Issue 334 I October 2020

التميمي و مشاركوه
AL TAMIMI & CO.

LAW UPDATE

Latest Legal News and Developments from the MENA Region

BUSINESS DEVELOPMENT & MARKETING DIRECTOR
Barbara Koenen-Geerdink
b.koenen@tamimi.com

LEGAL EDITORIAL COMMITTEE CHAIR
Mark Brown
m.brown@tamimi.com

PUBLICATION AND CREATIVE LEAD
Shriya Sanjeev
s.sanjeev@tamimi.com

LEGAL EDITOR
Siobhan Farrell
s.farrell@tamimi.com

FOCUS ARTWORK
Saif Zulfiqar
saifzk.01@gmail.com

FEDERAL GAZETTES
Zane Anani
z.anani@tamimi.com

TRANSLATION
Vincent Percival
v.percival@tamimi.com

For more information on Law Update
info@tamimi.com

www.tamimi.com

SPORTS & EVENTS MANAGEMENT EDITION

IN THIS ISSUE

SAMER QUDAH
Managing Partner
s.qudah@tamimi.com

Welcome to October's issue of Law Update.

This month we focus on Sports & Events Management. The world before COVID-19 seems a long time ago and 2020 so far has been a year of true monumental disruption, particularly for the global sports and events sector. Mass participation events, concerts, football matches and competitions of all description have had to take a back seat while health and community safety issues have come to the fore.

No one could have imagined a year ago that major events like the Tokyo summer Olympics as well as Expo 2020 would be postponed. Also the concept of tourism – let alone sports tourism – subsequent to the cancellation of major (sports) events and conferences has been redefined in the wake of the pandemic. Quite apart from the human costs of the pandemic, the economic impact in terms of devastating job losses, lost broadcasting revenues, gate receipts, sponsorship funding and vital footfall for travel, tour, hospitality and other symbiotic sectors has left event organisers and venues amongst those scrambling to plot a course forward.

This year, the previously booming sports industry has suffered a significant downturn in global revenue. Nonetheless, the resilience and importance of the sports industry in the UAE have shone a light as we navigate past coronavirus. Specifically, the UFC's Fight Island, hosted on Yas Island, was one of the first major events to re-emerge. Likewise, as you are reading this, the UAE is playing host to the IPL T20 Cricket Tournament and we see the Abu Dhabi Formula 1 event is slated on the 2020 FIA calendar, while many other host cities have been unable to host races this year. There have been significant challenges, but as our window into the sports sector indicates, there are green shoots and a number of reasons to believe we will see a strong return to form in the coming months.

It is difficult to ignore the impact COVID-19 has had (and still has) on so many sectors; both positive and negative. Our expert teams examine the lessons that have been learned and offer insights on how business may look going forward.

Starting with our Construction & Infrastructure sector, our lawyers consider some short-term steps which contractors and sub-contractors can take to manage and mitigate the risks posed by the pandemic as well as anticipate the potential longer term repercussions of the pandemic (page 13).

Following a global boom in live streaming services, as a result of COVID-19 and the increasing demand for digital services, our Corporate Structuring team shares advice with media companies who are looking to boost their live streaming services in the UAE and what the setup of those companies should look like.

Staying with our Corporate Structuring team, we address a recently issued Cabinet Resolution No. 50 of 2020 on the regulation of the Procedure of the Real Beneficiary ('Resolution 50'). This is a 'beneficial ownership' regime regarding the ownership of legal entities and is a critical tool in combatting tax evasion, corruption, money laundering, and the financing of terrorism in the UAE (page 19).

Lastly, our UAE Employment team addresses the new norm of working from home. Is it a concept that is here to stay or just a stop gap during these unchartered times? The historical stigma of working from home is analysed pre- and post-pandemic with employers expected to update their workplace practices to allow for working from home to be accepted without challenge (page 25).

This month our Jurisdiction Updates touch on a number of interesting subjects. Our Qatar office examines whether Qatari law provides adequate remedies for creditors seeking recovery from insolvent/under liquidation debtors and the conditions under which Qatari courts may pierce the corporate veil (page 29). Remaining in Qatar, our commercial team takes a look at the new PPP law which aims to enhance the productivity and sustainability of national projects in a cost efficient manner. The financial involvement of the private sector in public projects is viewed as a way of developing and supporting the local economy (page 31).

Finally, members of our Turkey Desk review the recent update to the Trademarks law which suggests that applications filed through the Madrid System and national applications filed directly before the local trademark office should be treated equally especially in terms of refusal grounds, including a refusal based on an opposition action by any third party (page 35).

I hope you enjoy this issue and welcome any questions or thoughts you may have.

CONTENTS

What are the rights of a bona fide purchaser where a prior contract has been invalidated?

Law Update Judgments aim to highlight recent significant judgments issued by the local courts in the Middle East & North Africa. 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.

Ahmed El Shaer
Senior Associate
Litigation
a.elshaer@tamimi.com

This article discusses the rights of a bona fide purchaser in the UAE in relation to a land purchase, in light of a recent judgment of the Abu Dhabi Court of Cassation (Judgment 136 of 2020), which considered whether a final court judgment that invalidates a sale of land will result in the nullification of a subsequent transaction involving the same piece of land.

Relevant UAE law

The UAE Civil Code does not expressly address situations where a bona fide purchaser of real property, pursuant to a valid contract whilst being unaware that an earlier contract for the same property, has been invalidated by the courts. However, Article 1 of the UAE Civil Code provides:

> *"The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in spirit. There shall be no innovative reasoning (ijitihad) in the case of provisions of definitive import. If the judge finds no provision in this Law, he has to pass judgment according to the Islamic Shari'ah. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi'i and Imam Abu Hanifa as most befits.*
>
> *If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morale, and if a custom is particular to a given emirate, then his judgment will apply to that emirate.".*

As a result, in the absence of express legislative provisions the courts have applied the Sharia of the Maliki school. According to this school, a tainted (void) sale contract shall be validated if a new valid sale contract is performed.

Court judgment

The Abu Dhabi Court of Cassation (judgment 136 of 2020 dated 30 June 2020), ruled that while the grants of certain property to a seller ('Second Respondent') were void, the Second Respondent's subsequent sale of the property to a purchaser ('Third Respondent') was valid.

As a result, although the initial contract to the Second Respondent was declared void, the Third Respondent could not be compelled to return the property.

It is notable that the Third Respondent, who was presumed to have acted in good faith, had purchased the property in question in 2010 based on the seller's registered title to the property with Abu Dhabi Municipality ('First Respondent').

The Third Respondent's purchase contract was also registered with Abu Dhabi Municipality. The sale had taken place prior to the Appellant's court case in which the grants were declared void in 2013. As a result, the court decision had no effect on the sale to the purchaser.

The Appellant could not provide proof that the land generated any income while it was vacant.

The Court of Cassation also noted that the purchaser or a mortgagee shall be deemed a bona fide purchaser, if:

1. the transaction to the purchaser/ mortgagee took place prior to the issuance of the judgment that invalidated the earlier contract (the bona fide purchaser therefore would not have notice of the earlier contract); and
2. such transaction (either sale or mortgage) is registered at the concerned department before the case to invalidate the earlier contract is commenced.

Thus, a judgment that nullifies an earlier contract will not be deemed authoritative against a bona fide buyer or the creditor mortgagee. In this case, the title transfer to the purchaser was valid by two collateral pillars - each supporting the other: (1) the valid act conveying title; and (2) the registration procured pursuant to such a valid act.

Finally, it is notable that in arriving at its decision, the Abu Dhabi Court of Cassation reversed the judgment on the same property by Federal Supreme Court (Case No. 161 of 2020). It based its decision on the good faith of the Third Respondent who relied upon the seller's established and registered title at the relevant municipality and who was not a party to the action of the nullification of the testamentary grant which was filed several years after his purchase, registration, possession and significant development of the subject property. As a consequence, the Court of Appeal held that the status quo existing prior to the Second Respondent's sale to the Third Respondent was impossible to restore and therefore, the sale contract was valid. This view is correct as a matter of law and is sufficient in and of itself to dismiss the action to overturn the sale to the Third Respondent.

Conclusion

In this case, the Abu Dhabi Court of Cassation established that the bona fide purchaser's deed was controlling because he bought the land for value and had no notice of the Appellant's interest in the land. The court acknowledged that contracts registered before a judgment invalidating a grant of a plot would still be valid.

Applying the same reasoning, a mortgage on the land sold to a bona fide purchaser would not be impaired where an earlier contract transferring the property had been invalidated.

This is a positive outcome as it will ensure certainty in transactions, guarantee the authenticity of official documents and reassure property investors and banks

For further information, please contact Ahmed El Shaer (a.elshaer@tamimi.com).

Tailoring the scope of arbitration agreements: A recent judgment of the Abu Dhabi Court of Cassation

Law Update Judgments aim to highlight recent significant judgments issued by the local courts in the Middle East & North Africa. 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.

Saifedin Mahgoub Nagar
Senior Associate
Litigation
s.mahgoub@tamimi.com

Introduction

In a recent judgment, the Abu Dhabi Court of Cassation considered the scope of the parties' arbitration agreement, and in particular the extent to which the parties intended to submit all disputes thereunder to arbitration. In this case, while the parties' agreement (a Sale and Purchase Agreement 'SPA') contained an arbitration clause, a specific exception to arbitration was made in a separate declaration which was appended to the SPA. The clause in the declaration excluded disputes arising in relation to service charges and community fees, which thus fell within the jurisdiction of the courts. The Court upheld the parties' agreement to exclude such disputes from the arbitration agreement, based on the general principle that special rules apply to the exclusion of general rules.

Background

The Claimant, a real estate development company incorporated in Abu Dhabi, filed a case against the Defendant, an Abu Dhabi registered investment holding company, for unpaid service charges and community fees owed to it by the Defendant.

Pursuant to the SPA, the Defendant had an obligation to pay service charges and community fees to the Claimant upon the receipt of the unit of property that was sold to the Defendant. In the event of a delay in payment of such fees, the Claimant had the right to impose delay penalties. Both parties agreed that the courts had jurisdiction to decide any dispute related to the recovery of the service charges and community fees. The Defendant failed to pay these charges and fees and so the Claimant initiated court proceedings for recovery of the outstanding amounts.

The Court of First Instance

The Defendant argued that the claim should be dismissed on the basis of the arbitration clause contained in the SPA. The Court of First Instance dismissed the case.

The Court of Appeal

The Claimant appealed the Court of First Instance judgment. The Court of Appeal upheld the Court of First Instance judgment and rejected the appeal.

In its judgment, the Court of Appeal highlighted that the SPA contained an arbitration clause. The clause indicated that the arbitration tribunal had jurisdiction to settle all disputes arising out of the SPA after exhausting all means of amicable settlement. The clause specified the arbitration procedure along with the method of appointing the arbitrators.

The Court of Appeal did not engage with the Claimant's argument that the Defendant was required to pay the service charges and community fees in accordance with the Declaration appended to the SPA, which the Claimant argued formed an integral part of the SPA, failing which it was entitled to commence court proceedings as an exception to the arbitration clause in the SPA.

Court of Cassation judgment

The Claimant appealed the decision of the Court of Appeal to the Court of Cassation and requested the case be remanded to the Court of First Instance

The Court of Cassation overturned the Court of Appeal's judgment and rejected the first instance ruling.

In its judgment, the Court of Cassation held that the Court of First Instance ignored established facts. It was clear from the record that the Claimant had asserted, before the Court of First Instance, that the plea of an arbitration clause should not be entertained. The Court of First Instance stated, in response that: "*Clause 25 of the SPA is an arbitration clause that specifically and expressly provides for the jurisdiction of the Arbitral Tribunal to resolve any disputes which may arise out of the SPA, after an attempt at amicable settlement, and defines a mechanism for arbitration and the appointment of arbitrators.*"

The Court of Cassation held the Court of Appeal's reasons were an insufficient response to the Claimant's plea. This was because, while the SPA undisputedly contained a dispute resolution clause providing for the referral of disputes to arbitration, the declaration appended to the SPA contained a specific rule, in which the parties agreed to submit certain matters under the SPA to the courts.

Clause 11-5(b) of the Declaration read: "*The Purchaser acknowledges and understands that whilst the Service Charges and/or Community Fees and other monies due under the Declaration may be due and payable by the Purchaser, the Seller or the Seller's Affiliate shall be entitled pursuant to the Declaration to charge a reasonable penalty on late payment and/or place a charge on the Purchaser's property title (if any) and/or commence court proceedings for recovery of the amount due.*"

In the Court's view, since the particular derogates from the general, the foregoing was binding on the parties. This express agreement evinced an intention to submit to the jurisdiction of the courts in any dispute which may arise between the parties regarding service charges and community fees.

The Court of Cassation also held that the judge must interpret the contract according to its plain language, without departing from the meaning borne out by the contract or going beyond what the parties had intended or contemplated at the time the contract was made.

The Court of Appeal thus erred in its interpretation of the SPA, which it had construed contrary to the parties' agreement. Its ruling was accordingly flawed. Furthermore, the Court of First Instance had not considered the merits of the dispute and has not, therefore, determined the dispute over which it had jurisdiction.

The court held that arbitration is an exception to the court's jurisdiction and the arbitration clause should be construed narrowly.

Commentary

Although the Court of Cassation respected the agreement to arbitrate, it also protected the jurisdiction of the courts to the extent the parties had agreed to limit the scope of the arbitration agreement. Applying the rule, *lex specialis derogate legi generali*, the court decided that as long as an agreement between parties contained a special rule that excluded certain matters from the scope of the arbitration agreement such a rule should apply irrespective of an arbitration clause, provided that the agreement is both clear and explicit. Hence, the Court held that the parties to the agreement to circumscribe the scope of their arbitration clause, and in doing so, was influenced by the view that as an exception to the jurisdiction of the courts such arbitration agreements were to be narrowly construed. Finally, the Court was prepared to enforce the terms of a separate document appended to the main agreement, which it appears to have regarded as an integral part of that agreement.

The Court's decision is to be welcomed. While obviously confined to the specific facts of the case, it suggests that under UAE law parties are generally free to tailor their arbitration agreements to include and exclude certain disputes.

The Court of Cassation confirmed that arbitration is an exception to the competence of the ordinary courts with respect to civil and commercial disputes. The arbitration clause however must be clear, explicit and exhaustive in it terms if it is to exclude the jurisdiction of the courts.

For further information, please contact Saifedin Mahgoub Nagar (s.mahgoub@tamimi.com).

Construction & Infrastructure

Managing commercial risk in construction contracts

Steven Graham
Associate
Construction & Infrastructure
s.graham@tamimi.com

Background

As is the case for many sectors, 2020 has been a turbulent one for the construction industry in the region. COVID-19 and the economic fallout, the extent of which is yet to become clear, continues to disrupt the industry in the short term but the impact on 2020 is likely to be felt in the medium and long term.

This article briefly considers some of the short term steps which contractors and sub-contractors can take to manage and mitigate the risks posed by the current situation and considers what the longer term repercussions, positive and negative, of COVID-19 may be.

The short term

In the short term, the key consideration for many in the supply chain will be protecting cash-flow. This is not a new concern in the industry and has been the subject of many articles prior to 2020. Nonetheless COVID-19 has undoubtedly exacerbated this problem as a result of:

- existing projects being suspended or terminated;
- employers delaying/failing to certify payment applications and to make payments;
- a slow-down in the pipeline of new projects;
- delays to existing projects;
- increased operating costs; and

- developers calling, in some cases (for example recent articles in the UAE press) publically, for contractors to accept price-cuts on existing contracts which already contain tight margins and tough risk profiles.

In order to manage this increased risk, more important than ever is to ensure that contracts are pro-actively managed at every level of the supply chain.

Pro-active management of contracts draws out potential issues which may give rise to payment disputes at an early stage. Most construction contracts used in the region, notably the 1987 and 1999 FIDIC suites, contain provisions for the early notification of any instruction or event giving rise to additional cost. All too often these provisions are either ignored or are paid only lip-service which can lead to disagreement as to entitlement to payment and/or the amount due arising long after works have been undertaken.

As part of proactive management of contracts, two further 'common sense' steps are vital to being able to support a claim in respect of payment:

- Firstly, it is important that those managing the contract and making decisions in respect of it are familiar with and understand the contract. It is still all too common to discover that contracts which contain particular payment and notification provisions have operated on the basis of custom and practice or on the assumption that the standard FIDIC 1987 provisions will apply. Where this occurs, procedures are inevitably not followed leading to the loss of rights to claim (for example due to late notification) and/or statements are made or not made which ultimately prejudice the contractor's position.
- Secondly, proper records of costs incurred and of any instructions or occurrences which may give rise to later claims are vital. Whilst most projects do keep records, it is important that these records are complete, objective, contemporaneous and most importantly record the information which is: (a) required by the contract; (b) would be required to properly evidence a claim for costs. Further, where contracts permit it, video and pictures of progress on a weekly or monthly basis are invaluable to evidence entitlement to payment and refuting questionable Engineer's assessments.

Whilst managing the contract may help in bringing issues to light and ensuring compliance with the contract so as to avoid losing the right to claim, this is only part of the story as effective contract management it does not necessarily help in securing payment. Where employers are not prepared to make payments then contractors need to be aware of the potential remedies in their contracts and, at law, seek to use those remedies to secure payments, at least of sufficient amounts to manage cash-flow pending future disputes final resolution.

This is, of course, a difficult balancing act that can be challenging for contractors seeking to balance the need for payment against maintaining commercial relationships with an eye to future opportunities. That said, it is becoming increasingly common, notably amongst larger contractors and consultants, to decide not to seek future opportunities from employers with a history of failing to honour payment commitments.

A contractor's chief remedy for non-payment, short of termination, is to slow-down performance or suspend the works (or, at least, to threaten to do so in part of in full). Some contracts contain provisions allowing for such slow-down or suspension in the event of non-payment (for example Clause 69.4 of the 1987 FIDIC Red Book Contract). Such contractual rights are beneficial to contractors as there is a clear and unambiguous right to slow-down or suspend in prescribed circumstances (specifically in the event of failures to certify and failures to make payment). When such rights are invoked, contractors must ensure they have satisfied the preconditions to slow-down performance or suspension (for example notice requirements) and should ensure they have sufficient evidence of the employer's breach to ensure they are protected from future claims that the slow-down or suspension was not justified. Indeed, the wrongful slow-down or suspension could expose the contractor to significant repressions so it is typical that contractor only take such assertive action in respect of uncontested breaches by the employer (or breaches that the employer is objectively unable to justify).

Where the contract is silent as to suspension, in most jurisdictions in the region the applicable civil code will contain a statutory right to suspend. In the UAE, Article 247 of the UAE Civil Code provides for suspension in certain circumstances:

> *"In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligations if the other contracting party does not perform that which he is obliged to do."*

When exercising a statutory right, care must be taken to ensure that there are performable mutual obligations and that the breach is proportionate to the decision to suspend. Once again, this comes down to the prevailing circumstances, being able to evidence that the contractual pre-conditions to the obligation to make payment have been met (for example submission of supporting documents) and that there is clear evidence of the amount due.

The medium term

Looking ahead to new contracts, it seems that there is likely to be ever more competition for a limited pool of contracts as a result of the economic impact of COVID-19 (although the infrastructure and industrial sectors may well be exceptions) as well as the pre-existing trends in the regional market prior to 2020.

In those circumstances, the risk is that a "lowest-price wins" approach to procurement will dominate and that contractors will be asked to accept ever more risk for ever lower margins. As discussed below, it is hoped that 2020 may provide a 'reset' for the industry and lead to a move towards a more balanced risk profile, however only time will tell if this is likely to happen. In the meantime, it is more important than ever that contractors have a clear understanding of their risk profile and ability to deliver against the same from the early stages of procurement through to delivery of the works.

In negotiating a construction contract, it is common for employers to seek to transfer as much risk as possible to the contractor despite the fact that a contractor may be less well placed to manage that risk. In this regard, we have seen a tendency for pure construction-only contractors being asked to accept full design responsibility. In a commercial environment where procurement decisions are often based on landing the lowest price, contractors are forced to submit a competitive bid, which can result in low profit margins. It follows that that contractor is then even less able to absorb the risk. This is increasingly prevalent in the current market, with contractors being asked by clients to re-price contracts to accommodate the economic fallout from the COVID-19 pandemic. The consequences of such pricing are then inevitably passed down the supply chain (although we are aware of various instances when the underlying forms of subcontracts have made no provision for this).

However, and notwithstanding the increasingly competitive nature of the contracting market, contractors should nevertheless ensure that the contract clearly addresses fundamental issues in respect of extension of time entitlements and additional costs (including in respect of the evolving impact of COVID-19), variations, limitations on liability and dispute resolution.

Contractors should ensure that the contract makes provision for the following:

1. Extension of time and additional costs

Contractors should ensure that there are clear provisions in the contract that allow for an extension of time where there are delays to the project that are unforeseeable, outside of their control, and/or are not caused by the contractor.

In addition to provisions for an extension of time for such delays, the contract should provide for additional costs to be claimed, and potentially a variation to the contract price.

The interplay between these provisions and the force majeure provisions, often overlooked in negotiation, should be carefully considered to ensure there is some right to additional

cost in the event of force majeure events and/or a right to take action to mitigate or avoid additional cost being incurred as a result of 'no-fault' events.

2. Variations

In the increasingly fast changing market (not just for construction but for real estate market and the sectors in which the buildings will ultimately be used) effective variation mechanisms are crucial.

Contractors should ensure that they are able to notify variations or changes of circumstances which incur additional cost and/or time. This may include revisiting force majeure provisions, employer's risks and often overlooked provisions such as changes in law and fluctuation provisions (in relation to cost of materials and labour) as well as considering who carries the risk for delay and disruption in the materials supply chain.

A further area where contractors can seek to regain the ability to mitigate risk is in amending variations provisions to require the cost consequences of instructions to be agreed upon before work has to be undertaken (save in an emergency). Whilst this may be difficult to negotiate this is an area in which contractors can seek to improve their bargaining position by securing relatively limited changes to the contract.

3. Penalty Clauses

Contractors should pay attention to the way penalty clauses, for example delay damages, work with clauses dealing with variations and force majeure events. Where there is a justifiable delay the contractor should not be penalised even if the event is not itself the employers 'fault'.

4. Dispute Resolution Provisions

With regard to dispute resolution, It has long been considered the 'safe' option to include arbitration agreements in construction contracts. Whilst arbitration undoubtedly has some advantages over the local courts in certain circumstances, a major drawback is the cost involved in arbitral proceedings. For lower value disputes arbitration, even adopting an expedited procedure (for example as provided by the ICC Rules), is unlikely to be cost effective. As a result, many 'small' disputes are never resolved and the aggregate loss suffered by a contractor over multiple small disputes could be significant.

Only time will tell how COVID reshapes the construction sector (and indeed the wider economy). What is certain is that in these difficult times it is more important than ever for contractors to ensure they manage contracts and so risk effectively but, at the same time, to actively embrace new opportunities that arise

The above issue tends to penalise contractors and sub-contractors rather than employers. In order to mitigate this, it may be possible to negotiate a tiered dispute resolution provision allowing large disputes to be referred to arbitration but providing that below a certain threshold 'small' disputes can be referred to the local Courts, while it is also noteworthy that certain courts (such as the DIFC Court) have small claims divisions. This is by no means a perfect solution, however, it gives contractors a forum which is more likely to be cost effective in which to resolve small disputes. Perhaps more importantly, it keeps alive the risk of litigation which may bring employers to the negotiating table – without this, employers can be confident arbitration will not be cost effective and so there is little incentive to resolve matters amicably.

The long term

Prior to the unexpected events of 2020, there was discussion in the UAE and the wider region about the future of the market and the need for a more sustainable model to be adopted.

Steps have already been taken, for example the Abu Dhabi government's decision to impose 30 day payments terms on its contracts, to move towards a more balanced risk profile, but more remains to be done.

The 2019 report issued by Mashreq Bank focused on the potential for change in the UAE construction market to create a more sustainable model. It focused on: (a) the introduction of a more balanced risk profile, perhaps through the introduction of a standard form of contract or via legislation imposing minimum standards on the industry (b) reviewing dispute resolution procedures; and to ensure that disputes can be resolved more quickly to aid cash-flow (for example through the use of a specialist court or adjudication scheme similar to those used in jurisdictions such as the UK and Australia).

Despite the dramatic shift in the current state of the industry and the economic outlook in the immediate future, the issues identified in that report remain front and centre.

It is possible that the aftermath of COVID will create greater urgency to move towards a sustainable model for the industry. No matter what level in the supply chain you operate at, it is in no-one's interest for otherwise viable contractors to be driven out of the market due to cash-flow issues reducing the pool of competitive contractors or for ongoing projects to be threatened by the delays and complications of a contractor or sub-contractor insolvency.

If it is the case that public sector contracts and infrastructure works become a bigger proportion of the pipeline of future work in the next few years, COVID may well provide an opportunity for the public sector to expedite change.

Through the adoption of new risk-profiles designed to allocate risk to the party best able to manage that risk and through championing prompt payment the public sector can begin to bring about positive changes to the industry which will set it on a more sustainable course for the future.

Of course, the above is speculative and only time will tell how COVID reshapes the construction sector (and indeed the wider economy). What is certain is that in these difficult times it is more important than ever for contractors to ensure they manage contracts and so risk effectively but, at the same time, to actively embrace new opportunities that arise.

For further information, please contact Euan Lloyd (e.lloyd@tamimi.com).

Requirements to disclose real beneficial ownership of companies in the UAE

Izabella Szadkowska
Partner
Corporate Structuring
i.szadkowska@tamimi.com

Nasouh Raslan
Associate
Corporate Structuring
n.raslan@tamimi.com

Introduction

International organisations and bodies, such as the Financial Action Task Force ('FATF'), which recommends measures related to fighting anti-money laundering and to combatting the financing of terrorism ('AML/CFT'), and the Global Forum on Transparency and Exchange of Information for Tax Purposes ('Global Forum') both support the establishment of 'beneficial ownership' regimes.

A 'beneficial ownership' regime regarding the ownership of legal entities is a critical tool in combatting tax evasion, corruption, money laundering, and the financing of terrorism. It also allows law enforcement agencies to trace the ownership and control of legal entities such as corporations, and to "look through" the different corporate layers to determine who are the real (or ultimate) beneficiaries.

In the past few years, several jurisdictions around the world such as the European Union member states, Hong Kong, and Cayman Islands introduced such regimes. Also, within the UAE, some free zone jurisdictions, such as the Dubai International Finance Centre ('DIFC'), Abu Dhabi Global Market ('ADGM') and Dubai Development Authority ('DDA'), introduced beneficial ownership regimes a while ago.

As part of the UAE's shift towards greater transparency, and to be in line with global standards, the UAE Ministry of Cabinet Affairs ('Cabinet') issued Cabinet Resolution No. 58 of 2020 on the regulation of the Procedures of the Real Beneficiary' ('Resolution 58').

Resolution 58 introduced a requirement for entities in the UAE (with certain exceptions) to obtain and maintain appropriate, accurate and recent information of their real beneficiaries ('Real Beneficiaries') as well as update the authorities in this regard. This legislation introduces the beneficial ownership regime to the UAE "mainland" and free zone entities, and mandates the maintenance of the relevant registers discussed below.

Exemptions from application

Resolution 58 applies to all legal persons incorporated or registered in the UAE, including its free zones, except for:

1. financial free zone entities, i.e. entities in the DIFC and ADGM, that are subject to the free zone specific legislation concerning beneficiaries (i.e. ultimate beneficial owners' regime);
2. companies wholly owned by UAE federal or local governments, including the companies they wholly own; and
3. companies wholly owned by publicly listed companies that are subject to transparency and disclosure requirements, already, under UAE law.

Who Is a Real Beneficiary?

Under the Resolution, the Real Beneficiary is a natural person who either has ultimate ownership, or exercises ultimate control over a legal person, directly or through a chain of ownership or control, or other indirect means. The Real Beneficiary is also the natural person on whose behalf transactions are conducted, or who exercises ultimate effective control over the legal person.

In practical terms, the Real Beneficiary is every person who ultimately owns or controls, whether directly or indirectly, whether through shares or bearer shares:

1. 25 per cent or more of the share capital; or
2. 25 per cent or more of the voting rights, of the legal person.

This could be through a chain of ownership of control, or other means such as having the right to appoint or remove the majority of the company's management.

If no natural person satisfies the above criteria, or if there are any doubts as to who satisfies them, then the Real Beneficiary would be the natural person who exercises control of the legal person through any other means. If still one cannot identify such a natural person, then the senior manager of the legal person is the Real Beneficiary.

Register of Real Beneficiaries

Under the Resolution, each entity shall maintain a Register of Real Beneficiaries. The Register shall reference, in respect of the Real Beneficiary(ies):

1. name;
2. nationality;
3. date and place of birth;
4. residential or service address;
5. passport or identity card details;
6. basis on which that person is considered a Real Beneficiary;
7. date appointed as a Real Beneficiary; and
8. date ceased to be a Real Beneficiary.

Where the legal person identifies a person as a Real Beneficiary, it shall give them notice of this. The notice shall include the basis on which the person is identified as a Real Beneficiary, their available information, and a request to provide any missing information. If 15 days' notice pass without response, then the legal person shall give such notice. If a further 15 days passes without a response, then the legal person shall record the available information.

The legal person shall update the above information in their records accordingly within 15 days of their being informed of such a change.

The new UAE requirements to maintain a Register of Real Beneficiaries and to lodge the details of the Real Beneficiaries, introduce an additional element of transparency into the UAE mainland free zone economies. Further to the FATF and Global Forum recommendations, the aim of the new legislation is to make the UAE jurisdictions, as a whole, more robust, more reliable, and operating in line with global standards.

Register of Partners / Shareholders / Officers

Further, the Resolution makes it mandatory for all entities to which it applies, to maintain a 'Register of Partners' or 'Register of Shareholders'. The applicable register shall include:

1. number and classes of shares, and the associated voting rights;
2. date of appointment as a partner/ member;
3. for natural persons: The full name as per passport or identification card, in addition to nationality, address, place of birth, name and place of work, and photocopies of the relevant identification documents;
4. for legal persons: Name, legal form and memorandum of association, registered office address, articles of association and any similar documents, names and particulars of the directors of the entity; and
5. information similar to that outlined above.

The legal person shall have 15 days to update any changes to the information.

Finally, UAE entities are required to maintain Officers Register, as well.

Disclosure Timelines

The disclosure timelines are as follows:

1. legal persons currently existing in the UAE have an obligation to create those registers and share them with relevant registrar by 27 October 2020; and
2. newly incorporated legal persons will have 60 days from the date of incorporation to create and share these registers;
3. where the legal person issues shares in the name of a person or board director, the legal person shall have 15 days to disclose to the registrar the details of these shares, as well as the identities of the recipient; and
4. if the registrar requests any additional information related to the registers, the legal person is obliged to provide this information within the time period the registrar states.

Whilst some registrars have already started accepting those submissions, the others (e.g. the Department of Economic Development for onshore entities) are yet to open for submissions. At the moment, there are no stated fines for incorrect disclosure or for lack of disclosure.

Conclusion

The new UAE requirements to maintain a Register of Real Beneficiaries and to maintain and, in certain circumstances file with authorities, the details of Nominee Board Directors, Trustees, and their beneficiaries, introduce an additional element of transparency into the UAE mainland free zone economies. These are based on the FATF and Global Forum recommendations. The aim of the new legislation is to make the UAE jurisdictions, as a whole, more robust, more reliable, and operating in line with global standards. On a global level, such new requirements assist in combatting tax evasion, corruption, money laundering, and the financing of terrorism. The Resolution follows other related legislation the UAE enacted in the recent past such as those concerning anti-money laundering and economic substance requirements. Combined, they demonstrate the UAE's progressive outlook and commitment to becoming and remaining one of the world's most transparent and competitive places to do business.

For further information, please contact Izabella Szadkowska (i.szadkowska@tamimi.com) or Nasouh Raslan (n.raslan@tamimi.com).

Live streaming services in the UAE: questions of licences and locations

Nazanin Maghsoudlou
Senior Associate
Corporate Structuring
n.maghsoudlou@tamimi.com

You are a media company looking to take advantage of the global boom in live streaming services. Naturally, you would like your online platform to be visible within the United Arab Emirates ('UAE'). Do you need a licence? Should you incorporate a local entity, and, if so, what and where?

The COVID-19 pandemic has changed the way in which the world consumes live content – and possibly forever. Globally, use of live streamed content rose by a fifth in March 2020 relative to the preceding two weeks. Daytime (i.e. non-prime time) usage surged by 40 per cent[1]. For companies with live streaming platforms, the opportunities should also have increased a lot in the UAE and across the region.

If you are doing business in the UAE, you will need a commercial licence from the relevant corporate regulator

The question that perhaps arises for media companies wishing to extend their reach to the UAE would be whether or not they are required by law to set up a local entity: the alternative is to deliver content to the UAE consumers from offshore.

As a general observation, foreign investors wishing to undertake commercial activities in the UAE need to comply with generally applicable foreign investment requirements. This involves being registered and licenced by the relevant authorities in the UAE. Failure to comply with the general foreign investment and commercial registration requirements relating to doing business in the UAE can attract penalties - including fines up to AED 500,000 (approximately US$136,000).

If you are doing business in the UAE, you will need a commercial licence from the relevant corporate regulator.

You will also need to consider the requirements of the National Media Council

The National Media Council ('NMC') is an independent federal government agency that regulates traditional and digital media. Among others the NMC issues licences that are required under the 2018 Electronic Media Regulation ('the E-Media Law').

There are no specific laws in the UAE that address the distribution of content or theauthorisation/licensing of content distributors. The E-Media Law does, however, address the issue of what will be "Licensable Electronic Media Activities".

The following activities are considered Electronic Media that must be licensed in advance, even if they are practised through Social Media platforms:

1. websites of trading, offering and selling of audio-visual and print material;
2. on-demand electronic publishing and printing;
3. specialised websites (e-ads, news sites, etc.);
4. any electronic activity that the NMC may determine to add.

It is worth noting that the range of activities that fall under the scope of the E-Media Law is broad, but vague. An aggressive, but reasonable, interpretation of the E-Media Law is that a company that is set up in the UAE will need a licence from the NMC if it wishes to sell audio-visual content of any nature to the public.

Crucially, the E-Media Law requires that the media company behind the platform has a licence if the company is seen to be doing business in the UAE (including the Free Zones). There are no clear criteria that must be met. In general, the regulator will probably regard your company as actually doing business in the country if: your platform appears to be actively marketed to UAE residents or; your platform is using servers or other infrastructure that is physically in the country.

Look at what, exactly, you want to do before choosing a location and a corporate structure

Aside from the NMC licence, a media company which intends to commence business activities in the UAE has the option of setting up a presence either "onshore" or in one of the available "free zones" that have been established throughout the UAE.

For an onshore (also referred to as a "mainland") presence, subject to Federal Law No. 19 of 2018 in relation to foreign direct investment law, foreign media companies must partner with a UAE national (either an individual or a company wholly owned by UAE nationals)[2]. The UAE partner must hold at least 51 per cent of the shares in the onshore company.

By contrast, setting up in a free zone does not require partnering with a national shareholder: this makes for a more attractive environment for many businesses. There are two types of free zones in the UAE: financial free zones and economic free zones. Currently, the only two financial free zones are the Dubai International Financial Centre ('DIFC') and the Abu Dhabi Global Market ('ADGM)'. There are a large number of free zones located in each emirate.

[1] *Conviva, Streaming in the Time of Coronavirus, 2020, p2.*

[2] *An onshore (or 'mainland') presence is one that is outside of a free zone.*

The right corporate structure and location will depend on what activities the media company intends to pursue in the UAE.

Economic free zones are usually industry specific. In Dubai, the Dubai Development Authority ('DDA') was formed to foster Dubai's creative and innovative industries. Free zones overseen by the DDA include, amongst others, Dubai Media City, Dubai Internet City and Dubai Studio City. Any of these three free zones may be attractive to international media companies. This is in part because the DDA itself will obtain necessary approvals from the NMC when the companies apply for incorporation.

The three most widely used corporate vehicles in the UAE are the LLC, a branch of a foreign company and a representative office. Choosing the best vehicle depends on the purpose of the company and on the business activities that are contemplated.

Certain media companies may also enter the market through a distributorship or commercial agency, depending on the nature of their contemplated activity, rather than through a direct investment.

In addition to the commercial and NMC licences, a media company that intends to operate in the UAE will also need an office lease and, probably, registration for Value Added Tax ('VAT').

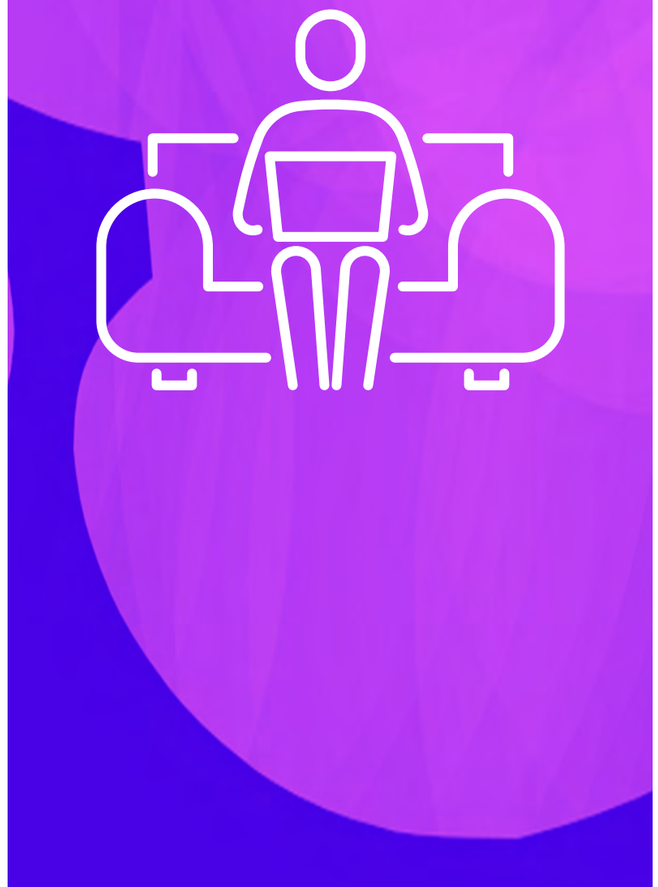
To date (September 2020), some platforms have been operated entirely from outside the UAE. However, the risks of making live streamed content available within the country without proper licensing and documentation are significant. Violation of federal law concerning companies can result in fines of AED100,000- 500,000 (approximately US$27,000- 136,000). The NMC may impose sanctions. The authorities may also block the online platform.

To conclude, the right corporate structure and location will depend on what activities you intend to pursue in the UAE.

For further information, please contact Nazanin Maghsoudlou (n.maghsoudlou@tamimi.com) or Omer Khan (o.khan@tamimi.com).

Employment & Incentives

Remote working: here to stay in the UAE?



Victoria Smylie
Associate
Employment & Incentives
v.smylie@tamimi.com

For many working in traditional office roles prior to the beginning of this year, the concept of "working from home" was foreign. However, due to the recent COVID-19 pandemic it has now become the new normal for employees across the world and it begs the question, is working from home here to stay in the UAE?

Legal position prior to the pandemic

Remote working in the UAE is a relatively new concept, as the legal position is that employees are generally required to work for a specific employer at a specific geographical location (i.e. an employer's business premises as set out in its commercial trade licence). Whilst homeworking has been actively encouraged by the Ministry of Human Resources and Emiratisation ('MoHRE') for onshore UAE national employees since 2017, previously there was no similar recognition for expatriate employees and the key employment legislative framework throughout the UAE (both onshore and within the free zones (including the Dubai International Financial Centre ('DIFC') and Abu Dhabi Global Market ('ADGM')) does not provide for the concept of remote working.

However, the position changed dramatically in March of this year when the UAE government introduced a number of measures to curb the spread of COVID-19, and as a result, employees within both the public and private sectors in the UAE were required to work remotely, where possible.

Legal position following COVID-19 outbreak

In response to the COVID-19 outbreak, the MoHRE released a Temporary Guide Regulating the Remote Work in Private Establishments annexed to the Ministerial Resolution No. 281 of 2020, in addition to the enactment of the Ministerial Resolution No. 279 of 2020 which gives an employer (amongst other emergency measures) the explicit right to request that an employee works remotely. Whilst both Resolutions were introduced on a temporary basis, they remain in force, and it is yet to be seen whether the MoHRE will extend this guidance beyond the current circumstances and make permanent legislative changes. Application of these Resolutions varies within free zones however, a number of the free zones, such as the Dubai Multi Commodities Centre ('DMCC'), introduced their own guidance or best practice drawing on the terms of these two Resolutions.

There is now an expectation on companies to amend their current workplace practices and policies in order to adopt to the new "normal", retain employees, and attract the best future talent.

For employees within the DIFC, the DIFC implemented the Presidential Directive No. 4 of 2020 ('Directive') which introduced a range of emergency employment related measures, one of which was to impose remote working conditions and requirements on employees. The Directive was however formally revoked as of 31 July 2020 and there have been no further legislative amendments announced by the DIFC to date. No additional measures or directives have been implemented in the ADGM to date.

In the Emirate of Dubai, it has been permissible, since June, for companies (both onshore and within the free zones) to operate at 100 per cent capacity however, despite this, many private sector companies continue to operate remote working entirely or alternatively, have introduced atypical working arrangements and have amended and/or implemented company policies reflecting these arrangements. For public sector employees within the Emirate, the Dubai government has recently introduced a number of innovative measures including a flexible working system across all government departments and a "work from home" policy to support female employees where their children are undertaking distance learning.

A restriction on the number of employees on business premises remains within the Emirate of Abu Dhabi, currently at 60 per cent occupancy.

Remote working: the future

Undoubtedly COVID-19 has changed the way in which remote working is viewed and has removed any stigma that may have previously been attached to the phrase "working from home", which for many had connotations of 'working' from the sofa in pyjamas. Over the past eight months, employees have been able to successfully demonstrate to their employers that they can work in an efficient and productive manner outside the four walls of their office, helped significantly of course by modern day technology. Specifically, for the UAE, remote working has seen the introduction/expansion of videoconferencing platforms like Zoom and Microsoft Teams.

Recent months have also highlighted a number of additional benefits to remote working and/or atypical working arrangements including employees reporting higher job satisfaction, increased work/life balance, greater flexibility, elimination of tiresome commutes and

Undoubtedly COVID-19 has changed the way in which remote working is viewed and has removed any stigma that may have previously been attached to the phrase "working from home."

importantly for businesses struggling through a global recession, a potential decrease in overhead expenditure. However, it is of course recognised that not everyone can or wants to work from home and future arrangements will vary. For many, the past few months have served as a reminder of how much they enjoy social interaction in the workplace, and a return to the office resembles a sense of normality. However, with several global household names such as Twitter and Facebook publicly announcing that their employees are free to work from home indefinitely, the indication is certainly that remote working will remain a feature not just within the UAE but worldwide.

There has been a steady increase in recent years of private sector companies allowing flexible working arrangements for their employees and this has increasingly been recognised as an important factor in employee recruitment and retention. However, this general trend has been fast tracked in recent months due to the virus and accordingly, there is now an expectation on companies to amend their current workplace practices and policies in order to adopt to the new "normal", retain employees, and attract the best future talent.

As this is a developing area of the law, it is important that legal advice is sought to ensure that any applicable remote working policies are consistent with local laws and practice.

For further information, please contact Victoria Smylie (v.smylie@tamimi.com).

Piercing the corporate veil: Qatari law perspective

Hani Al Naddaf
Partner, Head of Litigation - Qatar
h.alnaddaf@tamimi.com

Aiman Kler
Associate
Litigation
a.kler@tamimi.com

Introduction

Due to the economic slowdown post the drop in oil prices, as well as recent measures imposed by the State in response to the COVID-19 pandemic, we have noticed an increase in companies that are unable to meet their financial obligations to their creditors such as banks, suppliers, sub-contractors and even employees and workers. As a result, many of these companies have been subject to liquidation procedures under Qatari law on the grounds of insolvency. Recently, we have initiated multiple legal proceedings on behalf of our clients against such insolvent/under liquidation corporations in order to seek recovery of our clients' dues, and have also been successful in securing favourable judgments.

However, we have noticed that it is often the case that during enforcement proceedings the insolvent/under liquidation company either does not have any assets or has siphoned off its assets to its parent company. As a result, despite securing a favourable judgment it is often the case that decree holders are not able to recover their outstanding dues.

The only available remedy in such instances is recovering outstanding dues from the insolvent/under liquidation company's shareholders and/or directors. While the concept that a company is a separate entity from its shareholders is well established and recognised in various common law and civil law jurisdictions, including Qatar, nevertheless, the concept is not absolute and courts have the power to depart from it in limited circumstances. Where such a situation occurs, it is often said that the courts "pierce" the corporate veil. This will usually lead to personal liability being imposed on the corporation's directors or shareholders for the corporation's debts. This article examines whether Qatari law provides adequate remedies for creditors seeking recovery from insolvent/under liquidation debtors. In other words, we will examine the conditions under which Qatari courts may pierce the corporate veil.

Analysis of legal regime relating to piercing of the corporate veil

Under the Commercial Companies Law No. 11 of 2015 ('Commercial Companies Law'), the liability of shareholders in public and private shareholding companies and limited liability companies, is restricted to the value of their respective contribution towards the capital of such company. However, the Commercial Companies Law does provide instances in which the general rule is overlooked, i.e. where the liability of the shareholders goes beyond their share capital investment and the circumstances in which shareholders may be held liable towards third parties for their own acts. We also discuss relevant legal provisions where the board of directors and managers may be held personally liable.

Shareholders and managers' liability under Article 295 of the Commercial Companies Law where the company is in a loss

As per article 295 of the Commercial Companies Law, where the losses of a shareholding company amount to half of its share capital, the members of the board of directors shall, within 30 days of reaching such loss, propose to the shareholders at a general meeting to either cover the capital or liquidate the company. The failure of the manager to call the meeting and any failure of the shareholders to reach a decision on the matter could lead to managers and shareholders respectively being held personally liable.

However, it should be noted that the corporate veil will not be pierced, and the shareholders will not be held personally liable for all corporate debts. The creditors need to establish that the damages they have sustained are a direct result of the failure to implement the provisions above.

Managers and board members' liability under Article 732 of the Commercial Code where the company cannot pay its debts

As per article 732 of the Commercial Code Law No. 27 of 2006 ('Commercial Code'), if, after the company's bankruptcy, its assets appear to be insufficient to cover at least 20 per cent of its debts, the court may, upon the request of the liquidator, order to charge all the board members, managers, or some of them jointly or severally to pay all or some of the debts of the company unless they have proven that they exerted due diligence in conducting the affairs of the company.

While Article 295 of the Commercial Companies Law has been invoked and relied upon by claimants previously, we note that Article 732 of the Commercial Code is relatively untested before local courts. Creditors should take note of such a provision in the Commercial Code.

Managers and board members' liability under Article 113 of the Commercial Companies Law for acts of fraud

Article 113 of the Commercial Companies Law provides that the chairman and the members of the board of directors are jointly liable to compensate the company, its shareholders and third parties for damages resulting from acts of fraud, misuse of authority, gross mistake in performing their duties and breaches of the provisions of the Commercial Companies Law or the company's articles of association.

With regards to liability of managers of limited liability companies, article 244 of the Commercial Companies Law provides that the liabilities of the manager shall be similar to the liabilities of the board of directors of public shareholding companies. Accordingly, managers are liable to the company, the shareholders and third parties for any loss arising from fraudulent acts, deceit, abuse of power, violations of the Commercial Companies Law or the company's articles of association and any error in management (other than those made in good faith).

The only situation in which the corporate veil is pierced to attach liability to the shareholders is as per Article 295 of the Commercial Companies Law. Such a limited application of the concept of piercing the corporate veil is distinguishable from other jurisdictions where the concept of a separate legal form is disregarded during instances such as fraud, wrongdoing or injustice to third parties.

Managers and board members' liability under Clause 229 of the Commercial Companies Law for failure to add the term "limited liability company"

Under Article 229 of the Commercial Companies Law, a limited liability company's directors shall be jointly and severally liable in the event of failure of the directors to add the term "limited liability company" to the company's name in all official documents. This remedy has been confirmed by many judgments issued by the Qatar courts.[1]

Conclusion

As discussed above, the only situation in which the corporate veil is pierced to attach liability to the shareholders is as per Article 295 of the Commercial Companies Law. Such a limited application of the concept of piercing the corporate veil is distinguishable from other jurisdictions where the concept of a separate legal form is disregarded during instances such as of fraud, wrongdoing or injustice to third parties.

With regard to personal liability of managers and board of directors, the takeaways are as follows: (1) creditors can seek personal liability of the debtor company's managers only if the debtor company incurs losses amounting to half of its share capital and if the company's managers fail to call for a shareholders meeting; (2) during occasions. where after the company's bankruptcy, its assets appear to be insufficient to pay at least 20 per cent of its debts, the board members or managers may jointly or severally be liable to pay all or some of the debts of the company unless, they prove that they exerted due diligence in conducting the affairs of the company; (3) directors of a limited liability company may be liable if they do not add the term "limited liability company" to the company's name in all official documents; and (4) creditors can seek personal liability of the debtor company's chairman, members of the board of directors and managers for instances of fraud and misuse of authority.

It is suggested that Qatari legislative authorities amend the Commercial Companies Law to include liability of owners for acts of fraud, misuse of authority, gross mistake in performing their duties and breaches of the provisions of the Commercial Companies Law or the company's articles of association. Such amendments will place Qatar's legal regime relating to piercing the corporate veil in line with other jurisdictions, and also provide additional security to creditors and investors.

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

[1] *Court of cassation judgment no. 164 of 2010.*

Positive, progressive and promising: Qatar introduces a PPP law

Zeina Al Nabih
Senior Associate
Corporate Commercial
z.alnabih@tamimi.com

Law No. 12 of 2020 on the Regulation of Public Private Partnerships ('PPP Law') was recently promulgated in Qatar. The PPP Law aims to develop the Qatar private sector and encourage competition in order to boost the role and participation of the private sector in developing the local economy. The PPP Law also aims to allow the public sector a new perspective in managing national projects in order to enhance the proficiency, productivity and sustainability of such projects and handling the same in a cost efficient manner.

The PPP Law defines a Public Private Partnership ('PPP') as an agreement between a governmental body and the private sector to implement and finance works or provision of services, in one of the following forms:

- allocation of land by way of lease or usufruct in order for development by the private sector;
- build, operate and transfer ('BOT');
- build, transfer and operate ('BTO');
- build, own, operate and transfer ('BOOT');
- operate and maintain ('OM'); and
- any other form approved by the Council of Ministers.

Generally, a PPP will be carried out by the government body and the private sector participant under the terms of a PPP agreement, which must be in accordance with the provisions of the PPP Law and the PPP policy approved by the Council of Ministers. However, certain projects may be exempt from the PPP Law provided that the Council of Ministers' approval is obtained.

The PPP Law aims to develop the Qatar private sector and encourage competition in order to boost the role and participation of the private sector in developing the local economy.

PPP regulators

The PPP Law provides for the establishment of a PPP Administration Unit at the Ministry of Commerce and Industry ('MOCI') as well as project specific committees, which will comprise representatives of the relevant government contracting party, the PPP Administration Unit and the State Audit Bureau. These project specific committees will be responsible for:

- preparing the project policy and presenting the same to the Minister of Commerce and Industry for approval;
- examining tenders;
- negotiating project agreements; and
- issuing its recommendation concerning the winning bidder.

Tendering for PPP projects

The PPP Law sets out the following method for inviting bids on PPP projects:

- two-stage tender;
- selective tender according to lists of awarding specifications;
- by practice;
- by contest;
- open bidding process;
- direct agreement; or
- any other form of contract that the Council of Ministers approves.

The PPP Law permits tendering through a consortium of companies provided that none of the consortium members submits any separate bid alone or with another consortium for the same project, unless tender documents provide otherwise.

Upon the recommendation of the Minister of Commerce and Industry and the request of the government contracting party, the Prime Minister may cancel tendering procedures in any of the following events:

- if only one bid is submitted or only one bid is left after elimination of other bids;
- if all bids contain reservations, assumptions or conditions that are not in line with the tender documents or will render the bids impossible to evaluate; or
- pursuant to specific events set out in the tender documents.

In this context, the Prime Minister may cancel tender procedures for public interest reasons. Bidders may not claim any damages for cancellation of a tender unless the tender documents provide otherwise.

Furthermore, the Prime Minister will issue an approval of award upon the recommendation of the project specific committee.

A PPP agreement must cover the following aspects:

- the nature and scope of works or services that the project company must provide and the conditions of the same;
- the ownership of the project assets and the obligations of each party in relation to delivery and receipt of works and assets and the provisions of transfer of ownership;
- responsibilities for obtaining licenses, permits and approvals;
- mutual financial obligations and method of financing;
- determining the price of the products or services that the project may produce and the criteria determination of price increases and decreases, the method of dealing with inflation and the need to change interest rates'
- quality assurance and methods of supervision and audit of finances, management and technical operations of the project and its maintenance;
- granting the relevant government contracting party the right to make variations to the building, preparation, operation and maintenance of the project and other obligations of the project company;
- the entitlement of a project company to compensation upon variations, the criteria of which shall also be set out in the PPP agreement;
- insurance provisions and performance guarantees;
- risk management issues in terms of change of law, sudden accidents and force majeure and the compensation for such events;
- the term of the agreement, early termination or de-scoping and the rights of each party in such events;
- the events that entitle the relevant government contracting party to terminate the agreement and the financial consequences of such termination' and
- handing back or transfer of the project to the relevant government contracting party at the end of the term of the agreement or upon termination.

The PPP Law sets a maximum limit for the term of the PPP agreement, being 30 years, which may be permitted to be extended on an exceptional basis or in the public interest subject to the approval of the Prime Minister upon the recommendation of the Minister of Commerce and Industry.

The project company

The government contracting party may co-found a project company with participation of the private sector. If the relevant government contracting party does not wish to co-found the project company, the successful bidder of the PPP agreement must incorporate the project company as a special purpose vehicle for the sole purpose of implementing the PPP project pursuant to the underlying PPP agreement. However, the PPP Law provides that the government contracting party may permit, in accordance with the tender documents, the awarded bidder to implement the project without incorporating a specific project company provided that it has the capability to perform the project financially and technically.

Subject to the approval of the relevant government contracting party and provisions of adequate security, a project company may finance the project through banks provided that it secures its rights and assets contractually.

The PPP Law further provides that the Prime Minister may exempt a project company from certain restrictions on foreign owned companies, including ownership, usufruct or lease of real estate.

In addition to the obligations set out in the PPP Law and the executive regulations to be issued by virtue of the same, and subject to the terms of the PPP agreement, a project company has the following required obligations pursuant to the PPP Law:

1. not to dissolve the project company, change its legal form or reduce its capital without the approval of the Minister of Commerce and Industry. The project company's articles of association must make provision for prohibition of trading of its shares before the completion date of building, fit-out or development work of the project, as well as providing for a prohibition on trading shares owned by its majority shareholder after such date without the approval of the Minister of Commerce and Industry. Furthermore, the project company's shares may not be pledged for a purpose other than the finance or refinance of the PPP project. Any action or disposal made to the contrary will be void;
2. keep, maintain and take care of the assets of the project and use them for the intended purpose;
3. not to sell facilities, assets and moveable and immovable property related to the project that the project company may own, pursuant to the PPP agreement,

except for a sale made in respect of carrying out a replacement and renovation programme and pursuant to conditions set out in the PPP agreement and following the approval of the PPP Administration Unit at MOCI;

4. submit all documents, information and data required by the PPP Administration Unit at MOCI or the government contracting party, along with co-operating with the officials and allowing access to the project sites for inspection by them at any time;
5. provide environmental, health and safety requirements for the project's staff and any beneficiary of the project; and
6. not to enter into any subcontracting arrangements without the approval of the government contracting party, without prejudice to the project company's obligations set out under the PPP Law and any executive regulations to be issued by virtue of the PPP Law and the PPP agreement.

Final notes

The PPP Law provides that the ownership of the project and its assets and facilities shall be transferred to the State at the end of the term of the PPP agreement without payment of any compensation or damages unless the PPP agreement provides otherwise.

The tendering process under the PPP Law will not be subject to the Tenders and Auctions Law nor the State Budget. The PPP agreement must be governed by the laws of Qatar and any agreement to the contrary will be void. Also, Qatari courts shall have the jurisdiction in resolving disputes resulting from the PPP agreement unless the Prime Minister approves an alternative dispute resolution method.

For further information, please contact Zeina Al Nabih (z.alnabih@tamimi.com) or Frank Lucente (f.lucente@tamimi.com).

Jurisdiction Update
Turkey

Turkey: opposition to trademark applications under the Madrid System and the non-use defence

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

In this Article we highlight a recent update in relation to the practice of the Turkish Patent and Trademark Office ('Turkish Trademark Office'), with regard to the Madrid Agreement Concerning the International Registration of Marks ('Madrid Agreement') and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ('Madrid Protocol').

The WIPO Madrid System

Turkey is a member of the World Intellectual Property Organization ('WIPO') Madrid System, which is based on the Madrid Agreement and the Madrid Protocol. Accordingly, international trademark applications filed through the Madrid System may include Turkey among the designated countries.

According to Article 5 of the Madrid Agreement and Article 5 of the Madrid Protocol, international trademark applications filed through the Madrid System and national applications filed directly before a local trademark office should be treated equally, especially in terms of grounds for refusal of the application. Accordingly, any application refused by any country under the Madrid System must correspond with the grounds of refusal that apply to national applications filed directly before the local trademark office, including a refusal based on the opposition to proceedings initiated by any third party.

However, until recently, the principle of equal treatment between local and international trademark registration applications was not applicable in Turkey in terms of filing a counter statement to a notice of opposition.

The non-use defence in counter opposition

In a counter statement to a notice of opposition in Turkey, it is typical for an applicant to rely on the non-use defence whereby the applicant requires the opponent to prove genuine use of the trademark based on which the notice of opposition was filed. Such defence is possible if the opposition is based on the opponent's prior similar trademark registration, under certain conditions.

The non-use defence is of significant importance because absence of genuine use of the opponent's trademark, or the inability of the opponent to submit evidence proving such genuine use (whether directly by the opponent or through a licensing arrangement), could potentially lead to the opposition's proceedings being dismissed.

Recent compliance with the Madrid Agreement by the Turkish Trademark Office

As per the previous practice by the Turkish Trademark Office, the notification of opposition against the international trademark application was sent to WIPO after a decision was taken by the Turkish Trademark Office in the opposition proceedings, without giving the applicant of the international trademark application a chance to file a defence.

This practice practically deprived the applicant from defending its trademark application in the first opposition stage before the Turkish Trademark Office. Additionally, it made it almost impossible for the applicant to use the defence of non-use because this defence can only be used when filing a counter statement in the opposition proceedings before the Turkish Trademark Office, and cannot be filed later within the appeal before the Turkish Re-examination and Evaluation Board.

As such, for a period of two months after publication in the trade marks journal the applicant should actively monitor the trademark application in Turkey, in order to respond to any opposition filed against the trademark application as otherwise an official notification from the Turkish Trademark Office may not be forthcoming.

> One of the defences which could be filed by the applicant in response to an opposition action is the non-use defence; requesting the opponent to prove genuine use of the trademark based on which the opposition was filed.

Recently, although without an official announcement by the Turkish Trademark Office, this practice changed. Now, prior to issuing a decision, the Turkish Trademark Office would notify the applicant to allow the applicant to defend the trademark application and use the non-use defence where applicable, equal to national applications.

This new practice comes in line with other previous improvements in relation to trademark protection in Turkey. Such improvements include recognition of product groups within class 35 back in 2011[1], and issuing Law No. 6769 of 2016 on Industrial Property ('Industrial Property Law'). The Industrial Property Law came into force on 10 January 2017 and allows for the registration of sound and colour trademarks as well as improved trademark protection by including new criminal provisions for trademark infringements[2].

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

[1] *https://www.tamimi.com/law-update-articles/change-in-turkey-trademark-practice/*
[2] *https://www.wipo.int/news/en/wipolex/2017/article_0004.html*

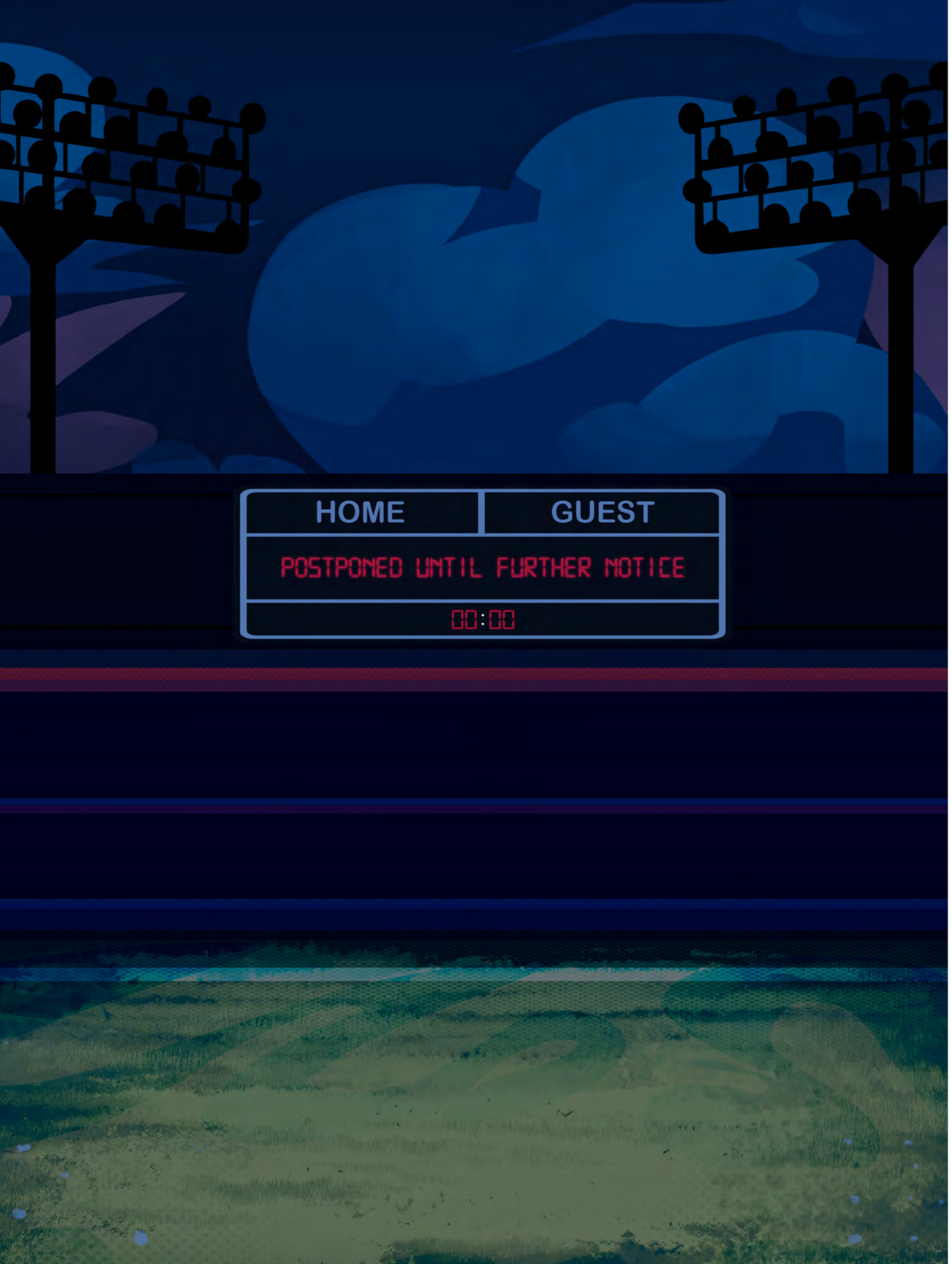
Steve Bainbridge
Partner, Head of Sports
& Events Management
s.bainbridge@tamimi.com

THE SHOW MUST GO ON

Welcome to the Sports & Events Management focus edition of Law Update. This edition provides an interesting glimpse into some of the challenges our clients throughout the Middle East region are working through in these unpredictable times. Year on year we cannot help but note how the pandemic has changed the landscape previously characterised by mass participation events and sold out venues. There is cause for great optimism, though, and whether supporting entities, individuals or institutions from the public or private sector, we feel privileged to support clients consistently leading the way towards a promising sporting horizon. This edition of Law Update gives us a chance to share some of the insights and experiences we have been fortunate to gain over the past year.

We start with a look at the direct impact of COVID-19 on the sports sector, which reminds us that even in challenging times there are green shoots and opportunities in the UAE. We take a look into the world of event insurance and consider some of those issues with which many clients have been grappling in terms of coverage under a pandemic. Thereafter, we look at a number of ways the sports sector has led the way to operating in difficult conditions and plotting a course forward. We then turn towards Kuwait, where the new sports law sets a foundation for growth and forms the cornerstone of the country's return to the international sporting fold. We also explore one of the interesting ways technology is working its magic in the form of virtual advertising, which is a promising economic development in the sports sector that is rapidly growing in prominence across numerous professional leagues and global sports events.

We look forward to the post COVID-19 world when the media headlines properly return to the athletes, teams and varied competitors we are proud to represent as they chase their dreams across golf, tennis, motorsports, football, cricket, rugby, cycling and so many other sports. It also seems sure that the early re-start suggests a trajectory for the sports and events sector in the Middle East that will ensure the commercial ecosystem of sponsors, suppliers, contractors, broadcasters, governing bodies, regulators, community stakeholders and fans will keep us busy between now and next year's sports edition, so please enjoy this snapshot as we move towards brighter days.



Sports law in the age of COVID-19

Steve Bainbridge
Partner, Head of Sports & Events Management
s.bainbridge@tamimi.com

N.B. *The original, longer version of this article was first published on www.lawinsport.com on Wednesday, 12 August 2020.*

The world before COVID-19 seems a long time ago. Any way you choose to look at the global sports and events sector, 2020 has already been a year of monumental disruption. Competitions in most major professional sports have been topped, tailed, trimmed or truncated, while major events from the Tokyo summer Olympics to Wimbledon and many points in between have been subject to postponements, cancellations and calendar re-shuffles.

Quite apart from the human costs of the pandemic, the economic impact in terms of devastating job losses, lost broadcasting revenues, gate receipts, sponsorship funding and vital footfall for travel, tour, hospitality and other symbiotic sectors has left event rights' holders and venues amongst those scrambling to plot a course forward. The previously booming sports industry has suffered a significant dent in global revenue as a result of the coronavirus-triggered shutdown starting in March 2020, when the coronavirus was declared a pandemic.

This article examines how the UAE's sports sector has been affected by the pandemic and the key elements required for a speedy recovery. Specifically, it looks at:

- the impact on UAE sports & events;
- lessons from sports and events that have successfully pivoted;
- how shutdown dynamics work;
- classifying and addressing the risks;
- return to sport guidelines – logistics; and
- a way forward.

UAE sports and events impact

The 2020 UAE Tour, a UCI sanctioned cycling event, taking place across the Emirates (23-29 February) was arguably amongst the very first international sporting events in the world to fall victim to COVID-19. The 7-stage road race was abruptly cancelled before

the final two stages could be held. Over one hundred participants, team members and officials were quarantined in what seemed like an unprecedented move at the time. The appropriate decision (seemingly obvious now, but at the time both difficult and bold) was taken after late night deliberations between authorities, organisers and medical advisors when two cases of coronavirus were suspected among staff members of one of the participating teams.

After the UAE Tour, events began to fall like dominoes. In addition to the closure of professional football competitions in the UAE, a host of marquee events were either called off, suspended or rescheduled. The Dubai World Cup horse race, the Dubai Open 2020 Chess tournament, the Asian qualifiers for the 2022 FIFA World Cup, Asian Champions League matches, the MENA golf tour, the ITU World Triathlon Abu Dhabi and the Abu Dhabi Paratriathlon World Cup were amongst the casualties with even the opening of Dubai Expo 2020 being postponed until late 2021.

Lessons from sports and events that have pivoted

To adapt, there is a need for the sports ecosystem to embrace greater flexibility through the current slowdown and to be better equipped to withstand similar potential ordeals in the future. Traditional sports can learn lessons from the successes of some new entrants to the market such as esports, where the successful staging of F1 virtual Grand Prix events, ePremier League invitationals, the Mutua Madrid Open Virtual Pro (tennis), the virtual grand national and the first ever virtual Tour de France offered by Zwift (including classifications for both men and women), have uncovered and exploited new market opportunities to garner increased appeal and rampant growth during the lockdown. Everyone wants to see an expeditious return of sports. For those sports that cannot effectively pivot, appropriate regulations can help speed up the process, provided they address the specific risks facing each sport.

Any way you choose to look at the global sports and events sector, 2020 has already been a year of monumental disruption.

Shutdown dynamics

Some events were impacted either directly by participants or stakeholders such as governing bodies, leagues, organisers, players or teams or indirectly by the lack of travel or accommodations logistics, closure of venues or the impact of statutory or regulatory provisions, amongst many other fact-specific reasons. The specific mechanics affecting any given event are particularly germane to the commercial and legal implications of cancellation, including such issues as the unparalleled reconsideration of force majeure, and the determination of liability and applicability of any insurance cover.

In the UAE, like many jurisdictions, there has been governmental action to ensure the safety of the population and to minimise the risk of exposure and transmission. Specifically, a number of swift and broad-ranging actions have impacted sporting shutdowns. While it is typically the case in the UAE that broader population protection was at the core of the legal mechanisms rather than sports-specific measures, it will be instructive in terms of sports reopening plans to consider the specific concerns that need to be addressed before reopening, be it through repealing or amending measures or providing for substitute requirements that otherwise ensure public health and safety.

In response to the seismic and rapidly evolving threat to public health and safety posed by the COVID-19 outbreak, the UAE government and its constituent emirates took legislative action, implementing a range of mitigation measures. These measures were

prepared and issued swiftly, often in the form of Circulars and Ministerial Resolutions as opposed to full statutory enactments, aimed at containing the virus. As early as 18 March 2020 - exactly one week from COVID-19 being declared a pandemic by the WHO, a series of precautionary measures were announced by the UAE Government to curb the spread of the virus. These measures included the mandatory imposition of a 14-day quarantine period applicable to anyone travelling to the UAE from abroad, the immediate suspension of issuance of new labour permits, (with certain exceptions), and the suspension of return entry even for valid residence visa holders caught outside of the UAE at the time of the decision. Numerous further safety decisions were issued by the General Civil Aviation Authority across a period spanning from April-June 2020. In a jurisdiction like the UAE where much of the sporting activity includes participation and/or support from tourists, athletes, production staff and others, the inbound and outbound travel restrictions issued in April had the indirect but immediate effect of preventing sporting activities.

Some travel measures have eased with the imposition of new safety requirements (e.g., PCR tests for all inbound and transit passengers travelling to the UAE and the establishment of isolation facilities). In addition to these strict travel measures (understandable in a nation bearing multiple prominent international airports) domestic mitigation measures were taken to control and regulate the day-to-day behaviours of residents, such as the enforcement of strict and mandatory social distancing measures and the mandatory use of face masks.

The Department of Culture and Tourism ('DCT'), Abu Dhabi has acted to limit mass gatherings to strict minimums. It swiftly issued a Circular suspending public events in mid-March, and only permitted the operation of remote events with effect from mid-May (conferences, workshops and training courses) subject to a remote event licence being obtained for the same. Compliance with these directives has been enforced by timely inspections conducted by DCT inspectors and any events staged in breach of these measures constitute an offence for which violators would face significant legal sanctions. Additionally, strict penalties would continue to apply to anyone acting in violation of the precautionary and preventive measures issued by the Ministry of Health and Community Protection, the Ministry of Interior and the National Emergency Crisis and Disaster Management Authority.

Return to sport guidelines: logistics

Each jurisdiction and each sport must grapple with these issues and, while the re-emergence of sports is very much a work-in-progress, we can learn from those who have been quicker

The UAE has been a leader [in adaptability and re-emergence] with Abu Dhabi hosting the UFC's inaugural Fight Island [under special conditions].

to reopen in effecting optimal changes as well as from the pitfalls of those that have not worked as well. In this regard, a number of international sports' governing bodies have introduced guidelines, standards and recommendations to offer direction and a blueprint to leagues, relevant national sports bodies, teams and federations so that similar policies may be adopted to ensure the safe, smooth and secure resumption of sporting activity. Amongst the many return-to-sport guidelines that have been introduced in the recent months are the following examples:

1. Premier League 2019-2020 Restart Guide
2. ICC Back to Cricket Guidelines, May 2020
3. ITF Return to Tennis Guidelines, June, 2020
4. FIA Return to Motorsport Guidelines, June 2020
5. Safe Return to Rugby in the Context of COVID-19 Pandemic, June, 2020
6. FIBA Restart Guide for National Federations

While travel, accommodation, air filtration systems and many more elements impacting sports are touched on, some common themes can be drawn from these return programmes. Each of these guidelines contains minimum health and safety standards to be observed by the players, officials, staff, stakeholders and media personnel and, arguably, all involved have the responsibility to ensure safe reopening.

These measures include without limitation:

- the need to avoid unnecessary physical contact;
- the need to maintain and adhere to social distancing of 1.5-2m (including by adding locker-room space, additional facilities, etc.);
- disinfection protocols for venues and facilities;
- staged/phased return to training starting from solo training to training in small groups and eventually resuming full-squad training;
- the need for athletes to carry/ maintain their own individual equipment (where practicable);
- the need to minimise or avoid the use of communal facilities (changing rooms, dining halls, showers);
- the need to wear PPE when not playing or training or engaged in rigorous physical activity; and
- implementing appropriate biosafety plans.

Various creative measures have been devised in an effort to adhere to and promote the goals of these guidelines to support the safe return of sports. From the use of hub-cities in MLB to the Disney Bubble for the NBA, charter flights from Emirates for the USTA, isolation camps prior to cricket tests from the ICC and the reduction of support categories for Formula One events, it is clear there is a flexible will to adapt to new measures to preserve sports.

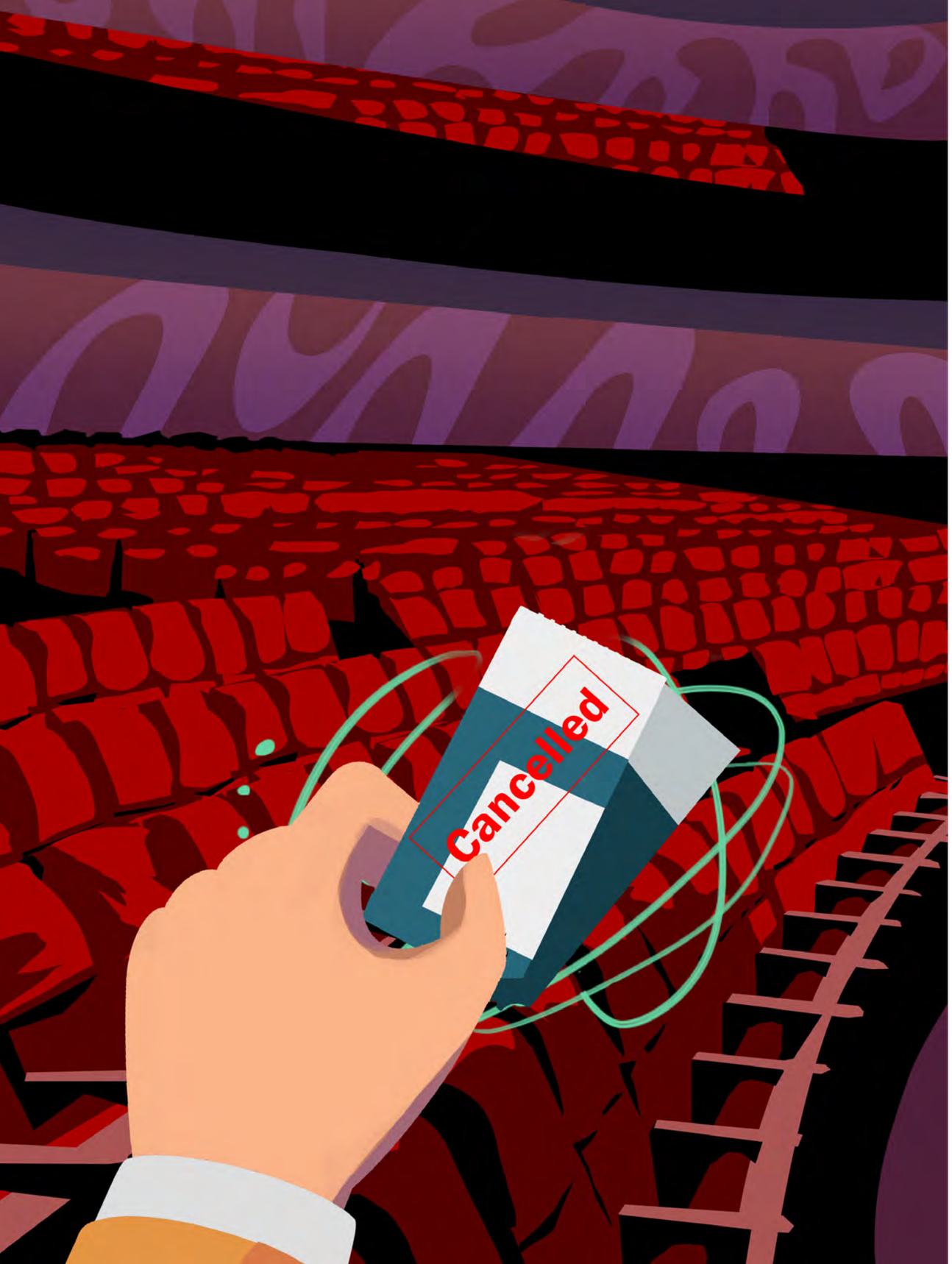
A way forward

Expecting a bright-line transition between pandemic modified sports' activity and a post-pandemic comprehensive lifting of all restrictions on sporting events may be unrealistic – perhaps even in the context of one or more viable vaccines (given such factors as uneven roll-out, the need for prudent caution and data analysis in terms of mid to long-term efficacy, etc.). What is certain, however, is that sports have shown the capacity for survival and adaptability.

Athletes and organisations alike will need to work with governing bodies to support adaptations and fans may need to appreciate and accept some variation in the historical sporting products as well as their methods of consumption. Pandemic pivots have shown green shoots in new disciplines, as well as the modification of existing forms. Zwift, Rouvy and a range of esports remind us of the ever-changing landscape and opportunity to create new niches where quality and competition drive interest and passion. The broadcast successes of events such as the NFL Draft, the eNASCAR iRacing Pro Invitational Series and Hafthor Bjornsson's new world deadlift record remind us how loyal the fan-base remains.

Sports governing bodies and stakeholders will need to develop effective guidelines for return to play. The broader ecosystem of contractors from media to ticketing providers, transit solutions, F&B, merchandising and the multitude of other contractors that depend on the sports industry will doubtless be willing to conform in most cases. The UAE has been a leader in this adaptability with Abu Dhabi hosting the UFC's inaugural Fight Island that began with UFC 251 and ran through July on Yas Island in a specially developed "safe zone". If this can be done with such success, despite the strict safety measures in place in the UAE, there are examples to follow – even if it is clear a single roadmap forward will not fit every sport. Additionally, with the ICC calendar now free after the postponement of the T20 World Cup, the UAE has been identified by the BCCI as the host for its marquee event the 2020 IPL, which kicked off in late September and which will run through until early November (at venues in Abu Dhabi, Dubai and Sharjah). This serves as a positive reminder that while COVID-19 legal restrictions are still very much in play, with appropriate advice and guidance sports' events can be successfully organised and delivered. In short, sports will find a way to adapt and, we need to keep learning from what works and. perhaps more from what does not work.

For further information, please contact Steve Bainbridge (s.bainbridge@tamimi.com).



Navigating event cancellation in a Post-COVID era

Steve Bainbridge
Partner, Head of Sports
& Events Management
s.bainbridge@tamimi.com

Justin Carroll
Senior Associate
Transport & Insurance
j.carroll@tamimi.com

N.B. *A version of this article was first published in Middle East Insurance Review (MEIR) June 2020 edition.*

COVID-19 has impacted the sports and events sector in an unprecedented manner. The changes that have occurred are on a scale that must surely reverberate well into the future. Leagues, teams, host venues, organisers and corporates involved in major sporting events as well as entertainment companies and music promoters will be familiar with event cancellation. But the COVID-19 pandemic provides us with an opportunity to review the key role this often misunderstood coverage can play in a crisis.

Can event cancellation insurance help?

Yes, and no. But it is all in the name, right? If an event is cancelled and you have a policy, the economic losses resulting from cancellation should be covered, right? Not quite. In reality, event cancellation policies are often complex and because they typically relate to high values they tend to involve bespoke and feature nuanced language. As is always the case in terms of insurance coverage, whether cover is available or not, will depend on the precise nature and scope of coverage agreed, including specific policy language and due consideration for the particular circumstances giving rise to a potential claim in any given situation.

Event cancellation policies are written on an 'all-cause' basis and could, depending on the policy wording, provide cover for events cancelled due to an outbreak of an infectious or a communicable disease like coronavirus. Careful consideration of the policy wording would need to be given alongside the timing of the event and the circumstances surrounding the event's cancellation.

Until January 2020, cover for infectious and communicable diseases was offered as an extension to standard event cancellation policies in the market. Since then, insurers have not. surprisingly. withdrawn this option from the market and many insurers have included specific exclusions in their event cancellation policies for coronavirus and/or pandemics.

Event cancellation policies written on an 'all-cause' basis could … provide cover for events cancelled due to an outbreak of an infectious or a communicable disease like coronavirus.

While headlines were quick to note the policy pay-out to the All England Lawn Tennis Club resulting from the cancellation of this year's Wimbledon, for every Wimbledon there are many more entities like the Endeavor Group (parent to IMG and WME), which have seen falling revenues and downgraded credit ratings. What gets you to the 'yes or no' of coverage should not be a matter of luck but the result of a concerted risk amelioration strategy. Wimbledon learned and astutely applied lessons from the 2003 SARS epidemic to navigate 2020.

For a sports or events' business, this process starts with identifying and understanding key event assets and delivery requirements, adequately quantifying your anticipated revenues, determining risk-tolerance and related thresholds and allocating resources to cover potentialities. The COVID-19 pandemic serves as a timely reminder that these issues should be considered and used as a touchstone for future planning and strategy. However, the proverbial horse has left the barn in respect of the current pandemic and insuring against loss arising from what is now very much a known risk, if not done prior to January 2020, is practically impossible and is an entirely different discussion than that which we are outlining here.

In fact, event organisers and rights' holders can anticipate difficulty in seeking 'all-cause' coverage. This is likely to be the case not only for obvious COVID-19 exclusions but for pandemic exclusions generally. Even where insurers are prepared to extend cover for pandemics and communicable illnesses and diseases, prospective insureds can expect to pay higher premiums and to have more restricted terms written into their policies.

Factors to be balanced in considering and selecting cover

Perhaps the largest financial risk to which an event organiser may be exposed is the risk that the event is unable to go ahead and has to be cancelled at short notice. While current circumstances have thrust pandemics and COVID-19 to the fore, many things can cause an event to be cancelled at the last minute, including:

1. physical damage to critical equipment or the premises where the event is to be staged;
2. extreme weather preventing the event from proceeding or spectators from accessing the event's premises;
3. the late arrival or failure to arrive of persons critical to staging the event; and/or
4. the sudden withdrawal or suspension of governmental approval for the event to proceed.

Which risks are of such likelihood or magnitude – or the product of an equation considering both of those factors – that a particular business should consider investing in cover? Among the questions to be considered by event organisers (including venue and facility owners, operators, promoters and ultimate rights' holders) in determining appropriate levels of protection against risk are factors such as the financial magnitude of the event, its core significance to the corporate brand (of organiser, venue, rights' holder or relevant third parties), reputational risk, event frequency/uniqueness and the feasibility of rescheduling. Comprehensively answering these questions may require a framework of other questions and a collection of evidence from the business before careful consultation with its advisors and insurance brokers.

The scope and nature of cover that a corporate entity opts to agree as protection against certain risks can be a business decision of considerable weight. For the purposes of major events, event cancellation cover can represent a substantial cost, whether viewed as an optional investment in protection, taken up after deliberations with advisors, followed by choice in adherence to industry best practice, mandated by applicable internal or external compliance measures, required by contractual obligations or otherwise.

Event to watch: Saudi Arabia Formula 1

Commencing some months prior to the coronavirus pandemic and, notably, before the major part of the sports and events world was brought to a screeching halt, there has been mounting speculation that Saudi Arabia will announce concrete plans to host a Formula 1 Grand Prix. This speculation has to be considered all but confirmed by the announcement that Aramco is to be a top-tier F1 sponsor.

If we reasonably assume that a KSA F1 event is to be part of the post-COVID-19 Middle East sporting calendar, can you anticipate any likely positions in respect of prudent insurance for such a flagship event? Based on our overview and consideration of the scope, nature and applicability of event cancellation insurance, consider a KSA F1 this tabula raises an interesting case study for your consideration of event cancellation insurance.

Would such coverage be an optional investment, adherence to best practice, mandated by compliance measures, required by contractual obligations? Would it be chosen for and/or other reasons? What likelihood and magnitude of risks should be considered, given the likely assets, the geographical location and the time of year allocated on the FIA calendar? Are there unique requirements to consider from the potential applicability of national mourning cover to reliance on limited, highly specific sand-removal equipment? Are any of these factors altered if the event is based on a public street course versus a track event in a controlled facility?

Lessons learnt: moving forward

In a post-COVID-19 era, event organisers and insurers would do well to:

- be prepared well in advance, as this will allow you to lock in costs and protect you from new threats which may arise after the date of the policy but before the event (i.e., to beat the exclusion of such risks).; build the cost of appropriate cover into your event, giving advance opportunity for the budget team to allocate funds and the commercial team time to determine where revenue streams can be revisited or where to sweat assets;
- educate all relevant aspects of the business to appreciate the scope and nature of cover to ensure efficient and effective pricing and claim readiness (e.g., procurement may need to know the time of year and region of event can impact premiums in some cases for weather, etc., whereas applicable administrative teams should be alert to create and retain relevant documentation to substantiate losses for irrecoverable expenses and all categories of insured loss); and
- be attentive to the lessons offered by others. As we move through and hopefully beyond the current pandemic, a great deal more market information will become available. Consider that with a discerning eye as to how such experiences can impact your business.

For further information, please contact Steve Bainbridge (s.bainbridge@tamimi.com).

Identifying and addressing sport specific risks in COVID-19 era

Steve Bainbridge
Partner, Head of Sports & Events Management
s.bainbridge@tamimi.com

Ujjwal Ashok
Paralegal
Corporate Commercial
u.ashok@tamimi.com

N.B. *Elements of this article were first published on www.lawinsport.com on Wednesday, 12 August 2020.*

As sporting activity recovers from the pandemic and resumes in the UAE, and indeed globally, it remains imperative to be mindful of potential COVID-19 transmission risks inherent in each sport. These risks should be appropriately identified, accounted for and addressed. This article examines some such risks and considers measures being taken across the sports industry to facilitate safe resumption of activity.

Identifying sport-specific risks

While pandemic-induced shutdowns in the sports sector were relatively ubiquitous, each sport is different and there are specific risks of which we should be mindful in an effort to minimise the risk of exposure to the unforeseen enemy. Specifically, understanding what fundamental and unique features in some major sports may exacerbate or reduce the risk of participants and stakeholders contracting COVID-19 will be useful in determining appropriate restrictions in a safe and sustained re-emergence, as well as perhaps introducing systemic resilience against potential future challenges.

1. Cricket

Even the shortest format in cricket, T20, lasts approximately three hours. In the case of a test team, in addition to management, trainers, physios, and related support staff and officials, each team includes up to 18 players, whether selected to play or not, together for up to five consecutive days. The added risk here is the length of time for which the players occupy shared facilities in close proximity for the full duration of each day's play, not to mention travel and accommodation logistics. This alone creates a COVID-19 transmission risk owing to sustained exposure amongst players, fans, staff, officials, media personnel for the duration of a match.

2. Tennis

Commercially, most popular in its singles format, tennis alleviates some concerns regarding the large numbers of participants in other sports such as cricket; however, by ratio, tennis is one of the most heavily officiated sports. At any given stage of a tennis match, there may be dozens of officials and support staff (chair umpire, line umpires, ball persons) in close proximity. While the total number of persons involved in play is relatively low compared to team sports, the smaller dimensions and frequency of indoor facilities need to be taken into account, as indoor facilities pose an appreciably greater risk of contracting the coronavirus. Additionally, the predominance of the single-elimination tournament format with tightly coordinated competition schedules at professional levels (e.g., ATP schedule, featuring over 60 tournaments in a calendar year), with all related travel and accommodation interactions will increase potential exposure and transmission threat.

3. Football

One of the most cherished features of the English Premier League ('EPL') is one that increases the potential for virus transmission, i.e., that the matches are often played in packed stadia before capacity crowds, especially matches featuring top clubs, derby rivalries, and relegation battles. Such matches are quintessentially spirited environments with a good measure of camaraderie and vocal exchanges. Statistics for the recently

Health and safety issues are of paramount concern in the UAE, which is host and home to a series of one-off premier global sporting events each calendar year.

completed 2019-2020 premier league season confirm that average attendance by home fans (pre-COVID-19) for each of the twenty top tier clubs was in excess of ninety per cent, with the highest average over 97 per cent recorded at Old Trafford (Manchester United) and the lowest at St. Mary's Stadium (Southampton) at under 92 per cent. In an environment with over 70,000 fans at Old Trafford, in the absence of necessary health and safety protocols being strictly adhered to, COVID-19, quite literally, looms in the air.

4. Rugby

Rugby is quintessentially physically demanding and contact prone with aggressive tackling and forceful physical confrontation. Another seminal feature of the game is the scrum. This highly skilled and much misunderstood dynamic occurs with up to eight players from each team interlocked in a formation with their heads down and arms joined, in a mechanism that concentrates great force, to vie for possession of the ball and to gain advantageous field position. In a scrum, players collide and remain in close proximity during the heat of battle thus, creating a potential conduit for on-pitch virus transmission. Quite apart from the fans' experiences, team logistics, and related conditions noted in respect of other sports, this element within the sporting dynamic enhances the risk of exposure and transmission.

5. American Football

Apart from the features and elements typically found in a contact team sport American Football is another team sport with higher susceptibility to the virus in the inherent dynamic of the line of scrimmage. The commencement of play formation increases close contact and resulting vulnerability of the players to contract and/or transmit the virus. The offensive and defensive linemen square off - literally breathing down each other's necks – and make aggressive contact on almost every play of the game, thus compromising the players' safety and multiplying the threat of contracting or transmitting the virus through frequent contact.

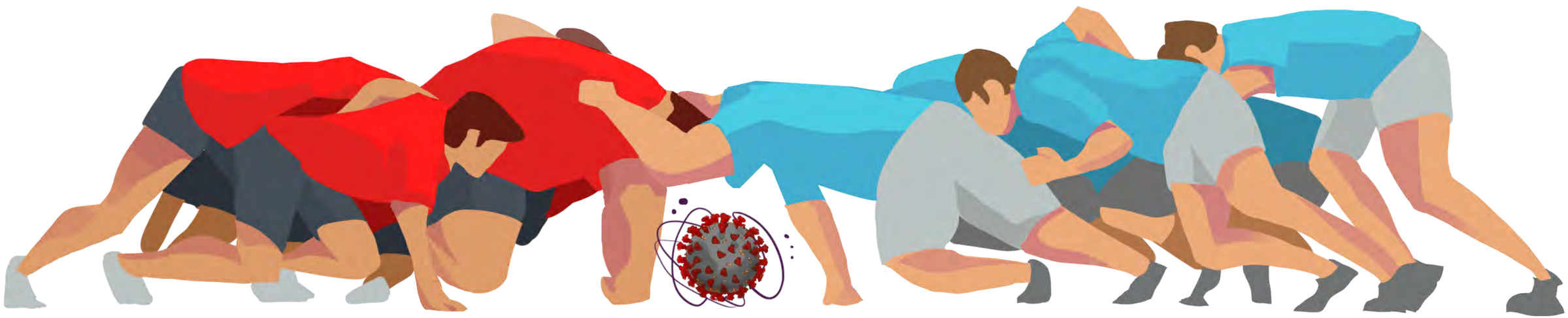
6. Basketball: the NBA

The COVID-19 risk, in competing in basketball and expressly in the NBA, is heightened, and some have suggested potentially amongst the highest in sports, as it incorporates multiple high-risk elements, that make the game particularly susceptible to transmission of COVID-19.: it is a team sport involving shared facilities and large periods of group interaction on and off court; it is a contact sport leaving little room for social and physical distancing during competitive play; and it is primarily played indoors, with a higher risk of the virus remaining airborne in close quarters, thus increasing the chances of transmission.

7. The Olympic conundrum

In late March 2020, the International Olympic Committee President, Thomas Bach, following a consultation with the Japanese Prime Minister, Shinzo Abe, and other relevant stakeholders announced that the 2020 Summer Olympics in Tokyo would be postponed. As it stands, the Tokyo Olympic games have been rescheduled to take place in July and August 2021.

The Olympic Games are the single largest and most prestigious global sporting event in the world, with the Tokyo Olympic Games now set for 2021, expected to be host to over 206 nations, attracting more than 11,000 athletes, 5,000 technical officials and coaches and 20,000 media personnel, not including



some 4,000 members of the Local Organising Committee and 60,000 volunteers who are already stationed in Tokyo. These estimated figures do not even include the spectators and tourists who are expected to flock from different parts of the globe to witness the games and attend the opening and closing ceremonies. It remains to be seen whether or not the games will be held absent a vaccine capable of being widely administered with sufficient time before the event to guarantee a safe and secure environment for all.

Added to this statistical framework, most athletes and officials are normally accommodated in the Olympic Village and could face the prospect of sharing rooms, accessing common facilities such as dining halls. This feature of the athletes' village does not bode well in the present climate where an overarching concern is to create a safe and secure environment for the athletes to minimise the risk of contracting the virus.

While pandemic-induced shutdowns in the sports sector were relatively ubiquitous, each sport is different.

Operational rule adjustments directly impacting on-field play

The COVID-19 pandemic has shown that the sports industry will have to adapt and remain flexible to remain sustainable and reliable when a worldwide crisis strikes. While we have seen a wide array of logistical measures and guideline requirements impacting off-field action being adopted and adhered to by various sports in an effort to restart in a safe and secure manner, it would be useful to look at some specific and practical measures and rules introduced by relevant leagues and sports' governing bodies, directly related to on-field action and designed to promote and sustain the safe re-emergence of sports from an operational, on-field, perspective.

Various considerations are under review and the introduction of several safety measures have impacted the spectacle of sports that we have been used to, brought about by COVID-19 inspired change. For instance, ball assistants have been reduced in football, the number of potential substitutes permitted to warm up on the sidelines at any given point has been reduced, match balls are sanitised (as with NBA game balls), players shaking hands has been discouraged, training staff appear wearing PPE and players routinely now use personal drinking bottles. Elsewhere, in tennis, line judges are being replaced by automated machines where possible and players are using opposite sides of the court for changeovers, in cricket bowlers are prevented from applying saliva to the ball and emergency medical staff and equipment are subject to new PPE requirements.

In addition to these practical and operational changes, we see foreshortened seasons in a number of sports and must consider limitations on previously typical parameters. Would a World Series champion escape an asterisk for an MLB season below 162 games? Would Wimbledon maintain the integrity of tradition without qualifiers? If the NBA survives the bubble, how will we view a season winner with no real home/away game dynamics? These questions will doubtless persist unless and until normalcy returns to the sports industry but the rigor and passion of sporting debate is an honoured tradition that looks set to continue.

Assumption of risks in resuming sports events in the UAE

Health and safety issues are of paramount concern in the UAE, which is host and home to a series of one-off premier global sporting events each calendar year. These events include the UAE Tour (a UCI sanctioned cycling event taking place across the Emirates and incidentally amongst the first international sporting events to fall prey to COVID-19), the Dubai World Cup horse race, The Dubai Rugby 7's, the ITU World Triathlon Abu Dhabi, The Abu Dhabi Formula 1 Grand Prix and numerous professional golf tournaments amongst many more. These sporting calendar favourites attract a legion of fans and travellers from around the world and the resumption of safe and secure sporting activity, in compliance with relevant return to sport guidelines, will require the coordinated efforts of government, the sports authorities, event organisers and all the other relevant stakeholders.

For further information, please contact Steve Bainbridge (s.bainbridge@tamimi.com).

Kuwait's return to the IOC: overview of sports law in Kuwait

Ahmed Amin
Senior Associate
Corporate Commercial
a.amin@tamimi.com

Introduction

The State of Kuwait has a longstanding history in sports activity and is one of the few countries within the Gulf Cooperation Council to implement a legal framework specifically to regulate the operation of sports activities and the functioning of sports entities, including the regulation of sports federations, the Olympic committee and sports clubs.

Before enacting the current sports law No. (87) of 2017 ('Sports Law'), sports activities in Kuwait were primarily regulated by the repealed Law No. (42) of 1978 regarding Sports Entities. The repealed law was subject to criticism by the International Olympic Committee ('IOC') because, contrary to the international Olympic Charter, it did not achieve complete independence for sports activity in Kuwait. More specifically, the criticism suggested the repealed law did not protect against governmental interference in the internal functions of the Kuwaiti National Olympic Committee ('KNOC'). As a result of such criticism, KNOC was suspended by the IOC in 1986 and Kuwaiti national athletes were not permitted to participate in international Olympic games as representatives of the State of Kuwait, albeit they were permitted to participate as independent athletes under the flag of the IOC. Kuwait's relationship with the IOC has gone through some ups and downs and whilst Kuwaiti athletes were sometimes allowed to participate in international Olympic games as official athletes of Kuwait, at other times the IOC banned official participation of Kuwaiti athletes.

Enactment of the new law

In order to put an end to the debate as to the compliance of Kuwaiti laws with international standards of sports law, the Kuwait Parliament.in 2016. voted by a majority of over two-thirds to amend the then applicable sports law to facilitate dialogue with the international sports community and to refute claims that Kuwait was not in compliance with its international commitments.

On 4 December 2017, the Kuwait Parliament enacted the Sports Law to facilitate the restructuring of the Kuwaiti sports community, including sports federations,

election procedures for sports club boards and to provide internal bylaws for sports clubs as well as to eliminate any perception of governmental interference in the internal functions of the KNOC.

Compliance with international standards

a. Establishments of sports entities

Most of the provisions of the Sports Law emphasise the importance of achieving compliance with international standards for sports legislation. Article (2) of the Sports Law expressly provides

> *"Sports entities shall be established in accordance with the related international standards through their registration with the authority [Public Authority of Sports] and promulgation as per the law."*

Sports entities, as enshrined under Article (2), means all entities concerned with sports activities in Kuwait; namely, general and specialised sports clubs, sports federations, the KNOC and the Kuwait Paralympics Committee ('Sports Entities'). Article (2) of the Sports Law eliminates governmental interference in the constitution or establishment of Sports Entities to ensure their independent functioning, free from any executive or governmental interference.

b. Independent bylaws and juristic personality

Internal bylaws are an integral part of managing any institution/entity. To achieve the aimed independence of Sports Entities and adherence to acceptable standards of international sports legislation, Article (3) of the Sports Law permits Sports Entities to adopt their own bylaws provided that they are in line with related international standards, the Olympic Charter and prevailing bylaws of relevant national and international federations. Article (3) mandates inclusion in the bylaws of such information as the name of the entity, its address, activity, membership conditions, board election procedures, financial resources, and member meetings. Moreover, Article (5) eliminates any control of Kuwaiti national authorities with respect to the recognition of the bylaws or any amendments thereto. Article (5) grants Sports Entities the right to ratify and amend their bylaws via the concerned international federation, which eliminates any governmental discretionary power in this area.

In addition to a Sports Entity's right to adopt its own bylaws, Article (11) grants each Sports Entity an independent legal personality, separate from the legal personality of its members. Independent legal personality entitles Sports Entities the right to conclude legal acts such as contracts, and it also gives them the right to sue and be sued independent from their members, which achieves a balanced relationship between the Sports Entity and its members and promotes a proactive role for members rather than a passive one.

c. Handling funds and audit rights

Further to the primary theme on the independence of Sports Entities, Article (21) of the Sports Law prohibits any current or exiting member of a Sports Entity from individually owning or seizing any funds that are privately owned by the Sports Entity. Moreover, a Sports Entity, as an independent juristic person, is not permitted to engage in any betting activities or to intentionally conclude any act that could prejudice its financial credibility or expose it to financial damage.

Article (22) authorises Sports Entities to deposit funds in one or more bank account(s) in Kuwait, provided that a notification is sent to the Kuwait General Sports Authority.

Article (23) permits Sports Entities to accept governmental donations and subsidies as well as allowing them to exploit premises and real estate owned by the government, subject to agreement between the concerned Sports Entity and the Kuwait General Sports Authority. In this respect, and given that governmental subsidies and premises are public assets, Article (23)

> [T]he Kuwait Parliament enacted the Sports Law to facilitate the restructuring of the Kuwaiti sports community...

also authorises the Kuwait General Sports Authority to audit and review the allocation of such funds to ensure they are allocated within the scope of their legitimate and agreed upon purposes. The Sports Law limits the scope of such an audit to a review of accounts related to the governmental subsidies or donations, so that the audit right does not extend to include all financial activity of the concerned Sports Entity.

Sports clubs

a. Definition

A sports club is defined by Article (24) of the Sports Law as a sports entity that enjoys an independent legal personality, which aims to exercise a sporting activity, facilitate and provide the necessary means and services to achieve its purposes for the benefit of all its members in all social, cultural and health fields.

b. Management

Sports clubs are managed by their general assembly, which is the superior authority of the club. A general assembly shall exercise the powers and authorities conferred upon it by the relevant club bylaws with complete independence to ensure every member's right to freely contribute to the decision-making process of the club without intervention from any third party. For reasons of efficiency, the general assembly elects a board of directors to run the day-to-day affairs of the club.

c. Joint liability of board of directors

Whereas the board of directors is responsible for the daily affairs of a sports club, Article (30) of the Sports Law makes all members of the board jointly liable to fulfil the financial obligations of the club in case the exercise of such obligations results in a violation of the Sports Law and/or the bylaws of the club. In addition, the said Article (30) makes former members of the board (i.e., members who have finished their terms and are no longer current members of the board) liable to settle any violations that occurred during their term on the club's board. These rules are provided to ensure efficient, conflict-free and accountable management of the board of directors of sports clubs.

National sports federations

a. Definition

A National Sports Federation is defined, by Article (34) of the Sports Law, as a Sports Entity that enjoys an independent juristic legal personality and is recognised by the concerned international federation. The membership of a National Sports Federation is composed of those sports clubs and other entities which exercise the concerned activity regulated by the federation. Each National Sports Federation is managed by its general assembly, which is the superior authority of the federation. The Sports Law also enshrines the principle that no more than one National Sports Federation can be established for the same sport.

b. Authorities of a national sports federation

According to Article (35) of the Sports Law, a National Sports Federation shall exercise the authorities conferred upon its bylaws. In particular, a National Sports Federation shall exercise the following authorities:

- planning general policy to ensure the spread of the sport throughout the country;

- managing technical, organisational and financial aspects of the concerned sport;
- preparing national teams which represent the country in Olympic, international; continental, Arabic and Paralympic tournaments and competitions;
- co-ordinating efforts of its members and establishing relevant programmes for international matches; and
- putting in place relevant regulations and rules for registering players and governing player movement between teams, whether domestically or internationally.

Kuwait national olympic committee ('KNOC')

As defined under Article (38) of the Sports Law, the KNOC is a Sports Entity that enjoys independent legal personality and it aims to support, develop and sponsor the Olympic movement in the country as per the rules of the Olympic Charter. The general assembly of the KNOC is the superior authority of the KNOC and it exercises its powers with complete independence in light of the KNOC's bylaws as approved by the IOC.

The KNOC exclusively represents Kuwait in Olympic games and related sports competitions organised by the IOC on regional, continental or international levels. No other Sports Entity or body may use the same name, slogan or marks of the KNOC without obtaining the prior approval of the KNOC.

Kuwait Paralympic committee ('KPC')

Article (41) of the Sports Law defines the KPC as an independent Sports Entity that enjoys independent legal personality and is recognised by the International Paralympic Committee. The KPC aims to support, develop and sponsor the Paralympic movement in the country as per the rules of the Paralympic Charter. The general assembly of the KPC is the superior authority of the KPC and it exercises its powers with complete independence in light of the KPC's bylaws as approved by the International Paralympic Committee.

The KPC exclusively represents Kuwait in Paralympic games and related sports competitions organised by the International Paralympic Committee on regional, continental or international levels. No other Sports Entity or body may use the same name, slogan or marks of the KPC without obtaining the prior approval of the KPC.

[T]he Sports Law represents a significant step forward in regulating the main foundations of the Kuwait sports community...

Dispute resolution

a. Establishment of the national arbitral tribunal

The Sports Law provides, under Article (44), for the establishment of an independent national sports arbitral tribunal ('National Arbitral Tribunal') to settle sports related disputes in Kuwait, provides that: (1) the subject matter of the dispute is related to sports; and (2) one of the parties to the dispute is a Sports Entity or a member of a Sports Entity. Article (44) also states that the resolution of dispute by the National Arbitral Tribunal shall be through either mediation, conciliation or arbitration.

b. Board of directors

Article (46) of the Sports Law provides that the National Arbitral Tribunal shall have a board of directors which is composed of the following:

- four judges to be delegated from either the Court of Appeal or the Court of Cassation; and/or
- three Kuwaiti nationals who have either a sports background or legal experience, and who are to be selected from the general assembly of KNOC.

c. Finality and enforcement of arbitral awards

Article (49) of the Sports Law provides for the finality and obligatory nature of the arbitral awards rendered by the National Arbitral Tribunal upon the award being signed by the chairman of the board of directors and served upon the relevant parties.

The same Article (49) provides that the enforcement of arbitral awards shall be subject to the arbitration provisions enshrined under Law No. (38) of 1980 regarding the Code of Civil and Commercial Procedures Law.

It is worth noting that the Sports Law does not provide for the parties' right to appeal/challenge the arbitral award, however, it does provide for the parties' right to resort to the Court of Arbitration for Sports ('CAS') at any stage in accordance with CAS's applicable rules and procedures.

Conclusion

While the Sports Law represents a significant step forward in regulating the main foundations of the Kuwait sports community, it does not regulate in significant detail some other important aspects of the sports industry. These areas include, but are not limited to, fan conduct, the management and organisation of sports events and guidelines for investment in the sports sector. Promulgation of the Sports Law was a positive and necessary step to put an end to criticisms regarding the independence of Sports Entities in Kuwait. however, further beneficial steps could be taken through supplementary regulations or amendments to better position the Sports Law to address broader practical concerns in a potentially, promising industry.

For further information, please contact Steve Bainbridge (s.bainbridge@tamimi.com).

Virtual advertising: now you see me, now you don't

Andrew Moroney
Associate
Corporate Commercial
a.moroney@tamimi.com

Introduction

Virtual advertising is the use of modern technology to insert virtual adverts into live or pre-recorded television broadcasts and is perhaps best known for its use in connection with live sporting events. As an example, the perimeter boards around a Premier League football pitch can be digitally overlaid so that at any one point in time the fans inside the stadium see a different advert to viewers watching on television. Depending on the number of broadcast feeds distributed to international markets, this can be further carved up so that television viewers in Europe see a different virtual advert to those in the Middle East which, in turn, is different to what viewers see in the Asia and so on.

Benefits of virtual advertising

There are many upsides to utilising virtual advertising in the sporting context, but four key benefits are worthy of note.

Firstly, the ability to show different virtual adverts in different regions (or even individual jurisdictions) vastly increases the amount of available advertising inventory that can be sold by rights' holders. Instead of only being able to sell a particular allocation of advertising time to one brand globally, virtual advertising allows the same allocation to be sold to multiple different brands (including same category brands, which otherwise would not be possible due to exclusivity restrictions) around the world enabling rights' holders to maximise their commercial revenues.

Secondly, advertising in this way is often a more attractive option for brands, particularly regional brands, that can promote their goods and/or services to their target market with region-specific virtual adverts that are less expensive to place than taking the same allocation on a global basis. Whereas international brands wanting to take global rights can tailor their virtual adverts to speak to regional audiences in a more personal way, for example by using local languages and integrating cultural touchpoints.

One of the key issues of Virtual Advertising in the UAE is whether the content of any virtual advert complies with local laws and regulations concerning prohibited products.

Thirdly, the increased proliferation of targeted regional adverts visible in the broadcasts feeds of foreign sporting events can lead to a more engaged fan experience, as the presence of familiar branding often makes viewers feel more connected with the event even if it is happening on the other side of the world. This effect is particularly strong where the virtual adverts are run in the relevant local language.

Fourthly, the ability to show different adverts in different jurisdictions has been mooted as a potential way for brands to navigate advertising black and grey markets, those markets being where the advertising of certain goods or services are either prohibited or significantly restricted. Only running virtual adverts for goods or services in jurisdictions where they are permitted and replacing them with non-prohibited adverts in jurisdictions where they are not, is certainly an interesting potential solution to an age-old problem that the sports industry has faced. However, ultimately the extent to which this is the workaround that some profess it to be depends on the relevant regulatory landscape.

The Middle East perspective

The Middle East is particularly relevant to this discussion, as an increasing number of world class sporting events are held in the region and many countries, such as the UAE, have broad prohibitions on the advertising of certain goods and services including alcohol, tobacco (including e-cigarettes) and gambling, as well as other restricted products such as baby formula and certain supplements.

Position under UAE law

In the UAE, there are no specific regulations that apply to virtual advertising. The key issue is whether the content of any virtual advert complies with local laws and regulations concerning prohibited products. The virtual advertisement of a prohibited product inserted within the broadcast of an event will, when shown in the UAE, result in a violation of the relevant regulations. This is regardless of whether the event is taking place within or outside the UAE, and regardless of where the virtual adverts are inserted or at whom they are targeted.

That said, the scope of the relevant regulations applies only to such adverts that are published within the UAE. As such, the virtual placement of an advert for a prohibited product (excluding tobacco, which is discussed below) within the broadcast of an event which is taking place in the UAE, but is only broadcast to viewers outside the UAE, is unlikely to be restricted under the regulations (subject to the point below relating to criminal liability).

Tobacco

The position under UAE law relating to tobacco is much broader in its scope than for other prohibited products. It almost certainly should be read to prohibit virtual placement of tobacco advertisements within a broadcast of an event taking place in the UAE, whether this is inserted for viewers within or outside the UAE. The relevant regulations prohibit any person or body corporate from being associated, in a sponsorship capacity, with an event conducted in the UAE if it promotes tobacco or tobacco related products.

Simultaneously, the regulations also prohibit sports outlets (whether public or private bodies) from advertising, publicising or promoting tobacco related products.

The wording of the regulations is wide enough so that a tobacco producer, or a sports body or broadcaster, that facilitates the advertising of a tobacco product in connection with an event taking place in the UAE, may be liable even where the virtual advertisement of the tobacco product is only televised outside the UAE.

Enforcement and criminal liability

There are potential practical impediments to prosecuting and seeking enforcement of the relevant UAE regulations against entities operating outside of the UAE and with no presence there. However, as the 'publisher' of any virtual advertisement, the local broadcaster in the UAE will normally be in breach of the regulations if they broadcast virtual adverts for prohibited products in the UAE.

It is also important to consider the potential penal consequences of running virtual adverts under the UAE's Penal Code. The Code's definition of a crime states that,

> *"a crime is said to have been perpetrated in the UAE Territory if one of the acts constituting it has been committed therein or if its results have been or were intended to be realised therein."*

It is arguable whether a virtual advertisement of a prohibited product televised outside of the UAE, in connection with an event taking place inside the UAE, creates the "intended result" in its audience of associating the prohibited product with the UAE event. However, it is worthy of consideration in terms of potential liability. This raises the possibility of criminal consequences for entities involved in promoting prohibited products through virtual advertising within broadcasts of events hosted in the UAE, even where the virtual advertisement of their products on the field of play is only broadcast outside of the UAE.

Closing thoughts

It is perhaps unsurprising that there is some confusion as to how the regulatory landscape in different countries interfaces with the advent of virtual advertising technology, given that the relevant legislation was enacted at a time when such technology was not anticipated. As time goes by, it may be the case that the relevant regulations are updated to specifically address the unique nature of virtual advertising. In the meantime, it is of paramount importance for stakeholders to carefully consider all relevant local laws and regulations to avoid any unintended legal consequences arising from the use of this exciting new technology.

For further information, please contact Steve Bainbridge (s.bainbridge@tamimi.com).

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 686 Supplement
27 Muharram 1442H
15 September 2020

FEDERAL DECREE-LAWS

7 of 2020	On the establishment of the UAE Government's Media Office.
8 of 2020	Amending Federal Law No. 6 of 2010 on Credit Information.

United Arab Emirates
Ministry of Justice

50th Year
Issue No. 687
13 Safar 1442H
30 September 2020

REGULATORY DECISIONS OF THE CABINET

60 of 2020	Abolishing various committees.
61 of 2020	Regulating the installation of fire alarms in homes.
62 of 2020	Amending Cabinet Decision No. 7 of 2017 on the establishment of the Office of the Minister of State for Tolerance.

MINISTERIAL DECISIONS

• From the Ministry of Finance	
110 of 2020	Executive regulations setting out the operational principles of the National Committee on Anti-Money Laundering and Combating the Financing of Terrorism and Illicit Organizations.
• From the Ministry of Health & Prevention	
321 of 2020	On use of data and information related to innovative pharmaceutical products.
• From the Ministry of Climate Change & Environment	
188 of 2020	On the reconstitution of the National Biosecurity Committee.

ADMINISTRATIVE DECISIONS

• From the Securities and Commodities Authority	
-	Certificate of approval of amendment of the Articles of Association of National Bank of Fujairah PJSC.
-	Certificate of approval of amendment of the Articles of Association of Ras Al Khaimah National Insurance Company PSC.
-	Certificate of approval of amendment of the Articles of Association of Gulfa Mineral Water & Processing Industries PSC.

Tuesday, 8th September
Egypt's new Personal Data Protection Law

Speakers:
Nick O'Connell
Partner, Al Tamimi & Company

Ayman Nour
Partner, Head of Office - Egypt, Al Tamimi & Company

Noriswadi Ismail
Managing Director Technology, Privacy and Cyber Risk Advisory, Ankura

---

Wednesday, 23rd September
Joint webinar with DIFC
Using the DIFC for Wealth Preservation

Speakers:
Richard Catling
Partner, Al Tamimi & Company

Nawal Abdelhadi
Senior Associate, Al Tamimi & Company

Khadija Ali
Chief Representative - Business Development Segments, DIFC

Tuesday, 29th September
KSA Movable Assets Security Law and Amendments to the Commercial Pledge Law

Speakers:
Rafiq Jaffer
Partner, Al Tamimi & Company

Mohammed Negm
Senior Associate, Al Tamimi & Company

Agathi Trakkidi
Senior Associate, Al Tamimi & Company

About Us

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

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

Our business and regional footprint continues to grow, and we seek to expand further in line with our commitment to meet the needs of clients doing business across the Middle East & North Africa.

17 Offices

9 Countries

73 Partners

350+ Lawyers

450+ Legal Professionals

850+ Employees

50+ Nationalities

1 Fully Integrated Law Firm

Client Services

Practices

Arbitration • Banking & Finance • Capital Markets • Commercial • Competition • Construction & Infrastructure • Corporate/M&A • Corporate Services • Corporate Structuring • Employment & Incentives • Family Business • Financial Crime • Insurance • Intellectual Property • International Litigation Group • Legislative Drafting • Litigation • Mediation • Private Client Services • Private Equity • Private Notary • Projects • Real Estate • Regulatory • Tax • Technology, Media & Telecommunications •

Sectors

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

Country Groups

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

Publications

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

Accolades

TOP RANKED Chambers GLOBAL 2020 Al Tamimi & Company

WWL Awards 2019 Al Tamimi & Company United Arab Emirates - Firm of the Year

The LEGAL 500 EMEA TOP TIER 2020

2019 DUBAI CHAMBER CSR LABEL

WealthBriefing AWARDS MENA 2019 WINNER Al Tamimi & Company

IFLR AWARDS 2020 MIDDLE EAST

the Oath THE MIDDLE EAST LEGAL AWARDS REGIONAL LAW FIRM OF THE YEAR WINNER 2019

Regional Footprint

Bahrain
Manama

Egypt
Cairo

Iraq
Baghdad
Erbil

Jordan
Amman

Kuwait
Kuwait City

Oman
Muscat

Qatar
Doha

Saudi Arabia
Al Khobar
Jeddah
Riyadh

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

Key Contacts

CHAIRMAN
Essam Al Tamimi
e.tamimi@tamimi.com

MANAGING PARTNER
Samer Qudah
s.qudah@tamimi.com

SENIOR PARTNER
Husam Hourani
h.hourani@tamimi.com

Offices

BAHRAIN
MANAMA
Foutoun Hajjar
f.hajjar@tamimi.com

EGYPT
CAIRO
Ayman Nour
a.nour@tamimi.com

IRAQ
BAGHDAD
Mohammed Norri
m.norri@tamimi.com

ERBIL
Khaled Saqqaf
k.saqqaf@tamimi.com

JORDAN
AMMAN
Khaled Saqqaf
k.saqqaf@tamimi.com

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

Philip Kotsis
p.kotsis@tamimi.com

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

QATAR
DOHA
Matthew Heaton
m.heaton@tamimi.com

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

JEDDAH
Ahmed Basrawi
a.basrawi@tamimi.com

RIYADH
Abdullah Mutawi
a.mutawi@tamimi.com

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

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

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

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

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

SHARJAH
Zafer Oghli
z.oghli@tamimi.com

Practices

ARBITRATION
Thomas Snider
t.snider@tamimi.com

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

CAPITAL MARKETS
Andrew Tarbuck
a.tarbuck@tamimi.com

COMMERCIAL
Willem Steenkamp
w.steenkamp@tamimi.com

COMPETITION
Omar Obeidat
o.obeidat@tamimi.com

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

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

CORPORATE SERVICES
Izabella Szadkowska
i.szadkowska@tamimi.com

CORPORATE STRUCTURING
Samer Qudah
s.qudah@tamimi.com

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

FAMILY BUSINESS
Richard Catling
r.catling@tamimi.com

Nawal Abdel Hadi
n.abdelhadi@tamimi.com

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

INSURANCE
Yazan Al Saoudi
y.saoudi@tamimi.com

INTELLECTUAL PROPERTY
Omar Obeidat
o.obeidat@tamimi.com

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

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

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

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

PRIVATE EQUITY
Alex Saleh
alex.saleh@tamimi.com

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

PROJECTS
Mark Brown
m.brown@tamimi.com

REAL ESTATE
Tara Marlow
t.marlow@tamimi.com

REGULATORY
Andrea Tithecott
a.tithecott@tamimi.com

TAX
Shiraz Khan
s.khan@tamimi.com

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

Sectors

AUTOMOTIVE
Samir Kantaria
s.kantaria@tamimi.com

AVIATION
Yazan Al Saoudi
y.saoudi@tamimi.com

EDUCATION
Ivor McGettigan
i.mcgettigan@tamimi.com

EXPO 2020
Steve Bainbridge
s.bainbridge@tamimi.com

FMCG
Samer Qudah
s.qudah@tamimi.com

HEALTHCARE
Andrea Tithecott
a.tithecott@tamimi.com

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

RAIL
Foutoun Hajjar
f.hajjar@tamimi.com

SHIPPING
Omar Omar
o.omar@tamimi.com

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

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

Country Groups

CHINA
Jody Waugh
j.waugh@tamimi.com

INDIA
Samir Kantaria
s.kantaria@tamimi.com

KOREA
Omar Omar
o.omar@tamimi.com

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

TURKEY
Omar Obeidat
o.obeidat@tamimi.com

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

Chambers Global


التميمي و مشاركوه
AL TAMIMI & CO.
@AlTamimiCompany
Al Tamimi & Company
www.tamimi.com