, the regulatory approach appears to be similar to the pre amendment regime. Therefore, we do not expect a considerably different application review process or ongoing regulatory obligations.

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Regulatory initial margin considerations for MENA entities

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You are a bank or large derivatives counterparty in the MENA region and your international counterparties have been enquiring if you are in scope for regulatory initial margin and if you have started implementing regulatory initial margin. Given you are operating in the MENA region, you are wondering whether the regulatory initial margin applies to you. In this article, we focus on certain requirements of regulatory initial margin relevant when dealing with European counterparties.

As a background, after the global financial crisis, the global regulators focused on revamping the over-the-counter ('OTC') derivatives market and introduced a range of measures including transaction reporting, clearing margin requirements for non centrally cleared derivatives.

The European Union adopted Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR'), as amended, as the umbrella regulation in this respect. More specifically, the Commission Delegated Regulation (EU) 2016/2251 supplemented the EMIR in respect of the margin rules for uncleared derivatives ('Margin Rules'). The Margin Rules include requirements to collect and post variation margin and initial margin ('IM').

IM coverage is effective in global jurisdictions such as the United States, Canada, Brazil, Switzerland, Japan, Hong Kong, South Korea, Singapore and Australia among others in addition to the EU with similar requirements.

What is IM?

IM is defined as "the collateral collected by a counterparty to cover its current and potential future exposure in the interval between the last collection of margin and the liquidation of positions or hedging of market risk following a default of the other counterparty". The IM should be collected on a gross basis without netting amounts collected by each party and segregated to protect from the insolvency or default of the collecting party.

Which entities are affected?

IM requirements apply where both parties to non centrally cleared derivatives are:

1. EU established financial counterparties ('FC') and non-financial counterparties above the clearing threshold set out under EMIR ('NFC+'); and
2. third country entities that would be a FC or NFC+ if established in the EU ('Covered TCE').

Most relevant to a Covered TCE, IM requirements apply (directly or indirectly):

1. when a Covered TCE is facing a FC or a NFC+; or
2. when two Covered TCEs trade with each other where: (a) both are acting through a branch in the EU and both would be FCs if established in the EU; or (b) either TCE is guaranteed by a FC established in the EU.

What is the threshold for application of IM requirements?

The IM requirements apply where both counterparties have, or belong to groups each of which has, an aggregate average notional amount ('AANA') of non centrally cleared derivatives, for the months of March, April and May of the preceding year, that is above €8 billion (approximately US$9.5 billion). The AANA should be calculated at the entity level or the group level if the entity belongs to a group.

When do the IM requirements commence?

The IM requirements have been phased out over several years with the largest entities coming into scope at the start.

On 3 April 2020, the Basel Committee on Banking Supervision ('BCBS') and the International Organisation of Securities Commissions ('IOSCO') announced their agreement to defer the deadline for completing the final two implementation phases of the IM requirements by one year. This additional time was recommended, bearing in mind the immediate impact of COVID-19 on the parties. The recommendation would now have to be formally approved by EU regulators.

These changes would result in covered counterparties with an AANA above €50 billion (approximately US$60 billion) becoming subject to the requirement to exchange initial margin from 1 September 2021, while covered counterparties with an AANA above €8 billion (approximately US$9.5 billion) becoming subject to the requirement from 1 September 2022.

What are the main obligations in respect of IM under the Margin Rules?

The main obligations in respect of IM under the Margin Rules are:

1. the IM requirement applies to all OTC derivatives which are non centrally cleared though there are certain exemptions;
2. no IM is required where IM due does not exceed €50 million (approximately US$60 million) though there are some differences in respect of some groups;
3. the IM should be calculated within one business day of any change to the netting set (such as a new trade being added or an existing trade being removed or having expired), a payment obligation being triggered, if no calculation has been made for the preceding ten business days or a trade is reclassified due to a reduction in maturity time;
4. the IM may be calculated using a standardised method or a proprietary method acceptable to regulators. In this respect, ISDA has developed the Standard Initial Margin Model ('SIMM') which has been almost universally adopted and, given its large scale acceptance, would lead to limited mismatches and disputes between trading counterparties;
5. IM must be segregated from the collecting party's own assets;
6. the collateral collected as IM should follow the eligibility requirements set out in the Margin Rules;
7. the collecting party cannot reuse the IM received from a trading counterparty; and
8. the parties should enter into collateral agreements covering the matters prescribed in the Margin Rules.

What is the concern with non-netting jurisdictions?

An area of concern for EU counterparties was their obligation to post collateral to Covered TCEs when the legal enforceability of netting and/or segregation in the relevant third party could not be conclusively determined.

Accordingly, the exchange of IM under the Margin Rules requires that an independent legal review of a netting agreement or an exchange of collateral agreement be legally enforced with certainty at all times and the requirements of segregation be met. When an independent legal review confirms that these standards may not be met, the Margin Rules grant certain limited exemptions.

What should be the next steps for a Covered TCE?

1. Covered TCEs should assess whether they are likely to be in-scope for IM requirements;
2. if in-scope, notify their trading counterparties so that preparations for compliance can be made in a timely manner. ISDA has prepared a standard form of disclosure letter which firms can use to indicate to their trading counterparty whether or not they may be in-scope for IM;
3. the Covered TCE should establish custodian relationships and open segregated accounts to post and collect IM. These may be bank custodians or securities depositories;
4. the Covered TCE should set up the operational capacity to calculate IM based on the ISDA SIMM or other models that are acceptable from a regulatory perspective; and
5. depending on the type of custodial relationships chosen by both the Covered TCE and its trading counterparty, the legal documents may include a bilateral IM credit support annex or credit support deed or collateral transfer agreement/ security agreement for each counterparty pair and a trilateral account control agreement or similar document for each counterparty/ custodian trio. The Covered TCE should set up procedures and teams to negotiate these legal documents prior to the implementation date.

While the issues raised in this note identify some of the more pressing questions to understanding when dealing with regulatory IM, they are certainly not exhaustive. Banks and other institutions in the MENA region dealing in derivative transactions should ensure a full understanding of the rules and requirements when dealing with international counterparties.

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Amendments to the UAE Commercial Agencies Law: broadening the scope

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In January this year, it was announced that the United Arab Emirates ('UAE') Cabinet had approved certain proposed amendments to Federal Law No. 18 of 1981, more commonly known as the 'UAE Commercial Agency Law', which regulates registered commercial agencies within the UAE. On 31 May 2020, Federal Law No. 11 of 2020 was published in the UAE Official Federal Gazette No. 679, and entered into force on 1 June 2020. Federal Law No. 11 of 2020 implements the anticipated changes announced earlier in the year and makes a fundamental modification to which types of UAE legal entities can register a commercial agency arrangement at the UAE Ministry of Economy ('Ministry').

Previously, only UAE nationals or companies wholly owned by UAE nationals could qualify for registration as a commercial agent by the Ministry and hence only UAE nationals, or companies wholly owned by UAE nationals, could avail of the protections afforded to registered commercial agents under the UAE Commercial Agency Law.

As addressed in previous Law Update articles, the primary reason for the enactment of Federal Law No. 11 of 2020 relates to the fact that the prior national ownership requirements naturally discouraged local UAE family businesses, which had existing registered commercial agencies as part of their business portfolio, seeking external investment via a private placement or initial public offering ('IPO') (due to the fact that any private or public offering would have to be restricted to UAE nationals in order to maintain and comply with the 100 per cent UAE national ownership requirement).

The position has now changed as a consequence of the amendments introduced by Federal Law No. 11 of 2020, which has essentially introduced two additional UAE legal entities that may qualify for registration at the Ministry as a commercial agent – thus widening the net. Now, post the enactment of Federal Law No. 11 of 2020, in order for a commercial agency arrangement to be registered at the Ministry, the agent must now be:

1. a UAE national; or
2. a UAE public joint stock company ('PJSC') owned, at least, 51 per cent by UAE nationals;
3. a UAE private entity owned by a PJSC meeting the requirements of (2) above; or
4. a UAE private entity that is 100 per cent owned by UAE nationals.

The additional registration criteria previously required for effecting registration at the Ministry have not changed under Federal Law No. 11 of 2020 (i.e. the relevant commercial agency arrangement must be exclusive, either in respect of an Emirate or Emirates or the entire UAE and the commercial agency agreement must be notarised and accompanied by certain supporting documents).

A word of caution is that the Minister of the Economy will, in due course, issue a resolution on the procedures and controls necessary for the engagement of a PJSC or private companies owned by a PJSC (meeting the national ownership criteria) in commercial agency activities in the UAE but, in principle, local family businesses are now able to convert their private companies into a PJSC in order to seek foreign equity investment without the risk of losing their registered commercial agent status (assuming, of course, that at least 51 per cent of the shares in the PJSC are and continue to be held by UAE nationals).

In addition to the amendments to Article 2 of the UAE Commercial Agency Law, noted above, Federal Law No. 11 of 2020 also introduced some additional modifications to Articles 1, 8, 28, 30 and 32. The below table highlights these changes and provides a short summary of the impact, if any, the amendments have made to the previous position.

Article	Previous Wording	Amended Wording	Commentary
(1)	In the course of applying this Law, the following terms and phrases shall have the meanings as defined below, unless the context otherwise requires: • **The UAE:** The United Arab Emirates; • **The Ministry:** The Ministry of Economy; • **The Minister:** The Minister of Economy; • **Competent Authority:** The local authority in the relevant Emirate; • **The Committee:** The Committee of Commercial Agencies, which is formed under Article (27) of this Law;	For the purpose of applying the provisions of this Law, the following words and expressions shall have the meanings assigned thereto respectively, unless the context requires otherwise: • **State:** The United Arab Emirates. • **Ministry:** The Ministry of Economy. • **Minister:** The Minister of Economy. • **Competent Authority:** The local authority in the relevant Emirate. • **Committee:** The Committee of Commercial Agencies.	Although certain definitions have been updated under the amendments to Article 1, principally, the new definitions still reflect the position pre Federal Law No. 11 of 2020 having been enacted. That said, the definition of Agent has been updated due to the amendments made to Article 2 concerning the legal form and ownership requirements for an entity to qualify for registration as a commercial agent in the Ministry.

Article	Previous Wording	Amended Wording	Commentary
(1) *(contd.)*	• **Commercial Agency:** The representation of a principal by an agent for the distribution, sale, offer or provision of a commodity or service inside the UAE against a commission or profit; • **Principal:** The producer or manufacturer inside or outside the UAE or the producer's approved exclusive distributor or exporter; provided that the producer does not practice marketing on its own; • **Agent:** A natural person having UAE nationality or a corporate person that is wholly owned by UAE nationals who are authorised under the commercial agency contract to represent the Principal to distribute, sell, offer or provide a commodity or service inside the UAE for a commission or profit.	• **Commercial Agency:** The representation of a principal by an agent under an agreement of agency, distribution, sale, display, franchise or providing a commodity or service in the State in return for a commission or profit. • **Principal:** A producer or manufacturer in the State or abroad, or an exclusive exporter or distributor authorised by the producer; provided that the producer does not carry out the marketing functions by itself. • **Agent:** A natural or legal person representing a Principal under a commercial agency agreement.	Additionally, the definition of "Commercial Agency" has also been expanded to add the wording "under an agreement" whereas the former provision provided for representation without an express requirement for any agreement. In practice, the majority of commercial agencies were via a written contract but, on occasion, if an agent did not have a written contract then it may have been possible for the agent to apply to the UAE court to consider correspondence and any other communications between an agent and relevant principal, in order to ascertain if there was sufficient evidence of an agreement (even though not reduced in a written contract). The judgment issued was then subsequently used to replace the written contract. This change in the definition could now impact an agent's ability to register itself at the Ministry without a written contract in place. Furthermore, there is now express reference to "franchise", which was not included in the old definition of Commercial Agency and this too represents an important development.

Article	Previous Wording	Amended Wording	Commentary
(2)	Practice of Trade Agencies' activities within the State shall be restricted to individual nationals or national Companies fully owned by national natural persons.	1. The practice of commercial agency activities in the State shall be limited to citizens, including individuals or companies that are fully owned by a: i. national natural person; ii. public legal person; iii. private legal person owned by public legal persons; or iv. private legal person fully owned by national natural persons. PJSC incorporated in the State to which the contribution of the State's citizens is not less than (51 per cent) of the company's capital shall be excluded from the provisions of Clause (1) above. 5. the Minister shall issue a resolution on the procedures and controls necessary for the engagement of the companies mentioned in Clause (2) above in commercial agency activities in the State.	As dealt with above, this amendment to Article 2 represents the most fundamental change to the UAE Commercial Agency Law. Now, in order for a commercial agency arrangement to be registered at the Ministry, the Agent must be: i. a UAE national; or ii. a UAE public joint stock company owned, at least, 51 per cent by UAE nationals; iii. a UAE private entity owned by a public joint stock company meeting the requirements of (ii) above; or iv. a UAE private entity that is 100 per cent owned by UAE nationals. Although the relevant individual or entity would still need to satisfy the other prerequisite criteria for effecting registration at the Ministry (as further dealt with above).

Article	Previous Wording	Amended Wording	Commentary
(8)	Subject to Article (27) and Article (28) of the Law, the Principal may not terminate or refuse to renew the agency contract unless there is a material reason for termination or non renewal. In addition, a Commercial Agency may not be re-registered in the Register of Commercial Agencies in the name of another Agent, even if the previous Commercial Agency was established under a fixed-term contract, unless the Commercial Agency has been consensually terminated between the Agent and Principal or there are material reasons which, are satisfactory to the Committee, give rise to termination or non-renewal of the Commercial Agency or upon a final judgment confirming its abolishment.	1. a commercial agency shall devolve to the heirs in the event of death of the agent. 2. subject to the provisions of Article (27) and (28) of the Law, the Principal may not terminate or refuse to renew the agency agreement without a material reason justifying the termination or non renewal. In addition, the agency may not be re-registered in the commercial agents' register in the name of another agent, even if the preceding agency is based on a fixed term agreement, unless the agency has been terminated by mutual agreement between the Principal and the Agent or in case of material reasons accepted by the committee justifying the termination or non renewal of the agency or after rendering a final court judgment writing off the agency. 3. the expiry of the agreement term shall not constitute a material reason for terminating the agency agreement between the two parties.	The amendment to Article 8 now brings clarity to two specific points. Firstly, it is now expressly mentioned that a commercial agency shall devolve to the heirs in the event of the death of the agent. Previously, in the event of death, Article 14 of the UAE Commercial Agency Law required that an agent's legal representative or heirs must submit an application along with supporting documents to remove the commercial agency from the register within 60 days of the death or submit objections to avoid the removal of the agency. Article 14 has not been amended under Federal Law No. 11 of 2020, so the Ministry will need to clarify whether, in light of Article 14, the notification requirements are now necessary given the amendment to Article 8. Secondly, it is now expressly mentioned that the expiry of a registered commercial agency does not amount to a "material reason", justifying the termination of the registered commercial agency arrangement. This confirms the interpretation previously given to the original wording of Article 8 i.e. a new commercial agency could not be registered for the same products even if the previous commercial agency was established under a fixed-term contract.

Article	Previous Wording	Amended Wording	Commentary
(28)	The Committee shall be competent to hear any dispute arising from the commercial agency registered with the Ministry. Parties may not bring the claim before the court until after the issue is referred to the Committee of Commercial Agencies. The Committee shall hear the dispute within 60 days from the date of the request for hearing the dispute (in the event that the request meets required formalities) or from the date on which the required documents are duly completed. The Committee may seek the help of any person it deems fit in order to fulfill the duties assigned thereto. The Committee's decision may be challenged before the competent court within 30 days from the date on which the Committee's decision is notified; otherwise the Committee's decision shall be final and not subject to further challenge.	The Committee shall have jurisdiction to hear the disputes arising between the parties to a commercial agency registered with the Ministry. No action may be admissible before courts in this regard before referring the dispute to the Commercial Agency Committee, which shall hear the dispute within 60 days from the date of submitting an application for hearing the dispute, in case of a complete application, or from the date of completing the required documents. In order to perform its functions, the Committee may engage whomever it deems fit. The Committee's decision may be contested before the competent court within 30 days from the date on which the Committee's decision is notified, otherwise, the Committee's decision shall be deemed final and uncontestable.	The wording of Article 28 has changed in part but the substance of the Article remains the same. Essentially, the Commercial Agency Committee must first hear any disputes arising out of a registered commercial agency. Thereafter, a party has 30 days following notification of the Commercial Agency Committee's decision to contest the decision before the local UAE courts. If no appeal is commenced within this timeframe, the Committee's decision is deemed final and binding.
(30)	A decree to nominate an official as referred to in a preceding article herein shall be issued by the Minister of Economy & Commerce. The decree shall determine procedures to be adopted to establish any breach of this act that may occur. Officials so nominated are prohibited from disclosing matters deemed confidential by their nature made acquainted with by virtue of their posts. Anyone who violates such restriction shall be disciplinarily penalised without prejudice to civil or criminal liability.	The employees identified by a resolution of the Minister of Justice, in agreement with the Minister, shall have the capacity of judicial officers to detect what falls within the scope of their competence of the violations of the provisions of this Law, the Executive Regulations thereof and the resolutions issued in implemented. Such employees shall not disclose the matters to which they may have access *ex officio* if such matters are of a confidential nature. Whoever violates such prohibition shall be penalised without prejudice to any civil or criminal liability.	The amendment to Article 30 has not changed the substance of the original wording save for the identity of the judicial officers charged with determining what falls within the scope of the UAE Commercial Agency Law and any violations thereof shall be by agreement between the Minister of Justice and the Minister of Economy, rather than solely the Minister of Economy.

Article	Previous Wording	Amended Wording	Commentary
(32)	Minister of economy and foreign trade shall implement this act and issue the regulations and decisions necessary for execution thereof.	The Minister shall issue the regulations and resolutions necessary for implementing the provisions of this Law.	The amendments to Article 32 are cosmetic in nature and rectify errors in the use of defined terms in the original English translation of the UAE Commercial Agency Law.

The enactment of Federal Law No. 11 of 2020 represents the most significant change to the UAE Commercial Agency Law since 2010. This latest amendment constitutes a milestone in encouraging local companies to access the financial markets for additional funding and investment, which in turn, should act as a stimulus to the local financial markets.

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Voluntary suspension of trade licence

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In the United Arab Emirates the option of voluntary suspension of trade licenses is offered by a number of licensing authorities to business owners undergoing temporary financial difficulties that prevent them from being able to continue operating in the normal course. The option is availed mainly by individual establishments and limited liability companies.

The first section of this article will tackle the concept of and conditions for temporary suspension, and the second section will focus on the effects and termination of temporary suspension of a licence.

The concept of and conditions for temporary suspension

The concept of temporary suspension of a trade licence is generally similar across all licensing authorities that offer the service. The conditions and procedures for applying for a temporary suspension are also usually similar, but with differences in the detail.

The concept of temporary suspension

The temporary suspension of a licence is commonly recognised as an administrative measure which the licensing authorities have put in place to help investors who face temporary difficulties that prevent them from being able to continue business operations and meet licensing expenses over a certain period of time. The temporary suspension option allows investors to suspend their business operations for a limited period of time without having to pay licensing and

operating expenses. At the same time, investors are able to maintain their business track record and rights already acquired in the course of business, including their trade name, without incurring any fines upon the resumption of normal operations. The duration of suspension varies among authorities. Some allow up to a year while others allow up to five years.

Conditions for temporary suspension

The conditions and procedures for applying for approval to temporarily suspend a licence are essentially similar across the various licensing authorities with some minor differences. The basic conditions can be summarised as follows:

- a letter from the owner of the individual establishment addressed to the licensing authority requesting a temporary suspension for a specific period of time, or minutes of a partners' meeting, if the establishment is a limited liability company;
- a copy of the establishment's licence;
- a letter from the Department of Human Resources and Emiratisation stating that there are no residence visas under the establishment's sponsorship;
- payment of the fee for the required approval. The fee differs among licensing authorities, but it is generally a nominal amount;
- some authorities may request a "release" from the owner of the leased premises (the establishment's registered office) to avoid potential future complications should the establishment owner fail to timely file an application to reactivate the licence after the temporary suspension ends; and
- additional approvals may be required for establishments that are subject to other regulatory authorities, in addition to the relevant licensing authority, such as healthcare establishments that are subject to the Health Authority and establishments with fleets of vehicles that are subject to the RTA.

The effects and termination of temporary suspension of a licence

The relevant authority's approval of the investor's application for temporary suspension of a licence has a number of positive effects for the investor. Firstly, the licensing authority would have provided the investor with a safe exit from the temporary financial difficulties being faced. Secondly, the investor may, during or after the suspension, apply to reactivate the licence and return to normal business operations without incurring any financial costs or additional fees.

Effects of temporary suspension

The main effects of temporary suspension of a licence are as follows:

- the licence is suspended, barring the establishment from carrying on any business activity during the suspension period;
- the suspension is valid for the period of temporary suspension indicated on the application for temporary suspension, as approved by the licensing authority. Permitted suspension periods vary among authorities and range from one to five years;
- the investor may apply to reactivate the trade licence and end the temporary suspension at any time, even before the end of the approved suspension period. The investor may also apply to renew the suspension at the end of its specified period. A renewal period cannot exceed the maximum period specified by the relevant licensing authority;
- the establishment retains proprietary control of its trade name, barring other investors from using it before the relevant licensing authority;
- the establishment is not required to hold a current lease for its registered office during the period of temporary suspension and all utility connections may be disconnected; and
- the establishment may not retain any staff or apply for any residence visas under its sponsorship during the suspension period.

The temporary suspension measure also has positive effects for the licensing authority. As a smart solution, the relevant authority uses the measure to retain investors who provide significant contributions to liquidity and sustainable economic growth in the UAE without the risk of losing their existing privileges.

Termination of temporary suspension

The procedure for ending a temporary suspension varies according to the economic situation of the investor. An investor who manages to recover from a financial setback before the end of the suspension period may apply to the licensing authority for the reactivation and renewal of his licence. The investor would have to enclose, with the application, a new lease for the registered office and satisfy all the other general requirements, as well as pay the usual renewal fee (but no additional fees). This procedure also applies to investors who apply to renew their licenses at the end of the period of temporary suspension. If, on the other hand, an investor's financial setback lasts beyond the approved maximum period of temporary suspension, the investor should then proceed with the formalities required to cancel his or her licence before the relevant licensing authority, according to the legal form he or she is licensed to operate under and without incurring any additional financial costs. Failure to complete these formalities will result in the fines usually payable for not renewing the licence.

Conclusion

The option of temporarily suspending a licence can be described as a stop gap solution to help investors overcome temporary setbacks in business, through cost-effective mitigation measures over a fixed period of time during which the establishment would continue to exist as a legal entity positioned to directly and promptly resume business operations after the setback. The relevant authorities, in offering a temporary suspension of a licence, take into particular account the position of investors and the issues they face due to fluctuations in the local and external markets, as well as supply and demand shifts in the market, and aim to help investors to return to financial stability and resume their operations. While the formalities and conditions attached to the licence suspension application vary from one licensing authority to another, the concept and general conditions are the same.

Voluntary suspension of a trade licence allows investors to stop their business operations for a limited period of time, without having to pay licensing and operating expenses.

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Remedies for shareholders in the company law of the UAE and the DIFC

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It is a settled principle under many legal systems that a company is a separate legal person distinct from its shareholders, embodied in the well-known concept of the corporate veil. Accordingly, the company is the proper claimant in an action where a wrong has been done to it. A shareholder is not usually permitted to sue where a wrong is done to the company of which he or she is a member, or to claim damages for that loss (known in English law as the rule against reflective loss).

It is also settled law in many jurisdictions that the company shall run its affairs through meetings of its shareholders and the board of directors, by virtue of the matrix of power provided in the company's memorandum and articles of association ('AOA') and the law under which the company is incorporated.

However, there are certain events where a shareholder can bring an action, for instance if the company is unable or unwilling to. This type of action is described in English law as a derivative claim because the shareholder's right to sue is not personal to him or her but derived from the right to sue which is vested in the company. Furthermore, in exceptional circumstances the court can grant relief where the affairs of a company are threatened to be or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally, or some part of its members.

There is a distinction between a shareholder's personal right to enforce his or her rights under the company's AOA and the shareholder's right to bring a derivative claim or an unfair prejudice claim, which this article considers. It also addresses the events and the prerequisites necessary for a shareholder to file a derivative claim and an unfair prejudice claim under the UAE Commercial Companies Law ('CCL') and the DIFC Companies Law (DIFC Law No.5 of 2018 as amended).

Shareholders' personal rights under a company's AOA in UAE law

In broad terms, in UAE law a shareholder has, amongst others, the right to vote at shareholders' meetings, receive dividends once declared, and share in surplus capital if the company is wound up. When a shareholder sues to enforce his or her rights under the AOA or the shareholders' agreement as the case may be, he or she is effectively bringing an action for breach of contract. Any judgment he or she obtains will be directly enforceable by him or her and binding on the company.

There are two dominant examples for enforcing a shareholder's personal rights under UAE law:

Example one: where the company defaults on the repayment of a loan or payments advanced by the shareholder. In this case, the shareholder can bring a claim against the company by invoking the general rules in the UAE's respective laws. Unless the parties agree to the contrary, the shareholder is freed from any restrictions provided in the CCL or the AOA, as long as, he or she is establishing his or her claim on the breach of contract event.

Example two: where the company refrains from distributing declared profits. In this case, the shareholder can initiate a claim against the company claiming for the undistributed profits. This claim may also be instituted against the company's director, where they commit an act of gross negligence and/or a serious mistake.

Article 8 of the CCL provides that *"A Company is a contract whereby two or more persons agree to participate in an economic profit making venture by contributing a share of capital or work and splitting among themselves the profit or loss resulting from the venture."*

In this regard, the Dubai Court of Cassation held that *"It is settled in this Court that a company's profit and loss are determined only once a year, at the end of its financial year, according to its balance sheet. If the company has made a profit, each partner's share of the profit is then determined as an amount standing to his credit which the company must pay him. Consequently, each partner has a right to claim, from the company, accumulated profit from previous years based on the company's balance sheets for those years. Accordingly, the fact that no balance sheets had been prepared for previous years would not preclude a partner from claiming his profit if it is proven that the company has made a profit for the years in question. Indeed, entitlement to profit is recognized when profit is actually realized, not when a balance sheet is prepared."* (Dubai Cassation Judgment No 1049 of 2018; 13 October 2019).

A prejudiced shareholder is not entitled to sue on behalf of the company.

Unfair prejudice claims in UAE law

Article 164 of the CCL, headed "Acts Harmful to the Interests of the Company", entitles a shareholder holding at least five per cent of the company's shares, who believes that the affairs of the company are being or have been conducted to the detriment of the interests of all or any of the shareholders, or that the company intends to commit an act or omission that may prejudice their interest, to submit an application to the authority to issue appropriate decisions at its own discretion. If the authority denies the application or the application is not considered within 30 working days, the shareholder shall be entitled to have recourse to the competent court within ten days from the date when the application was declined or that deadline expired, as the case may be. The court may then issue a judgment to either annul the act

or omission that forms the subject matter of the application, or to order the company to continue doing an act from which the company has refrained.

Similarly, Article 149 of the DIFC Companies Law, "Orders in Event of Unfair Prejudice", affords a protection to prejudiced shareholders. Moreover, it grants the court wider authority to entertain such applications.

It provides that:

Where a Company's affairs are being or have been conducted in a manner whereby the conduct is unfairly prejudicial to the interests of its Shareholders generally or of one or more Shareholders, or an actual or proposed act or omission of the Company (including an act or omission on its behalf) is or would be so prejudicial, the Court may, on application of one or more Shareholders of the Company, make one or more of the following orders:

1. an order regulating the conduct of the Company's affairs in the future;
2. an order requiring a person to do, or refrain from doing, any act or thing;
3. an order authorising proceedings to be brought in the name of and on behalf of the Company by such person or persons and on such terms as the Court may direct;
4. an order providing for the purchase of the rights of any Shareholders of the Company by other Shareholders or by the Company itself and, in the case of a purchase by the Company itself, the reduction of the Company's capital accounts accordingly; or
5. any other order as the Court sees fit.

It is clear that Article 149 grants the DIFC Courts a very wide discretion to deal with the alleged prejudice, as the Court may direct any order as it sees fit. In practice, however, the Court would usually order that the minority shareholding is bought out at a fair market value by the respondent shareholders. The position is quite different for claims under Article 164 of the CCL. In such claims, the competent court's discretion is limited to granting declaratory reliefs for determining the merits in question.

Article 149 also waives the prerequisites mandated by Article 164 of the CCL. There is no minimum threshold of the number of shares owned by the claimant shareholder and the application may be filed directly with the court without having to wait for the competent authority's directions.

Derivative claims under UAE law

Article 166 of the CCL states that *"Each shareholder may individually pursue a liability claim against the board of directors of the Company if not filed by the Company, provided that the error may cause damage to him personally as a shareholder and that such shareholder shall notify the Company of his intention to pursue the claim. Every provision in the articles of association of the Company to the contrary shall be invalid."*

The Dubai Cassation Court has ruled in this regard that *"the shareholder in a limited liability company is entitled to claim by his own name against the director of the company for the compensation for himself or the company in case a wrongdoing made by the director in the company's management which resulted in damages suffered by the shareholder or the company, in the event that the company failed to initiate this claim"* (Judgment 159 of 2015).

This claim under Article 166 is a liability claim against the company's director(s), where the relief sought shall be limited to damages. Accordingly, it is not permissible for the claimant shareholder to claim for a specific performance or declaratory relief. Moreover, such a claim shall not be instituted against a third party even if such party has a contractual relationship with the company.

Personal damage

There is no precise definition of personal (special) damage referred to in Article 166 of the CCL. There is no case law that deals with this issue. However, more likely, special damage refers to the loss of profit that the claimant shareholder has sustained as a result of the alleged mistake. In any event, assessment of the claimed damages is subject to the court's sole discretion.

Remedies available under UAE and DIFC law for a shareholder where the company fails to take action against a defaulting contracting party

As explained above, pursuant to Article 71 of CCL and Article 9 of the DIFC Companies Law a company shall have a distinct legal personality from that of its shareholders. Moreover, pursuant to Articles 83, 84/2 and 155 of CCL and Articles 20 and 21 of the DIFC Companies Law a director of the company shall have the capacity to represent the company and enter into binding contracts.

DIFC Courts have unfettered discretion to entertain the prejudiced shareholder application under Art. 149 of DIFC Companies Law.

Accordingly, a company's shareholder has no capacity to institute a legal action against a defaulting party which has a contractual relationship with the company. Nevertheless, such shareholder may cause the company to pursue such a legal action by virtue of an application pursuant to the aforementioned Articles 164 of CCL and 149 of DIFC Companies Law, where they will seek a court order enforcing the company to take an action or refrain from doing an action.

As a general rule, courts are reluctant to interfere in companies' affairs, which shall run by the general assembly and the directors. Therefore, a strict burden of proof lies with the claimant shareholder who will have to establish that the directors are acting in bad faith and/or committed a gross negligence, the act or omission in question is detrimental to the company's interest, and that the relief sought is the correct action which a prudent person would seek.

In sum, an aggrieved shareholder may, amongst others, take any of the following actions:

1. a shareholder can file a claim before the competent court seeking to enforce their rights under the respective contract e.g. recovery of the unpaid debts advanced by the claimant shareholder etc.
2. a shareholder can file a liability claim under Article 166 of CCL against the company's director(s) (not third parties), where the relief sought will be limited to damages; and
3. a shareholder holding at least five per cent of the company's shares, can file a claim under Article 164 of CCL (or Article 149 of DIFC Companies Law where the DIFC is the regulatory authority), where the company's affairs are being conducted to the detriment of the shareholder(s).

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Rental value reduction and remission according to Omani Civil Transactions Law in light of COVID-19

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Tenants affected by the coronavirus pandemic often enquire about the possibility of reducing or remitting rents. In this regard, the pandemic is governed by two theories: emergencies ('Emergencies'); and force majeure ('Force Majeure'). Most of the affected cases constitute Emergencies, under the first theory while some cases may constitute Force Majeure. In order to identify which doctrine applies a distinction must be made between the two. Such a distinction shall be made by clarifying the impact of the pandemic on the contractual obligations of the landlord and the tenant. Whereas, the tenancy contract is a continuous contract binding on both parties, under which, the landlord shall lease the premises to the tenant, and the tenant shall pay the agreed rental value. If the performance of the contractual obligations is oppressive and causes a severe loss, however, this case amounts to an Emergency. If performance of the contractual obligations becomes impossible, this falls under Force Majeure. This distinction is very important, because the consequences of both theories is to destabilise the binding force of the contract but to differing extents in terms of reducing the rental value in case of Emergency and remitting the rental value in case of Force Majeure.

To identify the pandemic's effects on tenancy contracts, we categorise the temporary cases into three types:

1. The places covered by the temporary partial closure decision (such as the closure of food courts in some sections of malls)

This case is governed by the principle of Emergency that gives the tenant the right to reduce the rental value, by agreement with the landlord or a court order. This will inevitably restore the balance between the corresponding obligations of the Tenant and the Landlord, and the obligation will be reasonably reinstated, as stipulated in Article (159) of the Omani Civil Transactions Law:

> *"If exceptional circumstances of a public nature that could not have been foreseen at the time of the contract occur, as a result of which performance of a contract becomes oppressive for a party, but not necessarily impossible, the judge has discretion, after weighing the interests of each party, to reduce the obligation to a reasonable level if justice so requires. Any agreement to the contrary shall be invalid."*

In light of the partial closure decision, it is not impossible to perform the obligation, but it becomes oppressive. An oppressive obligation is a difficult obligation but not an impossible one. Partial closure of the leased premises would add difficulty and oppression to the tenant's performance of their obligations, i.e. payment of the rental value, as he or she is unable to fully and normally benefit from the leased premises, which results in a severe loss, rather than customary loss, to the tenant. The theory of Emergency may be applied if a severe loss is sustained. The burden lies with the tenant to prove the alleged loss.

2. The places covered by the temporary total closure decision (such as clothing stores and barbershops)

The optimal doctrine to be applied to this case is the Force Majeure Theory, as represented in the temporary impossibility stipulated in Article (172-2) of the Civil Transactions Law:

> *"1- In bilateral contracts, if force majeure occurs rendering the performance of the obligation impossible, the corresponding obligation shall be extinguished, and the contract shall automatically be revoked.*
>
> *2- If the impossibility is partial, the amount covering the part that cannot be performed shall be extinguished, and this provision applies to the temporary impossibility in continuous contracts. In these two cases, the creditor may terminate the contract, provided that the debtor shall be notified of such termination".*

Performance of contractual obligations in this case is transformed from the state of oppression to the state of impossibility. It is a temporary impossibility as described in the provision mentioned above, as the closure decision is temporary as opposed to permanent. This impossibility is closely related to the utilisation/non-utilisation of the leased premises, as the tenancy contract is one of the utility contracts. When the leased premises are fully closed, it will be then impossible for the landlord to perform his or her obligation, i.e. enabling the tenant to use the leased premises, so that the landlord cannot perform its duties as they are considered impossible obligations. In this case, the tenant has one of the two options:

First option: temporary suspension of the tenancy contract

The tenant is entitled to suspend the tenancy contract by agreement or litigation, such that the rental value related to the contract suspension should be extinguished, on the basis of temporary impossibility, i.e. the amount of the unperformed obligation is extinguished. Such extinguishment remains until the impossibility is removed, while termination may, rather than must, be made. This is an exception to the original rule stipulating that the contract must be terminated if Force Majeure arises. Potentially this has two effects as confirmed by the Omani High Court in Principle (13 – Cassation Appeal No. 92/2004), as follows:

"Impossibility of obligation performance due to force majeure must be a final impossibility until the contract is annulled by the force of law. However, if the impossibility is temporary, the contract shall be only suspended until this impossibility is removed. The standard, according to the general principles in the contracts, is that the contract shall be revoked when a force majeure rendering the performance of obligation arising out thereof impossible occurs".

Second option: termination of the tenancy contract unilaterally without compensation

Force Majeure gives the tenant the right to terminate the tenancy contract unilaterally without being required to compensate the landlord for such termination, provided that the landlord is notified of such termination. At such time, the rental value should be extinguished as of the date of notification.

3. The places that are not covered by any closure decision (such as foodstuffs' stores and auto repair shops)

This case is consistent with the first case regarding the application of the Emergency theory, but it is unlike the previous two cases with regard to the utilisation. The tenant, in this case, fully utilises the leased premises, but, at the same time, the tenant does not gain the usual income in return for such utilisation, due to the pandemic impacting consumers' demand for various types of life services, and creating a recession in the market, rendering the tenant unable to pay the full rental value because of the severe loss sustained. Due to such loss, the tenant is entitled to request a reasonable reduction in the rental value, whether by agreement with the landlord or by recourse to the court, provided that the tenant shall prove that he or she sustained a severe loss, pursuant to the provision of Article (159) of the Omani Civil Transactions Law.

Conclusion

- Corona pandemic constitutes an Emergency for most tenancy contracts affected by it and a Force Majeure for some tenancy contracts;
- in the case of a partial closure, the tenant has the right to reduce the rental value by agreement or litigation, as having only partially utilised the leased premises, where the tenant's obligation to pay the initially agreed rental value became oppressive in addition to the tenant sustaining severe loss. It should be noted that the burden lies with the tenant to prove the same, according to the emergency theory stipulated in Article (159) of the Omani Civil Transactions Law;
- in the case of a total closure, the tenant has the right to temporarily suspend or terminate the tenancy contract, on the grounds that the tenant did not utilise the leased premises, which renders the performance of the contractual obligations temporarily impossible, in accordance with the Force Majeure theory stipulated in Article (172) of the Civil Transactions Law, which is fully set out in the principle of the Omani High Court (13 – Cassation Appeal No. 92/2004);
- in the case of non-closure, despite the tenant fully utilising the leased premises, the tenant has the right to request a reduction in rent as the pandemic rendered the tenant unable to pay the rental value which, in turn, caused severe loss to the tenant. It should be noted that the burden lies with the tenant to prove such loss, according to the Emergency theory stipulated in Article (159) of the Omani Civil Transactions Law.

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New restrictions on GCC nationals owning properties in Bahrain and Oman

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The Kingdom of Bahrain and Sultanate of Oman have introduced new restrictions on GCC nationals in relation to owning real property rights and it is anticipated that these changes may create some difficulties for GCC nationals who have already invested in real estate in Bahrain and Oman.

Kingdom of Bahrain

On 29 June 2020, King Hamad bin Issa Al Khalifa issued Law Number 17 of 2020 amending Article 1 of Bylaw Number 40 of 1999 Concerning the Ownership of GCC Nationals of Buildings and Vacant Lands in Bahrain ('Law No. 17').

Article 1 of Law No.17 states that the GCC Nationals, following the approval of the Minister of Justice, Islamic Affairs and Awqaf, shall have the right to own buildings and vacant lands in areas that are designated by the Urban Planning of Bahrain by any means of disposition in accordance with the law, wills, or inheritance rules, and this should be within the rules and regulations as set out by the High Committee of Urban Planning, and the decisions issued by the Minister of Justice, Islamic Affairs and Awqaf.

The above Article in Law No. 17 amends the original text of Article 1 of Bylaw Number 40 of 1999 Concerning the Ownership of GCC Nationals of Buildings and Vacant Lands in Bahrain which originally stated that all GCC nationals shall have the right to own buildings and vacant lands in any area in Bahrain, and such GCC nationals shall be treated as Bahraini nationals in that regard.

Consequences of Law No. 17

It is evident that, in order to own properties in Bahrain, GCC nationals must obtain a prior approval from the Minister of Justice, Islamic Affairs and Awqaf for any future property acquisitions. We will continue to investigate the rules and regulations for obtaining the approvals for GCC nationals to own properties in Bahrain.

Article 3 of Law No. 17 states that this law will be effective from the next business day following its publication in the official gazette on 2 July 2020, and this means it will not affect the property ownership of any properties owned by GCC nationals in Bahrain prior to the issuance of Law No. 17.

Sultanate of Oman

On 4 June 2020, Saif bin Mohammed bin Saif Alshibibi, the Minister of Housing, issued Ministerial Decision Number 292 of 2020 Issuing Implementing Regulations of Law Number 29 of 2018 Concerning Restrictions on Non-Omani Nationals to Own Plots and Buildings in Certain Areas ('Ministerial Decision').

The Ministerial Decision sets out the implementing provisions for Law Number 29 of 2018 Concerning Restrictions on Non-Omani Nationals to Own Plots and Buildings in Certain Areas ('Law No. 29), which introduced stringent restrictions on property ownership in Oman. In this regard, Article 1 of Law No. 29 states that the following areas are restricted to ownership by Omani nationals only:

1. *Dhofar (except Salalah), Musandam, Buraimi, Al Dhahirah and Al Wusta;*
2. *Liwa, Shinas and Masirah;*
3. *Green Mountain and Jabal Shams, and any other mountain which has strategic importance as determined by the relevant authorities;*
4. *Islands;*
5. *areas that are adjacent to palaces, security agencies, military sites, and areas determined by the relevant authorities; and*
6. *historical and archaeological sites, and sites determined by the relevant authorities.*

Furthermore, Article 2 of Law No. 29 states that all non-Omani nationals shall be restricted from owning buildings and plots that are designated for agricultural use in all areas within Oman.

GCC nationals wishing to own properties in Bahrain are now required to obtain prior approval from the Minister of Justice, Islamic Affairs and Awqaf for any future property acquisitions.

Consequences of Law No. 29

The enforcement of Law No. 29 in Oman is retrospective pursuant to Article 8 and as a direct result of this retrospective enforcement, many GCC nationals in Oman must rectify their position within two years from the effective date of Law No. 29 (11 November 2018), and must sell their buildings and plots located within the restricted areas listed in Articles 1 and 2 of Law No. 29 to Omani nationals through any legal means.

The above rectification period of two years from the effective date of Law No. 29 is renewable for one year only, and this renewal is subject to the approval of the Minister of Housing.

In the case of a failure to adhere to Article 5, the judicial committees, based on the request of the Minister of Housing, have the authority to proceed with the expropriation of the properties located within the restricted areas and allocate the same to Omani nationals and auction them exclusively in favour of Omani nationals,

all non-Omani nationals are now restricted from owning buildings and plots that are designated for agricultural use in all areas within Oman.

where the proceeds of the auction will be returned to the GCC national who previously owned the property prior to the auction.

Any disposal that contravenes the provisions of Law No. 29 shall be null and void. In this regard, Article 9 of Law No. 29 states: *"Any disposition that is against the provisions of this law shall be null and void, and any person of interest has the right to request the court for the annulment of such disposition, and the court must at its own accord annul any such dispositions, and restore the related parties to the same position before contracting".*

Penalties under Law No. 29

Article 10 of Law No. 29 states that without limiting any more severe penalty stated in any other law in force, the following penalties shall apply:

1. *Any person who deliberately concludes an agreement or procedure or deposition against the provisions of Law No. 29 shall be subject to imprisonment for a period not less than three (3) months and not more than one (1) year, and a fine that is not less than OMR 1,000 and shall not exceed OMR 3,000 or one of these aforementioned penalties.*
2. *Any person who achieves the above crime through means of fraud shall be subject to imprisonment for a period not less than six (6) months and not more than two (2) years, and a fine that is not less than OMR 2,000 and shall not exceed OMR 5,000 or one of these aforementioned penalties.*

The recent changes in laws in some Gulf countries relating to property ownership by GCC nationals is a step backwards to having an open real estate market with less restrictions in the Gulf countries and this has put the United Arab Emirates and, in particular Dubai at the forefront making Dubai more attractive to GCC nationals for investment compared to other GCC countries where investment restrictions are more strict.

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Ministry of Housing issues Implementing Regulation for the 2020 regulation on Jointly Owned Property

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In March 2020, the Kingdom of Saudi Arabia, as part of its 2030 vision, introduced Regulation No. 440 on the Regulation of the Ownership, Subdivision and Management of Real Estate Units ('New JOP Regulation'). The introduction of the New JOP Regulation, which came into effect on 9 September 2020, represents the first significant overhaul (in over 17 years) of the regulations relating to jointly owned property and some key elements of the New JOP Regulation were set out in our article in the April 2020 edition of Law Update.

The New JOP Regulation contemplates, at Article 21, the Ministry of Housing issuing the implementing regulation, which will supplement the New JOP Regulation and provide further clarity on the interpretation and application of the New JOP Regulation ('Implementing Regulation'). On 14 June 2020 (corresponding to 22 Shawwal 1441 H), the Ministry of Housing introduced the Implementing Regulation by virtue of Ministerial Resolution No 168, with the Implementing Regulation to be in full force and effect from 9 September 2020 (being 180 days from the date that the New JOP Regulation was published in the Official Gazette).

What follows is a high level overview of some key concepts from the Implementing Regulation of which all developers, purchasers and owners should be aware.

Disclosure regime

The New JOP Regulation imposes a mandatory disclosure regime that must be complied with by developers when selling a unit in a jointly owned property. The Implementing Regulation clarifies, in more detail, the information required to be disclosed in the disclosure statement and ensures that a purchaser is aware of the specifications of the unit, its general rights and obligations (as an eventual owner of a unit in the jointly owned development) and other general matters pertaining to the operation and management of the jointly owned development. The disclosure statement would include, at least the following information:

- the address of the unit;
- the area of the unit;
- the plan of the unit;
- the units share of the common areas;
- the unit's appurtenant (if any);
- fixed and movable items (if any) of the unit;
- a copy of the constitution for the Owners Association ('OA') and the constitution for the community association (if applicable) which would set out matters pertaining to the administration of the OA and the operation and management of the jointly owned development ('Constitution') along with a copy of the general assembly resolutions (if any);
- any existing mortgage, usufruct and leases related to the unit, jointly owned development or real estate community (if any);
- any restrictions on the use of the common areas of the jointly owned development; and
- the anticipated construction, commencement and completion date, in case of selling or leasing off plan.

The Implementing Regulation indicates that the Real Estate General Authority ('REGA') will issue the form(s) for such disclosure and as at the date of the writing, the form(s) are yet to be issued by REGA.

It is important that all developers are aware of the disclosure requirements in this regard as failure to comply with this regime could provide a purchaser with a right to terminate the sale and purchase agreement.

Registration of owners' association

The Implementing Regulation, at Article 10(3), prescribes the requirements that must be satisfied to enable an OA or community association to be registered with REGA. At the time of registration, the OA or community association must provide REGA with:

- details of the owners of the units in the jointly owned development;
- details of the jointly owned development or real estate community, as required and as requested by REGA, which includes the national address and the title deed number;
- the Constitution for the jointly owned development;
- the names of the members forming the general assembly at the time of registration; and
- any other information or documents required by REGA.

REGA shall maintain a register for the registration of OAs and community associations and Article 11 of the Implementing Regulation reinforces the positon under Article 12(2) of the New JOP Regulation, whereby an OA will only gain legal capacity and financial liability upon its registration with REGA. As such, it is crucial that an OA is registered with REGA as soon as possible so as to ensure the OA can perform its intended functions under the New JOP Regulation.

The introduction of the New JOP Regulation, which will came into effect on 9 September 2020 represents the first significant overhaul (in over 17 years) of the regulations relating to jointly owned property.

Role of REGA

Amongst other matters, REGA will be responsible for organising the works and affairs of the OA and these may include:

- issuing any resolutions regarding the governance of OAs, with such resolutions to be binding on all OAs; and
- providing general support and advice to OAs.

REGA shall also issue a technical guide that details the technical specifications and standards regarding the subdivision and re-subdivision of real estate and real estate units.

Constitution

In addition to the requirements detailed in Article 12(4) of the New JOP Regulation, the Implementing Regulation prescribes additional matters that must be appropriately dealt with in the Constitution for the jointly owned development, such as:

- the process for the calling of a meeting of the general assembly and the minimum quorum requirements;
- provisions regulating the management and use of the common areas;
- procedures for amending the Constitution;
- general rules and regulations relating to the conduct of owners and occupiers in the jointly owned development; and
- the method for determining an owner's contribution towards the costs of the OA (i.e. the service charges), including the mechanism for payment of such amounts.

As outlined above, the Constitution is required to be prepared and provided to REGA to enable the OA to be registered.

Article 17 of the Implementing Regulation confirms that by owning a unit in the jointly owned development, that owner is deemed to have approved the Constitution and agreed to adhere to the decisions of the general assembly.

Appointment of manager

The Implementing Regulation confirms the requirement for a manager to be appointed to manage the jointly owned development and the right of the developer to solely appoint the manager provided that:

- the developer commits to retaining ownership in 10 per cent of the units;
- the total number of units in the jointly owned development is more than 100; and
- the developer otherwise complies with any other requirements of REGA.

Once appointed, the manager, in performing its duties, must act honestly and sincerely, taking into account the interests of the jointly owned development.

It is important that all developers are aware of the disclosure requirements in this regard as failure to comply with this regime could provide a purchaser with a right to terminate the sale and purchase agreement.

Auditor

The Implementing Regulation details when an auditor must be appointed for a jointly owned development and details the role and responsibilities of the appointed auditor.

Maintenance and repair

The Implementing Regulation provides sufficient rights for works to be undertaken in a unit, if such works are necessary to preserve the integrity of, or improve the use of, or to maintain, the jointly owned development, whilst also detailing the responsibility for payment of the costs associated with undertaking such works and the compensation payable should an owner be required to vacate their unit during the period of works.

Moving forward

The Implementing Regulation provides a useful insight into how the New JOP Regulation is intended to operate and how it will be applied in practice. As the New JOP Regulation and the Implementing Regulation are relatively fresh, Al Tamimi & Company has been working very closely with a number of master developers with respect to the implementation of the New JOP Regulation and is aware of a number of practical issues which require careful consideration. Additionally, Al Tamimi has well established relationships with REGA and other authorities, which enables us to seek clarity on certain matters, first hand, without delay.

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The 2020 Education sector: hit fast forward on the remote!

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Welcome to our Law Update Education 2020 edition.

We were hoping to shamelessly flog the '2020 vision' pun but then COVID-19 happened. There is no point in sugar-coating it, 2020 has been an horrendous year for the sector as a whole, and in particular, for sub-sectors like nurseries; but there are green shoots emerging.

Before I get into the nitty gritty, you will have seen a number of creative works of art in this edition... With the Education sector forced to 'hit fast forward on the remote' due to the pandemic, we were thrust into home schooling with the implementation of remote learning solutions globally. For those of you with children, you have probably been taken back in time helping out on artistic projects you thought were a distant memory whilst trying to juggle working remotely. In this edition, we wanted to showcase some of the works of art created by the very talented 'Children of Al Tamimi' during the pandemic. A big thanks to my colleagues around the region for sharing so much wonderful content – we hope you enjoy it!

During the summer we ran a series of webinars - EdWeb2020 - where industry experts gave their thoughts on the issues affecting the industry (K-12 and Higher Education focus) ranging from disruption, new models of learning, lessons learned, digital transformation and EdTech, financing/refinancing and landlord-tenant considerations. The links to those webinars are included in this issue as are 'one minute read' key takeaways.

Our Education team has been busy advising education providers on the inevitable consequences of COVID-19 across a range of topics from employment, health and safety, EdTech, M&A and refinancing, across our geographies in MENA.

Notwithstanding the doom and gloom, we remain very bullish about the key emerging markets of Egypt and Saudi Arabia. In fact, the Egypt market remains quite active given the market there is less dependent on expatriates/external cash. For Saudi Arabia, activity levels have fallen but it remains 'the next big thing' with many encouraging developments which make it attractive for investment; it is a case of 2020 being a pause button rather than stop button for that market.

In this edition we look at a range of eclectic topics including PPP in education, a topic we looked at before but which merits an update given what is happening in that space.

Our real estate team looks at the current state of the UAE market regarding educational assets and identifies some possible near to mid-term future trends.

We could not possibly issue this edition without having a piece on EdTech. We also have interesting articles on plagiarism and cyberbullying, unfortunately both of which are highly topical right now.

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

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Impact of COVID-19 on education in Egypt: a new world order in the education realm

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Ever since the COVID-19 Virus hit Egypt, the Egyptian Government has undertaken a number of strict measures to prevent the rapid spread of the disease. With approximately twenty million students enrolled in schools and universities across the country, the Education sector has been one of the sectors that has been most affected by the pandemic.

Precautionary measures

In March 2020, the Egyptian Government decided to shut down all schools and universities and have all teaching undertaken virtually.

The Egyptian Ministry of Education launched an online portal where all the teaching material was uploaded and where the students submit their work to be reviewed by teachers.

On the other hand, the Ministry of Higher Education ensured that all lectures were taught online and allowed each faculty to mandate the method of teaching.

Examination procedures

In order to minimise physical interaction between students, the Egyptian Government took additional steps pertaining to the examination methods to be applied.

As a matter of fact, the Government decided to introduce new examination methods across the educational system. Save for graduating students, both school and university students were required to submit research papers based on the material taught in class and online.

The decision to alter the examination methods comes as part of the implementation of the Government's "Vision 2030", which has the modernisation of the educational systems as one of its key pillars.

With approximately twenty million students enrolled in schools and universities across the country, the Education sector has been one of the sectors that has been most affected by the pandemic.

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Challenges to the online system

While the increased use of technology across the different educational levels represents a milestone in Egypt's strategy to improve its educational systems, it also gives rise to various issues and challenges, namely legal ones.

Firstly, with all the teaching material being offered online, it has become more accessible to a wider audience. This places such material at a higher risk of being misappropriated, having its intellectual property rights infringed or reproduced illegally.

Secondly, both the students' and teachers' data being shared online is at risk of being appropriated or misused. In fact, students' records and research papers constitute confidential information that, if leaked, could pose a serious problem for the Government which is responsible for safeguarding this sensitive information.

In conclusion, although e-learning has been introduced as a temporary solution in light of COVID-19, it has proven to be a success, and as such is likely going to remain part of the education system, even once the pandemic ends. That being said, the legislative framework needs to be updated in order to conform with the requirements of this new system. More specifically, the Government should work on promulgating new laws that regulate e-learning platforms, protect students' data and guarantee that the intellectual property rights of teachers and educational institutions are preserved.

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Education PPP across MENA

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> Alone we can do so little; together we can do so much.
> *-Helen Keller*

'All governments have limited resources, not only financially but also in terms of human resources, political capital and the ability to manage multiple competing priorities. Developing infrastructure is a complex and lengthy process that places demands on these resources. Procuring by Public Private Partnerships ('PPP') relieves government of some of the burden of acting as developer and allows a greater focus on core roles and responsibilities. For instance, PPPs allow governments to focus on the provision of … education, not the construction of … schools'.

This statement, from the Private Partnership Handbook published by the Organisation for Economic Cooperation and Development, is a neat summary of the driving motivation of the surge in PPPs across the MENA region over the past few years. Population growth, combined with burgeoning urbanisation, has increased demand exponentially for infrastructure across MENA, from airports, roads, water and energy to hospitals and schools. More than that, however, citizens are demanding, and governments are promising to deliver rising living standards and enhancements to the quality of the services they provide. An essential tenet of this is education, with people viewing a decent education as a right; no longer a privilege. This chimes true with regional development goals to upskill workforces, add value and accelerate economic output. However, the very high levels of investment required to deliver the promised improvement in education cannot be funded by the government alone, resulting in the emergence of PPP as a means of financing education development across MENA.

Population estimates give an indication of the scale of the challenge facing MENA governments. Total population across MENA is estimated to grow from around 330 million in 2020 to over 840 million by 2050. Improvements in economic output per capita have been lagging behind in MENA, meaning that there is an increasing funding gap for governments to plug. PPP is increasingly being used across the region as a means to finance growth in education provision.

MENA was a pioneer of PPP: the first ever PPP was established in 1854 to fund the development of the Suez Canal. More contemporarily, education PPPs have been utilised in Saudi Arabia, Qatar and the United Arab Emirates. There is a growing move towards the PPP model to finance education, with a focus on both quality of education provision, as well as quantity.

The basic structure of the PPPs across the region are similar. The government issues tenders for a project or bundle of projects, granting a concession to the private party/sponsor to build and/or operate the educational establishment, with the government undertaking to pay the private party over the life of the project. In education PPPs the payment can be linked to the number of students attending the school, college or university. The concession agreement allocates risks between the government and the private party, with the private party obtaining financing from lenders which, in turn, assess the potential risks associated with the project. This model offers governments certain advantages including avoiding the need to finance, upfront, the cost of building new schools and amortisation of payments over the concession period with payments being pegged to the achievement of key performance indicators. Significantly, in addition, it allows the government to utilise the expertise and qualities of expert education providers and thereby satisfy the objective of raising standards.

Historically, PPPs have had a mixed reputation, and the experience of education PPPs in Europe offer some cautionary tales. The most notorious examples are possibly in the United Kingdom, where Tony Blair's government used PPPs on a massive scale in the early 2000s to fund a boom in building new schools, colleges and other educational establishments, amongst other infrastructure investment. It was alleged that the terms of many of these PPPs did not fairly apportion risk and reward, with long term concession agreements guaranteeing returns for the private sector whilst placing much of the risk with the government. Official investigations have since concluded that the commercial terms agreed for the PPPs were deeply flawed: the UK Parliament's Treasury Select Committee stated in 2011 that PPP *"funding for new infrastructure, such as schools and hospitals, does not provide taxpayers with good value for money and stricter criteria should be introduced to govern its use"*. It would appear that governments and other organisations have taken these lessons on board, and a new generation of PPPs is being structured according to more robust and transparent principles which also promise greater accountability. The Organisation for Economic Cooperation and Development has published its 'Principles for Public Governance of Public-Private Partnerships' with the stated objective of ensuring that PPPs represent value for the public sector. New PPP laws being enacted in the MENA region and the terms of tenders do tend to indicate that governments are alive to the need to balance the need to expand education provision, but not at any long-term cost to the public sector.

Public private partnerships in education are becoming increasingly common across the MENA region. PPPs are enabling governments to meet their commitment to expand and improve education provision in a more cost-effective (and cashflow friendly) manner which takes advantage of the expertise of industry specialists.

Done properly, PPPs open up new markets to operators in those jurisdictions, attracting high quality teachers and other staff. For example, GEMS Education, which is one of the world's leading private education providers, currently operates 53 schools across Qatar, Egypt and United Arab Emirates, and last year bought Saudi Arabia's largest private education provider. The decentralisation inherent in PPPs means that delivery of education projects can be the responsibility of acknowledged experts, and thus removed from the bureaucracy of the state. Governments inevitably retain control over syllabuses, but delivery of the content is entrusted to organisations that have access to the latest education technology, resources and know-how.

Currently there are education PPP projects at bid or award stage in Saudi Arabia, Kuwait, Qatar and the United Arab Emirates. Oman recently enacted a new PPP law, as did Jordan and Qatar, with Egypt amending and updating its previous PPP framework. These all point to the increasing importance of the PPP model in education across MENA.

MENA countries are committed to meeting their shared development objectives of broadening and deepening education provision. Most of the countries are also aiming to make their economies less dependent on imported skills and experience, thereby requiring an enhanced focus on the quality and availability of education. Set against this background are the economic challenges thrown up by COVID-19 and the deep fiscal scars that it will leave for years to come, allied with falling revenues from the hydrocarbons industry. The Organisation for Economic Cooperation and Development has stated that *"work, knowledge and skills ... drive better jobs and better lives, generate prosperity and promote social inclusion."* Throw all of those considerations into the pot and it seems inevitable that governments across MENA will have no choice but to utilise PPPs to meet their education objectives.

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Digital transformation, accelerated: key technology legal and contract issues for UAE educators

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Schools, colleges and universities (together, 'Schools') are very busy this summer reviewing and developing their digital strategies. A big part of this will be procuring new technology as they build for a future where online learning will be a key component of the educational offering.

Online learning was a growing part of the education industry, whether K-12 home learning or online higher education courses before the pandemic, but the pandemic has accelerated that progress and moved it from a secondary teaching delivery model to a critical part of a school's offering. Those Schools that had already started their digital transformation journey before the pandemic were well positioned to move swiftly to a virtual teaching model. Other Schools had to scramble at the start of the pandemic to lift and shift from the physical to the virtual classroom, rapidly onboarding video conferencing and collaboration tools.

There are big questions over how education technology will be incorporated into the learning experience and educators are quick to point out that technology is only an enabler and will only be effective if properly located in an effective digital strategy and a learning centred approach. That said, technology is expensive, it takes time to procure, longer to implement successfully and needs to be used properly (by properly trained staff) to ensure a proper return on investment. Schools need to get their technology decisions right. It is difficult, and costly, to reverse technology decisions and Schools need to consider the need for their technology procurements to provide them with agility and flexibility. This article looks at some of the key issues with procuring new technologies, particularly as part of both time and business critical procurements.

Scope it right

The more time spent considering what technologies are the right fit for the school, the better. This is easier said than done at the moment, with the pandemic far from over and a new school year not far away. As a result, institutions need to prioritise the technologies and systems they need now. They need to understand if these are standalone systems or systems that will require lots of integration work into existing platforms, such as learning management systems (more on that below). Is it "off the shelf" and can it be up and running with little customisation or will it need to be customisation or configuration work? Does the technology or system need to scale and change with the institution's needs? If so, any development work, and its cost, needs to be factored in.

Focus on the contract

All this needs to be agreed and covered in the technology contract with the vendor. A clear project plan timeline with milestones and deliverables and penalties for failure to meet them needs to be agreed. Whilst time to implementation is key, time spent on the contract is equally important. Schools do not have huge technology budgets and money needs to be spent carefully. This makes the procurement and contracting process all the more important.

Elena, 5
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Make careful vendor choices

The choice of vendor is going to be key. The market for new "ed-tech" solutions is booming. Many are established technology vendors but there has been an explosion of new, small, specialist, vendors with niche solutions that have been key to supporting Schools during the pandemic, offering free trial periods or proofs of concepts and helping Schools triage their immediate technology needs. Many of the ed-tech vendors are established technology players. A lot of ed-tech vendors, though, are start-ups. Schools need to assess the long-term viability of these companies and then seek the necessary contractual protections if they decide to procure their technology – whether it is intellectual property rights (and protections), access to documentation and training, software escrow arrangements and/or access to skilled vendor personnel. Contracts need to have effective business continuity processes and dispute resolution provisions documented. Technology disputes are on the uptick as companies cut costs and technology vendors look to optimise revenues (often through customer auditing). Effective force majeure clauses are, of course, a must.

Consider the delivery model: on premise or managed service

For cost and other reasons, many Schools will be looking at managed services arrangements. As headcounts are reduced, whether as part of pandemic cost cutting measures or as part of an ongoing digital transformation strategy, managed services offerings and the move from budgeted capex to opex, is an attractive one, offering cloud based services and subscription based software. Many Schools may already be comfortable with a largely outsourced IT model, reducing their in-house IT teams. Managed service contracts, though, need careful review to ensure that the Schools get the service delivery they need whilst maintaining the agility to move to a new managed service provider, mitigate data and/or in-source all or part of the services. Service descriptions need to be properly detailed. Service level arrangements are key to ensuring Schools receive the services they need. Development time needs to carefully scoped. Governance and reporting arrangements are important to ensure that Schools build effective relationships with their managed service providers, closely monitor service delivery and proactively manage issues.

Putting it all together

Another key issue for Schools to consider is whether they are procuring a raft of small solutions that do different things but need to integrate with each other, or with core systems like the learning management system or core back office HR or finance systems to be effective. If a lot of integration is required, Schools need to ensure that the vendors are responsible for the integration work. Some Schools may look to systems integrators who will manage the full end-to-end integration process. Those systems integrators need to accept full responsibility for the delivery of multiple integrated systems and the contracts need to clearly set out these requirements and ensure effective risk transfer for delivery to the systems integrator. As above, scoping the requirements (including the integration requirements) is key.

Focus on data

One of the key benefits that will come from greater technology adoption by Schools will be the amount of data collected on students. Every touchpoint of a student's journey through a school can be captured and analysed. This will be hugely beneficial both from a teaching perspective and for the schools themselves. A rich source of data can be analysed and monetised [Unlocking the value in data: successfully implementing compliant data monetisation strategies] but this needs to collected, used, transferred and stored according to applicable laws and regulations, particularly if the data constitutes personal data. Any data processing activities need to be considered in light of both current UAE regulations (e.g. under the UAE criminal law and civil regulations such as the Internet of Things (IoT) regulatory policy [Being Here: Local Presence Requirements for Telecommunications Equipment and IoT Service Providers in the UAE]) and also with the expectation of new UAE privacy laws being issued in the near future – laws that will likely introduce European data protection principles similar to those introduced in the new DIFC data protection law [Getting personal: the new DIFC data protection law and what it means for you]. Schools need to ensure that they have a clear lawful basis for their personal data processing activities (e.g. consent), that they know where they are holding personal data, what third parties they transfer such personal data to (e.g. managed service providers) and how long they hold it. All these details should be documented and made available to students (and parents).

What about disruptive new technologies?

Many of the new technologies Schools will be adopting bring new challenges in relation to data protection compliance. New technologies such as artificial intelligence (AI)/machine learning and virtual reality/augmented reality (VR/AR) offer fantastic opportunities for new, enriching and immersive experiences for students. Mobile technologies and wearables will be increasingly adopted. These technologies collect a lot of personal data previously not collected by Schools. The same is true for the video conferencing and collaboration tools that Schools have been using. A detailed analysis of the personal data being collected, how it is being processed and what the legal and regulatory implications are will be essential, particularly where new technologies are being delivered by third parties as part of managed services and stored in cloud environments. From a contract perspective, detailed data protection and IT security requirements need to be placed on service providers.

Added to this is the increased integration of social media platforms, discussion forums and chat rooms used as part of the learning experience which need to ensure that these tools can be used effectively whilst remaining in compliance with applicable laws and regulations.

Competing technology demands

In conclusion, Schools will face a number of competing technology demands as they head into the new school year. As they build out their technology footprint, they need to consider other technology needs (and the legal and contracting issues that go with them). For example, temperature detection technology to meet health requirements, mobile tracing application technology and cybersecurity measures to counter increased cyber threats. All of these come with legal and regulatory considerations that need to be teased out before these technologies are rolled out.

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What's mine is mine and what's yours is.... mine: plagiarism in law and practice

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The prevalence of technology in our lives, and the veritable library of information that sits at our fingertips all day, means that students can be easily tempted to 'borrow' a little work when writing their own assessments and research papers.

Students and teachers alike often have no clear understanding of the boundary as to what is acceptable practice, what is unethical practice and what constitutes illegal activity. We hope to clear up some of those misconceptions.

The general position under law

The UAE Copyright Law sets out, quite clearly, that an author has the exclusive rights to use their creative works: anyone wishing to use such works needs to request permission and, likely, pay a fee.

However, as with many other jurisdictions, there is some scope for use under the law that means that consent does not need to be obtained. For example, under UK law, the use of the copyright works of another party for certain limited, educational purposes, will not constitute an infringement of their copyright. The same applies in the US.

In the UAE, we have section 22 of the Copyright Law. This article broadly sets out the acts that are not prohibited in relation to a copyright work: in other words, these do not need to be permitted by the author.

Under Article 22 (1), making *"a sole copy from the work for merely personal and non-commercial or professional but personal use of the copier"* is acceptable. However, the wording of the Article would not extend beyond the true personal use - *"I am printing this to read for my personal enjoyment"* – and would not extend to use within a school or university project (no matter how tempting it might be to consider this to be personal use).

Perhaps more pertinently, under Article 22 (5), *"quotation of short paragraphs, derivation or reasonable analysis of the work for the purpose of criticism, discussion, or information provided mentioning the source and the author's name"* is also acceptable. This specifically allows for any person to use short excerpts for discussion. In some instances, discussion could include research papers and dissertations.

Importantly, the author's name and the source must be included for any use under this Article to be valid. In other words, arguing for the use as valid for discussion of the original work will not assist your case if you do not provide the appropriate credit.

Finally, and more importantly, Article 22 (8) allows for the *"reproduction of written, sound or audio-visual short excerpts for ... educational or vocational training purposes, provided that copying be in the reasonable limits of its purpose and that the name of the author and the title of the work be mentioned wherever is possible"*.

Students often think that using parts of other people's work within their own work, in a piecemeal fashion, may be legal or ethically acceptable. This is not the case.

As with sub Article 5, there is again a reference to the credit for the author but in this case, *"wherever is possible"*. We take this to mean that in some mediums, a credit may not be possible. Naturally, where it is possible, it must be provided – spurious claims as to an inability to provide a credit (such as lack of space) will not be acceptable as a defence.

How long is too long?

Articles 22 (5) and 22 (8) both refer to the length of the excerpt, albeit without much guidance.

In considering Article 22 (5), the length must be considered to be "short" under the law. In Article 22 (8), we see the limitation as to length, and a direct reference to "the reasonable limit of its purpose".

In many jurisdictions, the benchmark is that the use does not exceed the length that would be considered reasonable and which can be justified by the purpose for which it is being used. An analysis like this can only be subjectively applied to the work at hand, and such an analysis would in all likelihood form the basis of any analysis of a claim by the UAE courts.

So what, in law and in practice, is too much?

People tend to consider plagiarism as the use of the entire work from another person and passing it off under your own name. Whilst this is undoubtedly the worst of the plagiarism scenarios and will undoubtedly result in a claim for breach of copyright along with severe reputational damage, plagiarism can take many forms.

Often, students simply take a slab of words from another's work, including it without using quotation marks or providing a credit, and use it in a manner that makes it appear as if it is their own work. In a university, this will usually attract disciplinary action and may also attract such action in secondary schools. If the original author becomes aware of the use, they would have the right to claim copyright infringement.

As we move down the various forms of plagiarism, we come to two that are extremely difficult to detect. One is where a work is used and simply paraphrased. This is a common type of plagiarism. From a copyright perspective this 'copying' is hard to prove but professionally, given that the ideas are the same and are generally presented in the same manner, perhaps in the same order, a professional tutor or colleague will usually pick up the matter reasonably quickly. Changing around some words in several places along with using synonyms for some words will be readily detected. Again, professional disciplinary action is certain to follow.

Shahd, 12
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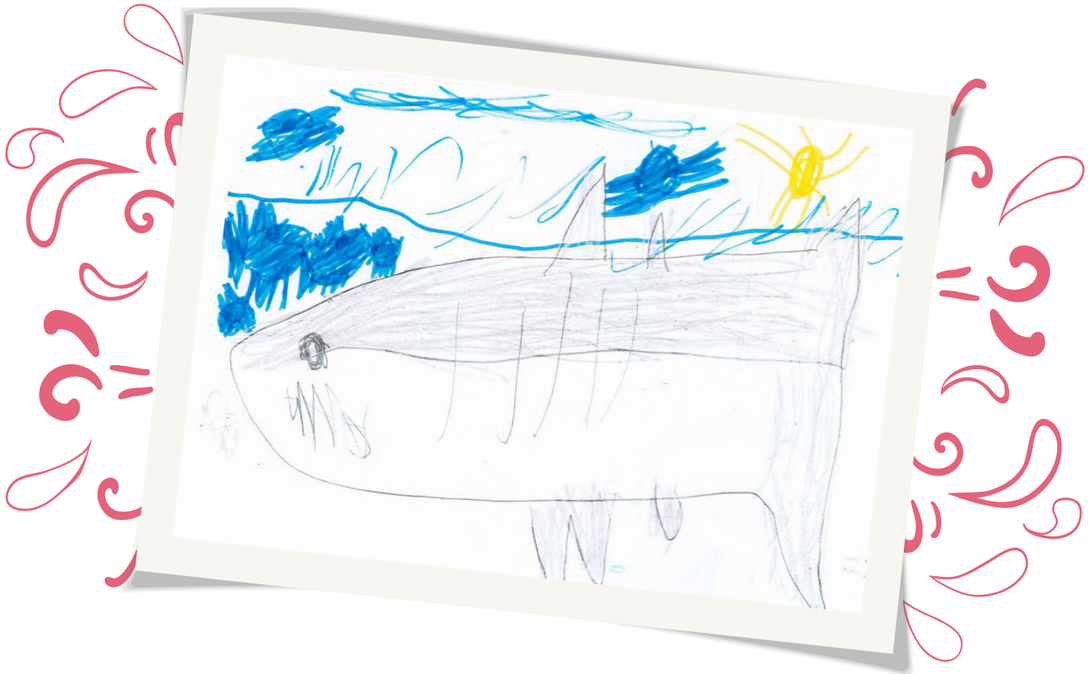

Saxby, 2
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Students often think that using parts of other people's work within their own work, in a piecemeal fashion, may be legal or ethically acceptable. This is not the case. Using the words of another person without accreditation is plagiarism, even if you do include it within other sentences that were written by you. Looking at the laws above, we can see that, even if the extract is short, the failure to credit will be problematic legally, and most definitely give rise to claims of professional misconduct and potentially a legal claim.

Of course, when students are buried in the many reference works that they are required to undertake for research, it can be easy to accidentally take someone else's work and include it within your own work. The most common issue is a failure to provide the reference to the source material, which gives rise to the perception that the work was copied.

Inspiration

Naturally, students at all levels of their education are constantly immersed in works that will, ultimately, be reflected in some way within their own works. Inspiration is to be encouraged but a student must be guided as to what takes inspiration into the realm of inappropriate or unethical copying and, worse, what makes it into plagiarism. Their respect for the work of others can only be enhanced by the reiteration of such principles of law and ethics.

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Mean girls, bad boys and other crimes by bullies: a legal review

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The internet continues to advance at the speed of lightning. It has made day to day lives easier and makes communication and information available to a global audience with the touch of a button. However, it has also opened up a broad range of new illegal activities relating to cybercrime. During 2020, as the world continues to grapple with a serious pandemic, people have become more reliant on digital communication which has resulted in people being increasingly exposed to anti-social and illegal online behaviour. Unfortunately, the increased reliance on technology to deliver education has meant that teenagers and children are increasing their use of technology and so they are online more than ever before. Both parents and teachers need to be aware of how these changes can impact their children and students and their future.

When considering cybercrime, people tend to think of fraudsters, impersonators and blackmailers however, cyberbullying is also considered to be a cybercrime in the UAE. It is usually associated with children and teenagers, but can also target adults. For example, in 2019 a man threatened and bullied a woman into sending him inappropriate photos of her on Snapchat. He was later arrested when the woman filed a complaint against him. Both the Criminal Court of First Instance and the Appeal Court sentenced the man after finding him guilty of violating Federal Decree No. 5 of 2012 on Cyber Crimes ('Cyber Crimes Law') because he was blackmailing her online and had requested inappropriate images.

What is Cyberbullying?

Cyberbullying is the use of technology to convey any bullying message to the victim and to those around the victim they can be known to the victim, or can be anonymous. Because students are online so frequently (whether on their laptop or smart phone), it is increasingly easy to spread negative messages and to spread them much further than was previously possible.

Potential bullies have access to a variety of social media platforms, such as WhatsApp, Twitter, Instagram, and Snapchat readily available for their use in creating the messages. Additionally, secondary perpetrators can forward and share the negative material, resulting in rapid and widespread dissemination. A secondary perpetrator is anyone who shares any content/material that may be considered illegal or prohibited and which falls under the Cyber Crimes Law; they can also be convicted of a crime. Cyberbullying is defined as to include not only the creation of the bullying messages, but also dissemination of them. Once shared, the bullying message may be viewed multiple times by a diverse audience globally (colloquially known as 'going viral').

Age restrictions and their value

Globally, social media websites set rules for controlling access to their sites for users they consider to be underage but, they are not enough to prevent a child or teenager from accessing adult content. A child can readily tick a box agreeing that they are above a certain age or use a false year of birth on registration, as no proof is required; no passport or ID is required.

This means that a child can readily access the same content that an adult can access, and can create content in the same unrestricted manner.

The UAE authorities have issued certain guidelines, regulations and channels that apply to media content generally. For example, telecommunications carriers have the right to block content they consider 'prohibited' under Annex 1 of the Telecommunications Regulatory Authority ('TRA') Internet Access Management Policy ('IAM Regulations'), for instance; internet content containing pornography and nudity, defamation, fraud and 'offences against the UAE and public order'. The TRA published statistics for the first quarter of 2020, showing that 614 websites have been blocked, each falling under Annex 1's 'Prohibited Content Categories' which will include pornography, gambling, promoting weapons: it is not specific to children rather the general public accessing such content online.

Zion, 7
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In relation to charging juveniles with crimes, the Juvenile Law (Federal Law No. 9 of 1976) specifically dictates that children under the age of 18 may be sentenced to no more than half of the prescribed detention period for some offences. Court hearings for children under 18 are not to be made public and may only be attended by certain persons (e.g. lawyers, custodians, Ministry of Social Affairs). A court may excuse a child's attendance during witness testimony if that is considered to be in the child's interests, even if they are the accused. The Cyber Crimes Law also allows a judge to order the deportation of any perpetrator (of any age) if they are not a UAE national.

How are you protected under the law?

Defamation is usually at the core of cyberbullying; calling the victim names, telling stories about them (whether true or not) and generally trying to ensure that the victim is less liked in a social circle than they were before.

Many people are unaware that defamation is treated as a criminal offence in the UAE. Not only does the UAE have extensive provisions within its Penal Code (Federal Law No. 3 of 1987), but it also has the benefit of the Cyber Crimes Law. Article 138 of the Penal Code stipulates that a punishment of jail and a fine (determined at the discretion of the judge) *"shall be inflicted on any person who publishes through any means of publicity news, pictures or comments pertaining to the secrets of people's private or familial lives even if the same is true"*. The UAE has traditionally considered defamation to be a serious criminal offence.

Article 20 of the Cyber Crimes Law deals with slander in the broadest of terms: *"... any person who insults a third party or has attributed to him an incident that may make him subject to punishment or contempt by a third party ... shall be punished by imprisonment and a fine ..."*. An example of this Article in practice can be seen in a case where two men were fined AED 500,000 (approximately US$136,000) after sending a demeaning and insulting message to a friend on social media via video and voice recording. The man recorded the video and voice recording as part of evidence to help in prosecuting these young men.

Of course, the standards that are applied to defamation can be high; as is generally the case globally. The statement must, first and foremost, do harm to someone's reputation, and must do so in a manner that makes people consider that person in a negative light.

As is often the case, it is the Cyber Crimes Law that provides the most practical recourse for victims of crimes involving technology and prescribes harsh penalties for any use of material that is considered to be pornographic.

Article 17 states *"Any person who ... transmitted, sent, published or re-published ... pornographic materials ... and anything that may prejudice public morals shall be punished by imprisonment and a fine ... Any person, who produced, prepared, sent or saved pornographic materials ... and anything that may prejudice public morals for the purpose of exploitation, distribution or displaying for a third party ... shall be punished by the same punishment."*

In addition, Article 18 imposes further penalties if the pornographic material concerns individuals younger than 18 years old; which naturally embraces all school age students. If the subject of the pornographic content is under 18 years of age the perpetrator faces imprisonment and heavy fines. So, inappropriate images of a classmate would fall into this category. The wording of Article 18 is important: *"Any person who intentionally acquires Juvenile Pornographic Materials ... shall be punished by imprisonment for a period not less than six months and a fine not less than (AED 150,000) and not exceeding (AED 1,000,000)."* It is important to note that this does not mean that the material must be actively sought. Merely receiving an inappropriate image from a third person; someone who is not the subject of the image will be enough to trigger the operation of the article, even if the recipient did not request the image.

Article 16 of the Cyber Crimes Law may also apply to cyberbullying. It states that a perpetrator of an action that could be considered to be extortion *"shall be punished by imprisonment for a period of two years at most and a fine not less than Dh250,000 and not in excess of Dh500,000, or either of these two penalties"*. This means that if, for example, a teenager threatened to bully or ridicule a fellow student unless they provide an inappropriate image of themselves, the teen will be liable for prosecution. In this case, not only will the perpetrator be guilty of inciting contempt (Article 20) receiving and distributing child pornography (Article 18), but they will also potentially be guilty of extortion under this Article 16.

It is important to note however that Article 16 can also exist in isolation. The threatened act does not have to eventuate; it need merely be intimated.

Enough already, no more bullying

In a nutshell, cyberbullying is an issue in society and it affects not only the victim but others around them. If action is not taken against the person bullying, it can aggravate the situation both online and offline. Exacerbating this situation is the fact that digital content remains accessible forever. Even if it is taken down, there are always ways to readily save the information: screen grabs, Bluetooth sharing, photos of screens. Everyone involved will have their part in the process permanently recorded, somewhere.

Cyberbullying may be very recent but bullying has been a part of society for decades. Open and honest conversations are one way to help a child's awareness of the issues facing them as perpetrators, victims and accomplices. These issues are not just social and emotional but legal as well.

If you or someone you know is being bullied and/or targeted online, please report these cybercrimes using the channels provided by the UAE government on: https://u.ae/en/information-and-services/justice-safety-and-the-law/cyber-safety-and-digital-security/report-cybercrimes-online. or download the ' My Safe Society' app.

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Education real estate assets in the UAE: what happens next?

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In this article, we look at the current state of the UAE market regarding educational real estate assets and look at some possible near to mid-term future trends.

Rent mismatch

There was already a mismatch in the UAE market between the unrealistic rental/yield expectations of school owners and investors and the actual revenues of tenants/operators. This was particularly true with regard to school operators' occupancy pursuant to the glut of sale and leaseback transactions seen in the last decade. These types of deals have been favoured by institutional investors, funds and REITs and often involve the operator/tenant taking a "triple net" lease, where the tenant assumes all of the usual obligations of the landlord regarding repairs and maintenance and insuring the buildings. Then COVID-19 appeared out of nowhere and the school experiment began to further unwind. The Bunsen burner fell over. The litmus paper turned a funny colour. Someone threw a chunk of caesium into a large glass bowl of water and it exploded and cracked.

The educational landscape, come the beginning of the new academic year in September. remains uncertain. Enrolments are likely to be down. There are likely to be increased operating expenses in ensuring compliance with relevant authority safety protocols. With the school closures for the last part of the 2019/2020 academic year and a move to distance learning, schools were forced to introduce fee discounts. Even if most children are able to return to school in the Autumn (albeit it in a very different way), it may be difficult for schools to bring back fees to pre COVID-19 levels – particularly if the size of the school means that a percentage of children have to remain at home pursuing their learning online on a rotational basis. Also, given the general economic headwinds, it is probable that there will be an increase in incidents of non-payment of fees by parents. The possibility of a future resurgence in new COVID-19 cases and the reintroduction of school closures and lockdown measures can also not be ruled out. All of these factors serve to ramp up the pressure on operators' levels of revenue and the ability of them to meet their rent obligations.

What has often been skipped over in discussions regarding commercial leases in the midst of COVID-19, is the pressure that landlords also face if tenants default on their rent payments; particularly if there is debt secured over the property that needs to be serviced or there are investors expecting a certain level of return. Measures such as placing a moratorium on evictions, if just used in isolation, can serve to tie the hands of owners to take action and can encourage tenant breach.

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Solving the rent mismatch problem therefore requires an holistic approach which seeks to strike a balance between the interests of tenant/operators, landlord/owners and lenders. How this plays out remains to be seen but the relevant stakeholders will need to take a realistic and pragmatic approach to agree upon new commercial arrangements moving forward. This could be through the renegotiation of rent payments; through rent waivers; deferrals; or the introduction of profit share/turnover rent arrangements that are common in retail and F&B leases. We may also see owners looking to protect their position by taking, for example, an equity share in the operator business in order to offset a reduction in rent payments. Business plans are also likely to be under preparation for potential debt restructuring between owners and lenders. The success of such rent negotiations and restructurings will largely depend upon whether the asset has solid, long term fundamentals, for example, value for money offerings located in the centre of communities with a captive base of families that does not wish to travel long distances on a daily basis or overpay.

On the issue of varying existing leases to reconfigure tenant payment obligations, tenants should be mindful of the fact that the COVID-19 pandemic is a particular and rare type of force majeure event. It is not like a hurricane or a flood which is sudden and localised and where the relevant effects and losses can be quickly assessed and quantified. It is a protracted, global event where, even though its general occurrence is known, the exact nature of how its effects will manifest themselves is uncertain. A similar type of force majeure event would be a world war. There is, therefore, the potential for smaller, unforeseeable force majeure type events to occur in the future within the overriding context of the known pandemic. Is a second wave of the virus and a future long term closure of the school foreseeable? Perhaps, but it is debatable. Any variation of an existing contract resets the position regarding the question of foreseeability of an event by the contracting parties. Due to this mix of the known and the unknown regarding the ongoing pandemic at present, it is best to take any future concerns or agreed protections regarding its future effects entirely out of the force majeure regime and deal with such matters separately and explicitly in the variation of the existing contract. The same applies to new agreements being entered into at the current time.

Consolidation and amalgamation

In June, it was announced that two American schools in Sharjah would be merging operations into one campus for the 2020/2021 academic year in order to reduce operating costs. This move was undoubtedly brought about due to the challenges being faced by school operators in current times as described earlier. Such an amalgamation of premises between schools may be a trend that is set to continue in the near future.

In addition, we may also see some of the big operational players eyeing up mergers and acquisitions regarding those smaller operators currently in distress. This may be a trend that develops post-September when there is more clarity regarding the exact nature of the new educational landscape in the UAE.

We may also see an uptick in sale and leaseback transactions, albeit it configured in a more realistic way, with owners looking to release cash from their ownership of non-liquid real estate assets, whilst still requiring the asset to operate.

Repurposing

With a large portion of the workforce working from home and the general shift to online interaction for the past few months, commercial tenants across the world are now rethinking the use and configuration of their commercial space and whether some of it may be surplus to requirements. This has accelerated a trend that was already in motion prior to COVID-19. The bricks and mortar real estate industry is being disrupted by technology.

We may [also] see some of the big operational players eyeing up mergers and acquisitions regarding those smaller operators currently in distress. This may be a trend that develops post-September when there is more clarity regarding the exact nature of the new educational landscape in the UAE.

In the context of education, blended learning, where students learn through a mix of online interaction and traditional face-to-face teaching, may be here to stay. This could lead to operators seeking to downsize their space requirements or lead to the amalgamation of premises, as discussed above. This could lead to owners having to repurpose the whole or parts of their educational assets for different uses.

In addition, and in a worse case scenario, for those owners and operators that are not able to navigate their way through the current rent mismatch and restructure commercial arrangements/debt obligations, and where smaller operators continue to bleed and are not snapped up by bigger fish, we could see a spate of lease terminations, as part of a wider insolvency crisis, with such buildings never to return as educational facilities and needing to be used for something else.

One further point; educational establishments in the UAE are renowned for the scale, variety and quality of the facilities that they offer. A way for operators to increase and widen potential revenue streams could be to allow for such facilities to be opened up out of hours for alternative activities and use by external customers. However, this may involve incurring greater operating expenses and a cost/benefit analysis would need to be carried out.

Silver linings

COVID-19 has accelerated and intensified problems that were already in play including, amongst others: the rent mismatch; unrealistic expectations; and a lack of focus and consideration on what types of products really work in the market. The current crisis could see a welcome injection of realism; a much needed correction; a Darwinian weeding out where fundamentally solid and sustainable offerings have adapted and are well placed to survive long term. We shall see.

For further information, please contact Ian Arnott (i.arnott@tamimi.com).

EDWEB 2020

Deepika, 17
d/o Babitha Vasanth, Senior Receptionist

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

To view this webinar go to this link:
https://youtu.be/O5LAvwH91N4

Panel

- **Ivor McGettigan**, Partner, Head of Education Sector, Al Tamimi & Company
- **Dr Hugh Martin**, Registrar and Chief Administrative Officer, British University in Dubai
- **Professor Keith Sharp**, Vice President, British University of Bahrain
- **Cameron Mirza**, University of Nottingham
- **Beatrice Cernuta**, Director at EY-Parthenon's International Education Practice

Below are the key points of our panellists on this topic:

New permanent models for teaching and learning?

- The move to online teaching has not been as transformative or radical as had been initially suggested. The panel felt that these changes were not going to result in a fundamental change in the way HE does things.
- Going to university is not about getting a piece of paper at the end of the course; institutions need to understand that the student experience is of fundamental importance and COVID-19 has exemplified this. A university education is about what you do when you meet other people - it is about the ability to discuss, debate and meet people from different backgrounds, genders, religions and cultures.

  Teaching can be carried out online, but there is another fundamental element to what a university experience entails which cannot be done without face-to-face interaction.
- The likelihood is that we will have a blended model of online and face-to-face teaching once we come out of the pandemic; however, things are not going to change fundamentally. Universities have an historical longevity and have survived other significant momentous challenges. It is clear that universities exist through and beyond these kind of crises because they are stable and we are able to be both traditional and agile at the same time.

Are there opportunities from the crisis that can be sustained?

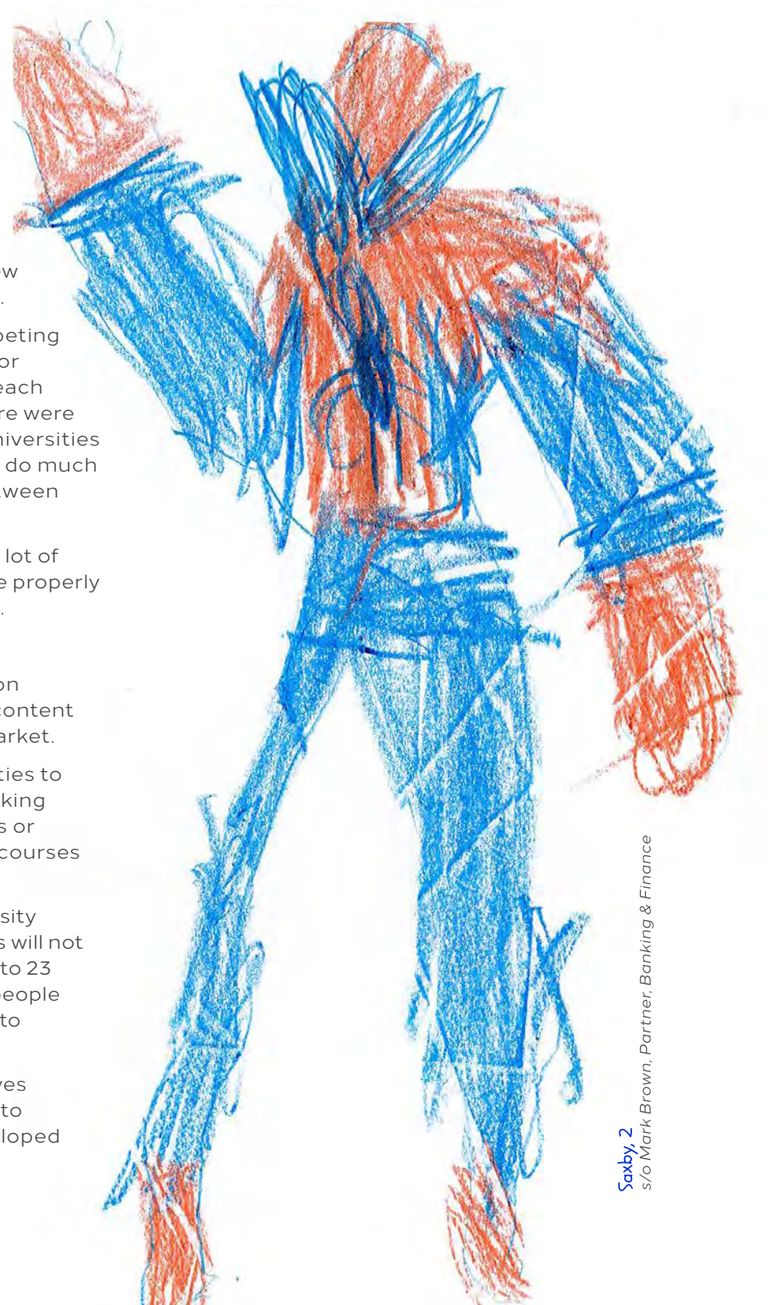
- Universities must improve the overall "student experience". Going to university is not about coming in at a certain time, going to a lecture and then leaving. It is about all the other extra curricular activities. If this region wants to become an international education hub, then we need to improve on the value of these extra-curricular activities.
- The pandemic has provided universities the opportunity to move beyond thinking about traditional ways of delivery. To enable change, institutions need the right policies that are forward-thinking, encourage autonomy and enable/empower rather than focus on box-ticking compliance. These policies should be student-centred and focus on learning, skill development whilst embracing emerging trends like micro-credentials.
- Quality assurance systems need to be more outcome focused.

What can we do as a community of educators: collaborate rather than the zero-sum competing hypothesis?

- There should be greater focus on designing programmes that are future focused and multi-disciplinary, for

example, creativity, social sciences and the arts are critical as we move into more automation and an artificial intelligence era.

- There needs to be a focus on career design so that students are aware of different career options prior to embarking on a university course.
- Importance should be placed on authentic assessment so that we move beyond memorisation/ rote-learning to pass an exam and obtain a degree; greater focus should be placed on student knowledge, the application of knowledge, attitude and behaviour. In essence, more of an holistic view of assessment should be taken.
- Although universities are competing with each other there is room for collaboration too. The aims of each university are similar and if there were greater focus on those aims, universities would be in a better position to do much more interdisciplinary work between each other.
- It is evident that parents drive a lot of decision-making and need to be properly briefed on the choices available.
- Student numbers.
- Universities will need to focus on upskilling and aligning course content with the demands of the job market.
- It will be important for universities to place greater emphasis on tracking data, be it prospective students or alumni, in order to better align courses with needs.
- The demographics in the university sector are changing; universities will not be attracting only the typical 18 to 23 year old students; there will be people already in work who are looking to transition to other sectors.
- There is also a lack of alternatives to university. It is either you go to university or you do not; a developed vocational alternative to university in the region that is compelling and that which employers have faith in, does not yet exist.



Saxby, 2
s/o Mark Brown, Partner, Banking & Finance

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

To view this webinar go to this link:
https://youtu.be/nuYXRjiPcc8

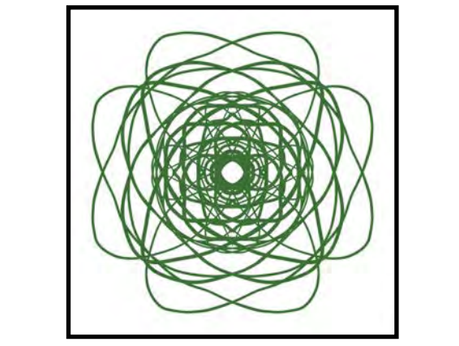
Panel

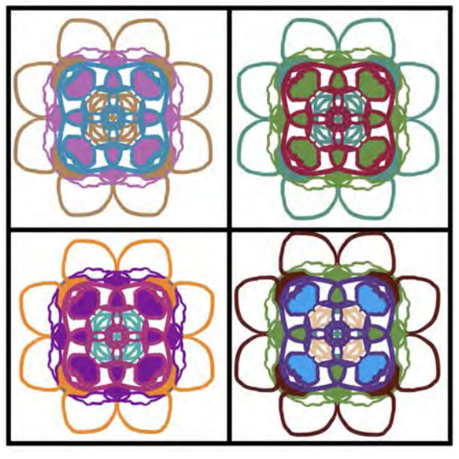
- **Ivor McGettigan**, Partner, Head of Education Sector, Al Tamimi & Company
- **Mark Ryder**, CEO, Daymer Group
- **Raza Khan**, CEO, Al Najah Education
- **Michael Gernon**, Chief Education Innovation Officer, GEMS
- **Cody Claver**, CEO, iCademy

Below are the key points of our panellists on this topic:

- There has been a significant shift in terms of mind-set and attitude from teachers, parents and students on embracing the "new norm". The focus should be on the pedagogical aspects i.e. the difference between the delivery of teaching, student learning and what should remain and what should be put aside. Once that type of discussion is commenced, that will inevitably have an automatic knock-on effect on the workplace and what it will look like.
- The region has an important part to play in leading the initiative of ensuring that K-12 come out of the pandemic stronger, particularly if it wants to be seen as the centre of innovation. The pandemic will offer a real opportunity to redefine and for the education sector in the region to be a real global leader. In order to evolve, schools should move away from traditional models and short term fixes, instead, they should focus on ensuring a genuine change that starts right at the core of what education is all about.
- Children must receive good education which allows them to develop their cognitive skills, subject knowledge and understanding the importance of applying themselves in the world. In addition, children must be offered the right social experiences that allows them to engage with the world as a mature and balanced person – socialisation, interaction, engagement in creative pursuits and sporting activities is an equally important function of what schools must offer.
- As a result of the pandemic, it is likely that certain trends will continue to rise e.g. a requirement among parents for flexibility, whereby certain schools will need to accommodate children who may want to come in five days a week, whilst others may prefer a three day week because they might be physically distant from the school environment. The feedback received form customers globally is that the pandemic has shown that they want their children to spend more time at school and not less. The most significant thing that parents have missed is their children being in a social setting with other children. The sector will need to focus on how to leverage technology to extend the school day so that children as they get older can cope with a longer day and still be empowered in a school setting to do their best over a much longer school day.
- The future for schools will continue into a physical hub setting, but the curriculum is likely to be integrated with some e-learning and remote learning opportunities. It is also likely that more children will have more of a variable attendance pattern and schools need to have flexible building designs with good technology to deliver a bespoke school experience for each child. It is likely that after the pandemic we will see a certain sector of the community shift to a much more comprehensive online model with economic imperatives driving schools towards that.

- The sector may experience mergers and acquisitions as well as restructuring and the asset is an important part of that model. In some cases, there are restrictions in what one can do and we will need to see a degree of co-operation between the various partners and stakeholders which to date we have not seen in this part of the world.
- In the last few years we have seen unsustainable positions where some schools have not been able to meet the rental costs. As a result of new models and opportunities, the sector will be in the position to rethink the economics and part of it is to ensure that we build schools in the right place which has to be looked at across the marketplace.





Ismail, 9
s/o Nour El Zaher, Executive Secretary, Corporate Commercial

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

To view this webinar go to this link: https://youtu.be/Zwxru28nCsI

Panel

- **Martin Hayward**, Head of TMT practice, Al Tamimi & Company
- **Marko Selakovic**, Senior Manager – Institutional Development, SP Jain School of Management
- **George DeBakey**, CEO, DeBakey International
- **Cameron Mirza**, University of Nottingham
- **Tenia Kyriazi**, Deputy Director of Academic Operations, Middlesex University

Below are the key points of our panellists on this topic:

- The adoption of new education technology needs to be part of a wider digital strategy and a learner centric approach. Technology should be approached as an enabler- as part of a wider cultural change.
- New education technology, particularly involving emerging technologies such as AI/VR/AR, offers the opportunity for wider data collection and use. This brings with it legal and regulatory requirements that need to be analysed to ensure the compliant use and exploitation/monetisation of data for a customised learning experience.
- With the move to virtual learning, it is important that the current regulatory landscape properly reflects the new digital reality.
- The pandemic has provided an opportunity for the education sector to utilise technology and create a better student experience. In discussing digital transformation there should be a focus on the "back-office" of an organisation. At present, there is a lot of focus on the front-end of the workplace such as the teaching and learning experience however, technology should be driven throughout the organisation to make it effective and instil quality assurance provision.
- Evidence suggests that half of students are dissatisfied with the current online provisions and research shows that there is support for a more blended learning model rather than traditional face-to-face learning.
- There needs to be a technological shift as well as a cultural shift within institutions if they are going to maximise the value of technology. The pandemic has provided the opportunity for universities to think outside the box and to not just focus on the short-term crisis as that will not be beneficial in the long-term. The higher education sector needs to ensure that it builds a long-term strategy and have, in place, a blended learning scheme that works for different institutions so that students are able to maximise the time they spend face-to-face with educators. Aside from instilling a blended learning model across the organisation for all students, another big challenge that all institutions will face is how to entice new cohorts of students in the new academic year.
- In terms of how can regulators help - they should reconsider their approach to virtual elements of learning and recognise the benefits of a blended learning approach. The regulators will be concerned about risk and compliance however, there should be more dialogue between regulators and academia. In terms of where we are in the region, we need to consider where we want to be in 10 years time and build a regulatory framework that fits the future.
- There are emerging technologies that will revolutionise learning. These include artificial technology and data. As artificial intelligence develops, the curriculum will flex around the learner rather than the curriculum. At the moment institutions are collecting large amount of data and doing little with it – there is a great opportunity for the online learning technology to collect data at every touch point of a student's journey through the institution and enable teachers to provide early intervention to students where needed.
- It is likely that artificial intelligence, blockchain and big data will be on the rise in respect of certification however, a good level of understanding, trust and confidence is required so that education can be transformed. There is significant amount of data that can be collected which can be hugely valuable to institutions for improving learning for students but which needs to comply with privacy regimes.
- There is an expectation that we will see a new onshore UAE data protection law which may have been accelerated by the pandemic. The data protection law will have a significant effect on the way in which institutions use, collect and store data. In parallel with that, there is a significant government move on the cyber security side. The telecoms regulatory authority is the governing body that drives the national cyber security agenda and, over the next 12 months, we are likely to experience changes that will affect emerging technology such as artificial intelligence. The expectation is that there will be a broader scope and that will affect higher education institutions whether they are storing data to clouds for data analytical purposes or whether they are running a lot of artificial intelligence on machine leaning.
- As higher education institutions form their digital strategies over the next few things, they need to be cognisant of what the current landscape looks like from a legal regulatory point and what is coming down the line.

4 The new tech landscape in K-12

To view this webinar go to this link:
https://youtu.be/m0KVjDcrRiI

Panel

- **Ivor McGettigan**, Partner, Head of Education Sector, Al Tamimi & Company
- **Michael Gernon**, Chief Education Innovation Officer, GEMS
- **Mark Steed**, Principal and CEO, Kellett School, Hong Kong
- **Cody Claver**, CEO, iCademy
- **George DeBakey**, CEO, DeBakey International

Below are the key points of our panellists on this topic:

- Education providers have access to a plethora of platforms and free resources from EdTech and other IT companies. However, let's not fool ourselves, a lot of it was the digitalisation of existing content rather than digital transformation - putting a learning plan on a PDF is not digital transformation!
- Schools have been developing diverse learning platforms to ensure that students remain engaged and productive (e.g. more interactive platforms for junior students, live streaming in the mornings and research/ project work in the afternoons etc.)
- Schools and parents are worried about the lack of socialisation and extra-curricular activities, which are particularly important for junior students' development of interpersonal skills. Similarly, schools are very conscious of the need to cater to the needs of children of determination.
- A lot of concern about spikes in online bullying during lockdown and general child wellbeing,
- EdTech being seen as part of continuity planning for schools for the future, irrespective of COVID-19.
- Only those schools that will be able to adapt will survive in the market. Schools will need to re-examine their overall purpose and use technology to implement the new vision, which is likely to include the following:
  - blended education models;
  - different pricing models;
  - evaluation and optimisation of the software/solutions used for home learning;
  - curating the right technology;
  - emphasising the human factor and ensuring social and emotional wellbeing of the students and their teachers as a priority over academic performance;
  - arranging professional development trainings for the teaching staff; and
  - providing pastoral support for students.

Inayah, 4
d/o Maymoona Talib,Associate, Banking & Finance

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

To view this webinar go to this link:
https://youtu.be/_ehx4HLWKKo

Panel

- **Ivor McGettigan**, Partner, Head of Education Sector, Al Tamimi & Company
- **Mamoon Khan**, Partner Banking and Finance, Al Tamimi & Company
- **Gemma Wild**, Head of Education, HSBC
- **Ajay Kathuria**, EY-Parthenon's International Education Practice

Below are the key points of our panellists on this topic:

Overview of financing in the education sector

- In light of COVID-19, it is important to distinguish between the types of education markets in the Middle East. Some are vibrant, expatriate-focused markets, which allow higher fees and hence attract foreign investors (like UAE), whereas others are focused on their local education providers, prevailing number of local students (i.e. nationals) and are therefore more resilient to change (such as KSA).
- situation, banks will be focusing on the four key trends that would determine their position on financing education providers:
  - fees collections;
  - cost control;
  - future enrolments;
  - operating models.

Options for financing

Stimulus packages

Both UAE Central Bank and Abu Dhabi Fund for Development are offering economic support schemes. The former provides stimulus packages to banks and financial institutions licensed by the UAE Central Bank, which can be translated into relief to existing borrowers (including education providers). They are largely based on a zero-rated facility in the amount of 50 million dirhams (approximately US$13.5 million). The scheme also provides certain capital buffers to be reduced which allows the unused capital to be deployed in relation to any distressed borrowers. The banks utilising the facility would need to follow specific guidelines and offer deferral of payment of the principal and interest for up to a period of six months. The Abu Dhabi Fund for Development's package is available for any industry that was disrupted by COVID-19. The threshold is a little higher: the revenue for the past three years should be around 150 million dirhams (approximately US$40 million) and the asset valuation should be around 10 million dirhams (approximately US$2.7 million). Further, in order to avail the facility, the education providers will need to put in place a detailed project plan.

Supporting existing projects

For education providers that are trying to support existing projects and avail further financing from the banks, they would need to provide certain security coverage to get approvals for any new financing. The primary security that banks would prefer is the security of hard assets/land security. Whilst this could be challenging for a large number of education providers, given that their facilities are usually constructed on the land owned by the operator or owner of the school, there is now an option of converting the leasehold interest into a bankable interest.

Secondary security preferred by banks is cash-flow income, which is divided between fees paid by credit cards and fees paid by post-dated cheques. This is where education institutions could choose an escrow route through the lending bank.

Other securities provided include security over debt reserve accounts, collection accounts and step-in rights offered to the banks (noting that the last option is not popular as it requires the regulator's approval).

Future of financing

- Regardless of the unstable situation in the market, investors are keen to support education providers.
- Whilst sovereign wealth funds would be more interested in bigger groups, private equity funds will be focused on single school assets and perhaps try to merge them with other single schools in the region to try and build larger education platforms.
- Education institutions are likely to invest in EdTech rather than hard assets (and therefore reduce their rental footprint). Banks will support such initiatives provided that an assessment of their affordability and business case would meet the banks' standards.
- Financial institutions and education providers are likely to offer more financing options to parents and students in the near future.

Taemin, 8
s/o Dukgeun (Thomas) Yun, Senior Associate, Korea Group

6 New investment horizon for K-12 in MENA

To view this webinar go to this link:
https://youtu.be/qVa4DKmuvB0

Panel

- **Ivor McGettigan**, Partner, Head of Education Sector, Al Tamimi & Company
- **Basim Ibrahim**, Head of Education, Ministry of Investment of Saudi Arabia
- **Shaun Robison**, CEO, BBD Education
- **Mohamed El-Kalla**, CEO, Cairo for Investment and Real Estate (CIRA)
- **Mansoor Ahmed**, Director, Education, Colliers

Below are the key points of our panellists on this topic:

Overview of the Middle East market

The Middle East education market has been attractive for investors due to its growing demand and constant push for innovation. Though hit by COVID-19, the operators expect the market to recover relatively fast, noting that parents are choosing private education over public education and those whose children have already been enrolled in private schools will be shifting from premium schools to more affordable options.

Egyptian market is one of the largest in the region with its number of K12 students reaching 24 million. At the same time, only 10 per cent of these students are enrolled in private education and only 1 per cent of those attending private education establishments chose high end schools, which indicates that Egypt is more adjusted to home-grown affordable yet, quality education. Higher education momentum is even higher – it is predicted that the country will require 50 new universities by 2030, which is certainly attractive for foreign investors.

In light of COVID-19, education providers in Egypt will be tested in three directions: ability to adjust to change; ability to cater to customer needs; and ability to implement new models to operate their business going forward. It is apparent that parents of KG1 to Grade 7 students are less satisfied with online learning articulating (presumably due to concerns about socialisation), whereas high school students seem to be happy with blended learning models.

KSA has the highest growth rate in the GCC and an education market value estimated at US$ 8-9 billion. The government is looking to increase the share of private schools in the kingdom from the current 14 per cent to 25 per cent, as Saudi nationals steadily shift to private schools. Whilst UK schools continue their expansion in the region, it is noted that very few US schools have entered the market especially given the huge number of Saudi graduates who go to the US for university.

Investor relations: walking up the aisle

- It is absolutely vital for the parties to the deal (education brand and financial backer) to carry out due diligence on each other.
- Make sure the relationship works and views are aligned.
- Be clear at the outset about what can and can not be done - clear redlines.
- Does the person you are talking to have authority to make decisions?
- The foreign party should understand the peculiarities of the market. Building relationships on the ground is vital to successfully operate businesses in the region.

Looking forward

- New schools will be built wisely, i.e. the main objective would be to meet the students' needs, rather than making them state-of-the-art, high maintenance facilities. EdTech is growing in the region and it is used not only for home learning software, but also for modernising and digitalising classrooms.
- The market is down in terms of school valuation. The majority of deals have been postponed due to the uncertainty caused by COVID-19. However, a large number of M&A deals are anticipated in the next 18-24 months.
- Overall the situation in the market looks promising. Education will move further towards a private offering which will attract more foreign investments and strong operators. Blended models of education are likely to be implemented by the governments leading to optimisation of schools' premises and further engagement with EdTech companies.

Tal, 10
d/o Basil Samman, Office & HR Manager - Sharjah

Campus crisis: working through real estate issues facing education providers

To view this webinar go to this link: https://youtu.be/RhheAgCyqqc

Panel

- **Ian Arnott**, Senior Counsel, Real Estate, Al Tamimi & Company
- **Mark Ryder,** CEO, Daymer Group
- **Mansoor Ahmed**, Director, Education, Colliers

Below are the key points of our panellists on this topic:

- **Trouble was already brewing.** Prior to the outbreak of COVID-19, there was already a disparity in expectations between developers and operators. The situation has become more problematic as a result of the pandemic. The health and education sector was considered relatively risk-free when compared to other sectors. Due to the pandemic, education investors are now seeking a nine to ten per cent return on investment when undertaking a real estate transaction due to perceived higher risks now. Conversely, operators are arguing that the number of students have dropped and in turn this has caused a significant decrease in tuition fees and therefore are only able to pay nine to ten per cent. The expectation gap has therefore widened since the pandemic. This situation is likely to continue for the next 18 months until such time as a realistic re-balancing and consensus can be reached between the parties around what the sustainable return on investment is.
- **Fixed not variable.** It seems that investors are still reluctant to accept a rent linked to turnover like in the retail industry whereby companies pay a small fixed rental percentage and the rest is linked to revenue. The view of investors is that it is not their concern and prefer a fixed rental price on the basis that they have taken bank loans and need to fulfil their commitments to the bank. At present, the market is still quite fluid but there is a disconnect between operators and investors. However, matters are likely to improve as the new school year progresses as the operators are then able to understand their revenue income.
- **M&A.** Operators faced cash-flow pressure even prior to COVID-19. At present, there is a lot of consolidation in the sector and this will likely continue for some time. The large majority of school groups across the UAE are individually owned and so there is a lot of opportunity for acquisitions. The key is around transparency and confidence that the investor has in the operation.
- **Space.** It will be inevitable that some schools will struggle with falling pupil numbers and a decline in tuition fees. However, affordable schools will be under less pressure. The numbers in classrooms will decrease from 20/25 to 10/12 and therefore, there will be more pressure on operators to acquire more space and pay further rent and recruit more teachers.
- **Neighbourhood school.** The pandemic has accelerated discussions around what to build and what will be profitable and sustainable. Before the pandemic, emphasis was placed on making school buildings attractive. The key is to reduce the cost of construction to ensure sustainability of the sector. Having a good school in the community will likely increase the sale price of a residential property in that neighbourhood by nine to ten per cent.
- **New designs.** On the upside, we will likely experience more invention and creativity. Investors are attempting to be flexible and are working with operators to try and find practical solutions. We need more flexibility in real estate; schools need to be designed in a particular way to enable flexible learning opportunities for all. The focus should be on operations, efficiency and design. A way of ensuring future sustainability in the sector is to ensure that the delivery of education is the main focus rather than aesthetics and the building's appearance. The pandemic has served as a catalyst in maturing the market. Unavoidably, there will be a change in design and the way in which buildings are used. It will be important for schools to ensure that they are offering better value for money and that may mean longer school days whereby children have more of an inclusive experience whilst at school, and then in the evening the school grounds can be used for other purposes e.g. vocational training for adults.

Nasma, 4
d/o Leith Al Ali, Associate, Construction & Infrastructure

The EdWeb2020 Playlist

4th June 2020
Beyond COVID-19: Lessons learned from the crisis, lasting changes and future opportunities for Higher Education in MENA
Click here to watch the webinar.

8th June 2020
Beyond COVID-19: Lessons learned from the crisis, lasting changes and future opportunities for K-12 in MENA
Click here to watch the webinar.

11th June 2020
Digital transformation: how will tech reshape the business and service delivery models of Higher Education
Click here to watch the webinar.

16th June 2020
The new tech landscape in K-12
Click here to watch the webinar.

23rd June 2020
Dollars and Sense: financing options for education providers in the new world order
Click here to watch the webinar.

14th July 2020
New investment horizon for K-12 in MENA
Click here to watch the webinar.

16th July 2020
Campus crisis: working through real estate issues facing education providers
Click here to watch the webinar.

Our Webinars

6th July

Riding the Podcasting Wave: Laws, Flaws and Helpful Clauses

Speakers: Fiona Robertson and Charlotte Sutcliffe

Click here to watch the webinar.

12th July

IP Landscape in KSA: Overview and Recent Developments

Speakers: Ahmad Saleh, Othman AlTamimi and Saleh Alhebshi

Click here to watch the webinar.

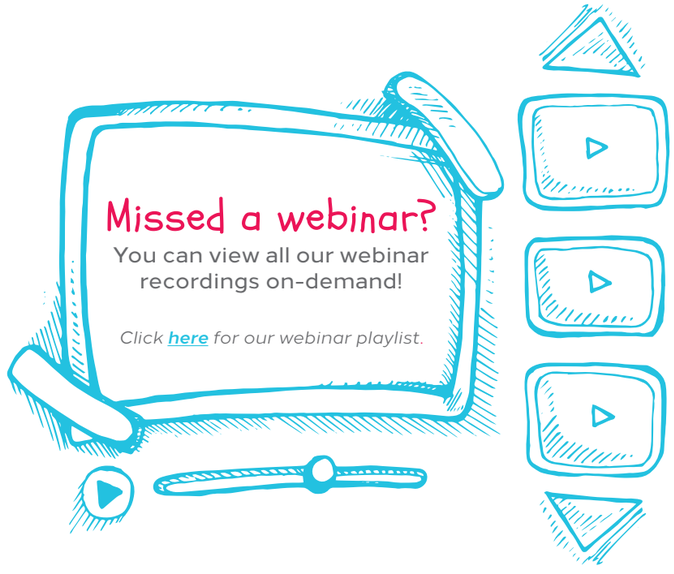
13th July

Joint webinar with NCC Group

Software Escrow: Ensuring Business Continuity in Uncertain Times

Speakers: Nick O'Connell and Haroun Khwaja

Click here to watch the webinar.



United Arab Emirates
Ministry of Justice

50th Year
Issue No. 684
26 Dhu al-Hijjah 1441H
16 August 2020

FEDERAL DECREES

112 of 2020 Appointing an assistant undersecretary at the Ministry of Presidential Affairs.

113 of 2020 Appointing an assistant undersecretary at the Ministry of Presidential Affairs.

114 of 2020 Terminating the duties of the UAE Ambassador to Morocco.

115 of 2020 On performing the duties of the UAE Ambassador to Morocco.

REGULATORY DECISIONS OF THE CABINET

53 of 2020 Repealing Cabinet Decision No. 29 of 2011 on the governance rules for boards of directors of for-profit and not-for-profit entities, corporations and companies owned by the Federal Government.

54 of 2020 On non-government institutions for the rehabilitation of persons with disabilities (people of determination).

56 of 2020 Adopting the UAE mandatory standard: Safety Requirements for School Buses in the UAE.

57 of 2020 On economic substance requirements.

MINISTERIAL DECISIONS

- From the Ministry of Health & Prevention

294 of 2020 Repealing Article 1 (Sections 1 & 2) of Ministerial Decision No. 734 of 2017.

- From the Ministry of Community Development

120 of 2020 Giving public notice of the registration of Emirates Arabian Horse Breeders & Owners Association.

121 of 2020 Giving public notice of the registration of Emirates Urban Planning Association.

135 of 2020 Giving public notice of the registration of Emirates Poultry Farmers Association.

ADMINISTRATIVE DECISIONS

- From the Securities and Commodities Authority

  - Certificate of approval of amendment of the Articles of Association of Julphar (Gulf Pharmaceutical Industries) PSC.
  - Certificate of approval of amendment of the Articles of Association of Abu Dhabi National Insurance Company PSC.
  - Certificate of approval of amendment of the Articles of Association of Emaar Properties PJSC.
  - Certificate of approval of amendment of the Articles of Association of Emaar Development PJSC.
  - Certificate of approval of amendment of the Articles of Association of Emaar Malls PJSC.

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 685
8 Muharram 1442H
27 August 2020

FEDERAL DECREES-LAW

5 of 2020 Amending Federal Law No. 28 of 2005 on personal status.

6 of 2020 Amending Federal Law No. 8 of 1980 regulating labour relations.

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 685 Supplement
8 Muharram 1442H
27 August 2020

FEDERAL DECREES-LAW

3 of 2020	Amending Federal Law No. 17 of 1972 concerning nationality and passports.
4 of 2020	Repealing Federal Law No. 15 of 1972 on the boycott of Israel.

REGULATORY DECISIONS OF THE CABINET

58 of 2020	Regulating procedures related to the real beneficiary.

About Us

Al Tamimi & Company has unrivalled experience, having operated in the region for over 30 years. Our lawyers combine international experience and qualifications with expert regional knowledge and understanding.

We are a full-service firm, specialising in advising and supporting major international corporations, banks and financial institutions, government organisations and local, regional and international companies. Our main areas of expertise include arbitration & litigation, banking & finance, corporate & commercial, intellectual property, real estate, construction & infrastructure, and technology, media & telecommunications. Our lawyers provide quality legal advice and support to clients across all of our practice areas.

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