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THE MENA BUSINESS LAW REVIEW

مجلة قانون الأعمال لمنطقة الشرق الأوسط و شمال أفريقيا

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QATAR INTERNATIONAL COURT AND DISPUTE RESOLUTION CENTRE
A GUIDE TO THE COURT AND REGULATORY TRIBUNAL:
PROCEDURE AND JURISPRUDENCE
Khawar Qureshi QC
Catriona Nicol
LexisNexis

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Caroline Presber

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These events are the glue that holds a business law community together, allowing private practitioners, in-house counsel, legal academics and government lawyers an opportunity to gather in one place, share legal insights and questions, and discuss what's in the pipeline for local business law.

Ces événements sont le ciment qui unit la communauté du droit des affaires, permettant aux praticiens privés, aux avocats internes, aux universitaires juridiques et aux avocats du gouvernement de se réunir en un seul endroit, de partager des idées et des questions juridiques et de discuter de ce qui est en préparation pour le droit local.

BUSINESS LAW FORUM SEASON

Dear Readers, *Chers lecteurs,*

As I write this, I am reflecting on the number of events that **LexisNexis® Middle East** has on in the coming months. By the time this issue goes to print and is released online, the annual **Qatar Business Law Forum** conference and awards will be underway. The **Oman Business Law Forum** and **Kuwait Business Law Forum** will follow on November 14 and November 23 respectively.

I encourage you all to attend these conferences if you are in the region. These events are the glue that holds a business law community together, allowing private practitioners, in-house counsel, legal academics and government lawyers an opportunity to gather in one place, share legal insights and questions, and discuss what's in the pipeline for local business law.

This issue of *The MENA Business Law Review* brings together articles on several hot topics: family businesses and corporate governance, financial crime, Saudi Arabia's new Companies Law, contingency fees and other outcome-related fee structures for lawyers, and a DIFC

IS UPON US ONCE AGAIN!

case dealing with the thorny question of a shareholder's authority to bind a company.

As usual, I hope you find this content enriching and relevant in your work.

À l'heure où j'écris ceci, je réfléchis au nombre d'événements organisés par ***LexisNexis® Middle East*** *dans les mois à venir. Au moment où ce numéro sera imprimé et publié en ligne, la conférence et les prix annuels du* ***Qatar Business Law Forum*** *seront en cours.* ***L'Oman Business Law Forum*** *et le* ***Kuwait Business Law Forum*** *auront lieu respectivement les 14 et 23 novembre.*

Je vous encourage tous à assister à ces conférences si vous êtes dans la région. Ces événements sont le ciment qui unit la communauté du droit des affaires, permettant aux praticiens privés, aux avocats internes, aux universitaires juridiques et aux avocats du gouvernement de se réunir en un seul endroit, de partager des idées et des questions juridiques et de discuter de ce qui est en préparation pour le droit local.

Ce numéro de The MENA Business Law Review rassemble des articles sur plusieurs sujets d'actualité, notamment : les entreprises familiales et la gouvernance d'entreprise, la criminalité financière, la nouvelle loi saoudienne sur les sociétés, les honoraires conditionnels et autres structures d'honoraires liées aux résultats pour les avocats et une affaire DIFC sur la question épineuse du pouvoir d'un actionnaire d'engager une société.

Comme d'habitude, j'espère que vous trouverez ce contenu enrichissant et pertinent dans le cadre de votre travail.

Outcome-Related Fee Structures and Arbitration in the UAE

This article briefly outlines the basic features and types of outcome-related fee structures (ORFS) for dispute funding, followed by a detailed analysis of the UAE legal landscape of the acceptability of ORFS in arbitration proceedings. This article puts forward a case for introducing ORFS in the UAE in line with public policy requirements of the country through a meaningful regulatory framework.

Cet article décrit brièvement les caractéristiques de base et les types de structures de frais liés aux résultats de financement des litiges, suivi d'une analyse détaillée du paysage juridique des EAU sur l'acceptabilité des frais liés aux résultats dans les procédures d'arbitrage. Cet article présente des arguments en faveur de l'introduction de frais liés aux résultats aux Émirats arabes unis conformément aux exigences de la politique publique du pays, grâce à un cadre réglementaire significatif.

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1 Introduction

The world is rapidly transitioning from the era of doctrine of "Maintenance" and "Champerty" (historic common law rules prohibiting third party funding) towards an era of dispute funding to ensure that parties to disputes have equal access to the courts and tribunals and ultimately a fair trial. Many jurisdictions have abolished historic rules prohibiting dispute funding to create a conducive environment for the parties to access justice. In 2013, Lord Neuberger, the former President of the UK Supreme Court stated: *"access to the courts is a right and the State should not stand in the way of individuals availing themselves of that right."*

Litigation funding has become an increasingly popular means of bringing cases to court in recent years, especially in the United Kingdom. Data from the UK law firm RPC in 2021 suggested that the value of the pipeline of court cases and cash held by the top UK litigation funders had reached GBP 2 billion.

Most recently, Hong Kong has introduced a bill permitting lawyers to use ORFS in arbitration and litigation matters, a development which will allow Hong Kong to maintain its status among the world's top arbitration seats.

Recently, in addition to promoting third-party disputes funding, certain jurisdictions have allowed lawyers to use "Outcome-Related Fee Structures" (**ORFS**) in arbitrations and litigation to ensure that parties to the disputes have the required means at their disposal to contest their claims properly and effectively. Most recently, Hong Kong has introduced a bill permitting lawyers to use ORFS in arbitration and litigation matters, a development which will allow Hong Kong to maintain its status among the world's top arbitration seats.

The United Arab Emirates, based on the principles of Civil Law, did not inherit many of the historical impediments to third party funding e.g., champerty and maintenance, faced by the common law jurisdictions. Accordingly, third party funding has never been prohibited in the country; however, it was not regulated until recently, which created uncertainty regarding its permissibility and which resulted in a scarcity of third-party funders. In contrast to the legality of third-party funding, ORFS, especially in the onshore UAE, has remained untested on account of contingency fees being in violation of the public policy.

This article will briefly outline the basic features and types of ORFS followed by a detailed analysis of the prevalent legal landscape in the UAE with regards to acceptability of ORFS in the arbitration proceedings. This paper will attempt to argue a case for introducing ORFS in the UAE in line with public policy requirements of the country through a meaningful regulatory framewor

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Outcome Related Fee Structures

ORFS are fee arrangements which set out the terms and conditions governing the mandate between a lawyer and a client, under which the lawyer who represents the client in contentious proceedings is entitled to receive a monetary benefit in the event of success. ORFS enhance the ability of the parties to engage lawyers of their choosing to represent them in a dispute without worrying about the upfront hefty legal fees which would otherwise have been paid in normal course of a lawyer-client engagement.

ORFS enhance the ability of the parties to engage lawyers of their choosing to represent them in a dispute without worrying about the upfront hefty legal fees which would otherwise have been paid in normal course of a lawyer-client engagement.

A. TYPES OF ORFS

ORFS are commonly described in three major forms which are as follows:

I. Conditional Fee Arrangements

An arrangement in which a client pays the legal fees to the lawyer only in certain situations is known as a conditional fee arrangement (**CFA**). CFAs are agreements which are also known as "no win, no fee agreements" whereby a client need not pay any legal fees to the lawyer if the claim fails. The lawyer may also charge a success fee where the claim is successful.

II. Damages-Based Agreements

A Damages-Based Agreement (**DBA**) is a type of ORFS wherein a lawyer and a client agree that the lawyer will receive payment only if the claim is successful and such a payment is calculated based on damages, such as a portion or percentage of the sum awarded.

III. Hybrid DBAs

Hybrid DBAs are arrangements between the client and the lawyer wherein it is agreed that the lawyer will receive legal fees for representation as well as a payment based on the damages awarded or outcome of the proceedings. This arrangement is also known as a "no win, no fee" arrangement.

B. LEGAL POSITION WITH REGARDS TO THE ORFS IN THE UAE

The legal framework in the UAE has made significant strides in the recent past with regards to explicitly allowing and regulating third party funding in the country. These developments have been taken across the board from the onshore UAE to the financial free zones. The Dubai International Financial Centre (DIFC) being the pioneer, issued Practice Direction No. 2/2017[1] on Third Party Funding in the DIFC Courts, followed by Abu Dhabi Global Market's (ADGM) Litigation Funding Rules[2] issued in 2019. Most recently, the newly issued arbitration rules of Dubai International Financial

1. DIFC Practice Direction No. 2/2019, DIFC Courts Fees Amendment, issued on 13 March 2019 (corresponding to 6 Rajab 1440 H).
2. ADGM Litigation Funding Rules 2019, issued on 16 April 2019.

Centre (DIAC)[3] explicitly deal with the third-party funding arrangements. However, the legal framework in the country is not consistent and open when it comes to ORFS.

I. Onshore UAE

The Federal Supreme Court has reaffirmed the bar on contingency fee arrangements in its judgments.

ORFS have not been so common in the mainland UAE owing to prohibition on the contingency fee arrangements. Article 31 of Federal Law No. 23/1991[4] regarding the Regulation of the Legal Profession states that "*it shall not be permitted for a lawyer to buy all of part of the rights which are in dispute, nor to agree to take a part thereof in respect of fees.*" Violation of this provision may result in disciplinary consequences for the lawyer, under Article 47 of the same law. Along the same lines, the Federal Supreme Court has reaffirmed the bar on contingency fee arrangements in its judgments. The situation is cemented by Ministerial Resolution No. 666/2015[5] on the Code of Ethics and Professional Conduct of the Legal Profession in the UAE, which makes clear in its Articles 1, 2C, 3D and 4C, that Federal Law No. 23/1991 applies to all lawyers providing legal services in the UAE, including those acting in the DIFC and those lawyers involved in arbitration.

In an upshot, there seem to exist clear impediments in the way of implementing ORFS in mainland UAE, largely due to the public policy requirements.

II. Dubai International Financial Centre

While the DIFC does allow conditional fee arrangements, contingency fees are not considered best practice.

The DIFC is an independent financial freezone in Dubai, established in 2004 to promote business and trade in the UAE. Being a freezone, the DIFC has its own distinct set of laws and courts based on the common law judicial system as opposed to the UAE mainland legal system, which is a civil law jurisdiction. Accordingly, the DIFC has devised its own rules and regulations to regulate the legal practitioners practising within its jurisdiction. DIFC Court's mandatory Code of Conduct does not mention contingency or success fees, while the DIFC Courts' Best Practice Code does specify that contingency fees are not to be considered a best practice. Article 9.3 of the DIFC Courts' Code of Best Legal Professional Practice states that *"A Lawyer may not receive a contingency fee in respect of any litigious or contentious action."* On the other hand, conditional fee arrangements (whereby, in the event that the client is successful, the legal representative receive an uplift in fees, as opposed to a share in the proceeds) are permitted subject to disclosure requirements.

While the DIFC does allow conditional fee arrangements, contingency fees are not considered best practice. A recent DIFC courts judgment, *Loralia Group LLC v. Landen Saudi Company*[6]" has stirred a new debate regarding the acceptability of contingency fees within the DIFC. The applicant in the case filed a claim seeking to set aside an arbitral award issued in favour of the respondent on the grounds that the award *"is in conflict with the public policy of the UAE"*, specifically the public policy against contingency fees.

The Court articulated that contingency fees for legal representatives may be de facto *illegal onshore; however, they merit case-by-case scrutiny in the DIFC.*

The DIFC Court, while dismissing the applicant's plea to set aside the award, distinguished the public policy against contingency fees in the onshore UAE and the DIFC. The Court articulated that contingency fees for legal representatives may be *de facto* illegal onshore; however, they merit case-by-case scrutiny in the DIFC. Contingency fees may not be considered "best practice" in the DIFC, but this label cannot be sufficient to create and support a public policy against contingency fees within the DIFC. The Court further held that unreasonable fee arrangements may include contingency fee arrangements, but not all contingency fee arrangements are automatically invalid. Instead, judges and arbitrators are required to assess whether a fee arrangement is reasonable and proper. This requirement speaks volumes in respect of the overall public policy as regards legal fees. The decision of DIFC Court in *Loralai* clearly gives encouragement for the further development of ORFS within the DIFC jurisdiction.

III. Abu Dhabi Global Market

Similar to the DIFC, ADGM is a standalone international financial center with its own distinct set of laws and court system. The legal framework in the ADGM appears more receptive to ORFS than the mainland and the DIFC. The ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appoints Regulations 2015[7] ("ADGM Regulations") expressly deals with CFAs and DBAs. In this regard, Articles 222- 225 lay down the conditions that must be satisfied for CFAs and DBAs to be valid in the ADGM. These conditions range from the requirement of the agreements to be in writing to certain disclosure and notice obligations.

3. DIAC Arbitration Rules 2022, issued on 3 March 2022.

4. Federal Law No. 23/1991, On the Regulation of The Legal Profession, Issued on 16 December 1991.

5. Ministerial Decision No. 666/2015 on the Rules of Professional Conduct and Ethics of the Legal Profession in UAE, issued on 29 November 2015 (corresponding to 17 Safar 1437 H).

6. *Loralia Group LLC v. Landen Saudi Company* [2018] DIFC ARB 004, www.difccourts.ae/rules-decisions/judgments-orders/arbitration/loralia-group-llc-v-landen-saudi-company-2018-difc-arb-004.

7. ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, issued on 17 December 2015, (corresponding to 6 Rabi Al-Awwal 1437 H).

With the abolishment of DIFC-LCIA Arbitration Centre, introducing ORFS could aid Dubai's goal of establishing and promoting DIAC as a premier arbitration centre, globally.

C. THE CASE FOR INTRODUCING ORFS IN THE UAE

I. Benefits of Allowing ORFS

The introduction of ORFS within the UAE could have the positive impact of promoting the arbitral institutions of the country. In particular, with the abolishment of DIFC-LCIA Arbitration Centre, introducing ORFS could aid Dubai's goal of establishing and promoting DIAC as a premier arbitration centre, globally. Furthermore, it should alleviate concerns raised by the sudden abolishment of the DIFC-LCIA and restore confidence in Dubai as a preferred seat of arbitration.

Additionally, the introduction of alternative fee structures may have a huge impact on the adjudication of the construction claims in the country. The construction industry is one of the leading economic sectors in the Middle East, where numerous infrastructure projects worth billions of dollars are commenced or completed every year. Due to this substantial activity in the construction industry, disputes become inevitable. The parties to these disputes mostly prefer arbitration as a dispute resolution mechanism compared to other modes e.g., litigation.

Subcontractors have been compelled to relinquish their meritorious claims due to their inability to afford the hefty legal fees in an economic crunch owing to the pandemic.

Most recently, the impact of COVID-19 has been felt across all sectors in the UAE, including the construction sector. The restrictions placed during COVID-19 caused the construction industry to undergo several major changes and challenges. One of the significant challenges faced by the industry at the time was the requirement of quarantining and social distancing of workers. Furthermore, delay in supply chains and key team members being stuck in other parts of the world impeded the performance and fulfillment of contractual obligations. While delay in the fulfillment of obligations may have affected construction contractors as well as subcontractors, it is often the smaller subcontractors who do not have the ability to carry the risk. As a result, subcontractors have been compelled to relinquish their meritorious claims due to their inability to afford the hefty legal fees in an economic crunch owing to the pandemic. With the constant rise in construction disputes and painstaking high risk faced by subcontractors in the construction industry, the introduction of outcome-related fee structures may come as more than a relief.

At the outset, the alternative fee structures could not only boost arbitrations within the UAE, but it will also provide greater means to justice and once implemented. The parties would certainly prefer keeping UAE as the seat of arbitration owing to the availability of the ORFS.

II. The Public Policy Argument against ORFS

A traditional critique of ORFS is that it paves the way for frivolous litigation and encourages parties to commence claims which they might not otherwise maintain.

The major impediment to ORFS in the UAE appears to be the public policy against contingency fees. The public policy argument is not a hollow one and is based on the potential abuses inherent in the structure of ORFS. A traditional critique of ORFS is that it paves the way for frivolous litigation and encourages parties to commence claims which they might not otherwise maintain. Likewise, ORFS are often blamed for encouraging satellite litigation, thereby increasing the workload on the courts and consequently hurting the public exchequer. Another criticism around ORFS is that when a lawyer performs on the basis of an outcome-related fee structure, he or she may have a direct interest in the end result of the dispute. In this manner, the may breach the duty of imparting impartial advice to the client. In such situations where the outcome of the dispute may bring a greater benefit to the lawyer, he or she may settle for lesser than what the client deserves in order to secure the legal fees expeditiously. Similarly, ORFS may tempt the lawyers in demanding a higher percentage to uplift the legal fees.

The public policy argument is substantiated by a sound criticism of ORFS; however, this criticism is not on ORFS itself but how these structures are manipulated and abused. The risks associated with ORFS can be managed through an extensive regulatory framework. In this regard, the UAE can follow the example of Hong Kong and formulate legislation to safeguard ORFS against its inherent potential for abuse.

III. Addressing the Public Policy Argument

The argument that ORFS are against public policy is based on the abuse of alternate fee structures by stakeholders and the risk to the overall wellbeing of the legal system associated with such abuse. These associated risks can be mitigated by adopting statutory safeguards and regulating ORFS. In this regard, it is recommended that UAE follows Hong Kong by introducing ORFS through comprehensive legislation that can be deliberated upon in the UAE with extensive consultation. The legislation would be issued following consultation with all stakeholders and addressing the inherent concerns.

Legislation can introduce certain safeguards to ensure that ORFS are not abused. One of the most essential safeguards would be requiring a written and signed agreement between the lawyer and client specifying the details of the agreed fee structure.

Legislation can introduce certain safeguards to ensure that ORFS are not abused. One of the most essential safeguards would be requiring a written and signed agreement between the lawyer and client specifying the details of the agreed fee structure. The client must know its rights before signing the agreement and must be provided all necessary clarifications, such as the definition of "successful outcome" in order to avoid confusion at a later stage. Furthermore, the client must be provided with a cooling-off period during which it is given the freedom to terminate the agreement by written notice. This will ensure that the client is allowed reasonable time to consider the agreement even after signing it. It is also important for the lawyer to state the reasons for uplift in fees to the client clearly and uplift must be allowed to a reasonable extent only. The client must be informed of the risks being undertaken by the lawyer. Likewise, hefty penalties may be introduced to curb frivolous claims so as not to put excessive pressure on the legal system. Furthermore, strict disclosure requirements similar to the ones for third party obligations may be introduced within the ORFS framework to ensure transparency. Irrespective of ORFS, control over a case will rest with the client, who will independently decide whether to settle or pursue a claim.

If safeguards to prevent the possibility of abuse within ORFS are implemented, there exists a strong argument that ORFS would not only be in consonance with the public policy of the UAE, but also consistent with jurisprudential principle in sharia law (*maslaha*) i.e., that a transaction should advance public interest in a way that ORFS can provide parties an opportunity to contest their meritorious claims that they might otherwise be unable to pursue.

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Conclusion

There are clear benefits of implementing ORFS in the UAE. The UAE needs to take the leap by going through a process of public consultation with the relevant stakeholders in order to address the public policy concerns and see how they can be addressed effectively through a legislative framework. OFRS being legalized in the UAE will give a big boost to the arbitration industry in the country.

Middle East experienced legal financier Joe Durkin notes:

> *"Construction disputes are on the rise. There has been the announcement across GCC jurisdictions of the insolvency of several high-profile contractors, which has had a domino effect on the supply chain. Prior to the disruption caused by COVID-19, the numbers of disputes in the construction sector had been increasing. Pre-COVID there had been the insolvency of several high-profile contractors across the GCC, which has worsened in the past two years, having had a domino effect on the supply chain. There is also a growing understanding by CEOs and CFOs of Middle East construction and energy companies, about how dispute finance can be used as an effective and profitable financial solution. There has been a shift in the mindset of leading contractors about how third-party funding can help a company manage the cost of its legal claims, turn the legal department into a profit centre and even offer the potential for monetisation straight into the P&L."*

ORFS would enhance the confidence of businesses operating within the emirates as they would then be able to contest their claims without worrying about liquidity issues. The UAE would certainly flourish as an arbitration seat which would boost local arbitration centres e.g., DIAC, enabling them to compete with leading arbitration institutions globally and align with and support the country's ambition to become a leading arbitration centre. Time will tell but the wind is blowing in the right direction.

توضح هذه المقالة بإيجاز الميزات الرئيسية وأنواع اتفاقيات الأتعاب المرتبطة بالنتيجة والمتعلقة بتمويل النزاعات يتبعها تحليل مفصل للمشهد القانوني في الإمارات العربية المتحدة فيما يتعلق بقبول هذا النوع من الاتفاقيات في إجراءات التحكيم. تطرح هذه المقالة أيضا مقترحا لاستخدام مثل هذه الاتفاقيات في الإمارات العربية مواكبة لمتطلبات السياسات العامة للبلاد من خلال وضع إطار تنظيمي مناسب.

BIOGRAPHY

DR TARIQ MAHMOOD heads the ADR team at 33 Bedford Row. He is a barrister, arbitrator and mediator with multi-jurisdictional experience, specialising in international commercial dispute resolution (litigation, arbitration and mediation). He is an Honourary Lecturer at the University of Keele and a Senior Lecturer in ADR at the University of Hull. He has right of audience before the ADGM, AIFC and in Pakistan. Dr Mahmood has been appointed as sole arbitrator, co-arbitrator and presiding arbitrator with leading arbitration institutions throughout the world.
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Usama can be contacted at usama.munir@schlueter-graf.com.

IGPL General Trading v. Hortin Holdings & Ors

In this case,[1] the Claimant/Appellant sought orders for specific performance of agreements, which were said to create an assured shorthold tenancy agreement in favour of the Appellant in respect of certain property in London. The Appellant contended the Respondents were thus obliged to enter into valid legal leases in respect of the properties. This case raised interesting issues as to the application and scope of the Duomatic principle to acts assented to by shareholders, with far-reaching practical consequences for a common practice in the UAE.

Dans cette affaire, le demandeur/appelant a demandé des ordonnances pour l'exécution spécifique d'accords destinés à créer un contrat de location à court terme, assuré en faveur de l'appelant à l'égard de certaines propriétés à Londres. L'appelant a soutenu que les intimés étaient donc obligés de conclure des baux légaux valides à l'égard des propriétés.
Cette affaire a soulevé des questions intéressantes quant à l'application et à la portée du principe Duomatic aux actes consentis par les actionnaires, avec des conséquences pratiques considérables pour une pratique courante aux EAU.

Anson Cheung
Barrister
Outer Temple Chambers

1

What Happened?

A. THE PARTIES

The Defendants were companies incorporated in the British Virgin Islands (BVI). Mr. Mohammed Abdulla Juma Al-Sari and Mr. Majid Abdulla Juma Al-Sari were the beneficial owners of the shares in the Defendants in equal shares. Imitating Justice Giles and Chief Justice Zaki Azmi as they did in their judgments, and equally meaning no disrespect, these gentlemen will be referred to as **Mohammed** and **Majid**.

1. *IGPL General Trading v. Hortin Holdings & Ors [2021] DIFC CA 015.*

Mohammed and Majid were the sons of Mr. Abdulla Juma Al-Sari, the patriarch of the Al-Sari family (to be referred to as **Abdulla**, as the courts have done in their judgment, and without intending any disrespect).

B. THE ASSET

"The Bridge" in Queenstown Road was a mixed-use residential and commercial development, whose premises were the subject of a long-term lease. Together, the Respondents held the freehold and certain leases of the Bridge and were the Respondents' only substantial assets (the "**London Properties**").

C. THE JUDGMENT IN FAVOUR OF CED

On 27 February 2017, the Commercial Bank of Dubai (the "**Bank**") obtained a judgment from the Sharjah Federal Appeal Court against Abdulla, Mohammed and Majid jointly and together with others, for AED 433,831,116.81 plus interest and costs. The judgment was not paid, and the Bank took steps to enforce it.

As part of its steps to enforce judgment, the Bank obtained judgment against Mohammed and Majid in the Eastern Caribbean Supreme Court in the amount of USD 118,103,193.58 plus interests and costs, and later a charging order over the shares in the Defendants beneficially owned by Mohammed and Majid.

On 19 March 2019, the Bank obtained a final charging order over the shares and an order for sale. The order for sale included the appointment of a receiver with power to realise the Defendants' assets and to sell the shares. In other words, the receiver was empowered to sell the London Properties in order to satisfy the judgment against Mohammed and Majid in the Eastern Caribbean Supreme Court and/or the Sharjah Federal Appeal Court.

D. THE TENANCY AGREEMENT

When the receiver wrote to Majid advising him that the London Properties were to be sold, he was advised instead of a tenancy agreement dated 16 January 2013 between the Respondents as lessors and the Appellant and others as lessees (the "**Tenancy Agreement**"), as supplemented by an Addendum on 4 March 2013. The Respondents' counterparties to the Tenancy Agreement were, respectively, the Appellant and the children of Mohammed and Majid. Abdulla was named as the manager of the Appellant, and the Appellant was also described in the application as a proxy for the Al-Sari family.

It should be noted the Tenancy Agreement prescribed English law as its governing law.

There was only one signatory of the Tenancy Agreement: Abdulla, who signed separately on behalf of each of the Defendants and the eight tenants (including on behalf of the Appellant). Abdulla allegedly signed the Tenancy Agreement on behalf of the Defendants by way of a Power of Attorney granted on 26 June 2008 to Abdulla by Mohammed and Majid.

At the time of the Tenancy Agreement and the Addendum, the sole director of each of the Respondents was Ayre Management Ltd ("**Ayre**"), a company registered in the BVI. It was common ground that whether at the time of the Tenancy Agreement or the Addendum, the director Ayre had not given authority for the Defendants to enter into the Tenancy Agreement – indeed, they knew nothing of the Tenancy Agreement.

E. THE DIFC PROCEEDINGS

The Appellant sought orders for specific performance of the Tenancy Agreement.

The Respondents applied for immediate judgment pursuant to RDC24.1, one of the grounds being that the Tenancy Agreement was not binding on the Defendants because the signatures by Abdulla purportedly on their behalf had been without their authority.

The Respondents applied for immediate judgment pursuant to RDC24.1, one of the grounds being that the Tenancy Agreement was not binding on the Defendants because the signatures by Abdulla purportedly on their behalf had been without their authority.

In turn, the Claimant argued that Abdulla had authority to either exercise the powers of Mohammed and Majid as the beneficial shareholders in the Defendants, via the Power of Attorney granted to him by Mohammed and Majid; alternatively in exercise of an implied actual authority of Mohammed and Majid. Only the former argument will be considered, in the context of the application of the *Duomatic* principle.

2 The Arguments Before the Courts

A. THE RESPONDENTS' CASE

The Respondents' case was essentially concerned with the proper division of power and responsibility between directors and shareholders.

Section 109 of the BVI Business Companies Act 2004, which governed the Respondents provided:

> *"109. (1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the directors of the company.*

(2) The directors of a company have all the powers necessary for managing and for directing and supervising the business and affairs of the company.

(3) Subsections (1) and (2) are subject to any modifications or limitations in the memorandum or articles."

Further, the Respondents' Articles of Association provided in identical terms:

"The business of the Company shall be managed by the directors [...], and may exercise all such powers of the Company as are not by the Act or by these Regulations required to be exercised by the members subject to any delegation of such powers as may be authorised by these Regulations and to such requirements as may be prescribed by resolution of the members; [...]".

It was therefore argued that the division of powers by statute and by the Respondents' Articles of Association meant management of the Respondents—including its power to grant leases of the London Properties or contract with third parties more generally—lay with the director of the Respondents, Ayre. Mohammed and Majid, as the ultimate beneficial shareholders, did not have the power *qua* shareholders to bind the Respondents to a contract with third parties, and therefore there could be not have delegated such power to Abdulla. Ergo, the purported signing of the Tenancy Agreement by Abdulla was invalid.

B. THE APPELLANTS' ARGUMENT

The Appellant's argument consisted of three building blocks, which supported the proposition that informal unanimous assent by shareholders could bind a company to a contract with a third party.

The Appellant's argument consisted of three building blocks, which supported the proposition that informal unanimous assent by shareholders could bind a company to a contract with a third party.

First, it was argued that the well-established cases of *Saloman v. A Saloman & Co Ltd* [1897] AC 22 and *In re Duomatic Ltd* [1969] 2 Ch 365 provided that a company would be bound by the unanimous agreement of its members, in circumstances where the formalities had not been adhered to.

The Appellant relied on Lord Davey's observation in *Saloman* at [57] that *"[a] company is bound in a matter intra vires by the unanimous agreement of its members"*. In *Duomatic*, directors' remuneration, pursuant to the company's Articles of Association, had to be approved by a resolution at a general meeting. However, it was held that the unanimous approval by shareholders of payments to directors (absent a shareholders' resolution) was sufficient:

"It seems to me that if it had occurred to Mr Elvins and Mr East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that it would have made the position of the directors who received the remuneration, Mr Elvins and Mr Hanly, secure, and nobody could thereafter have disputed their right to retain the remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr Elvins and Mr Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of the general meeting of the company. In other words, I proceed on the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be." (at 373A)

Before the Court of Appeal, the Appellant also made reference to a 20th century case *In re Express Engineering* [1920] 1 Ch 466, which had been applied in *In re Duomatic*. In *Express Engineering*, five individuals agreed to sell property to the company by the issuance of debentures. They appointed themselves as directors of the company, and stated the transactions effected through a "board meeting". Technically, the company was therefore transacting with "third parties". However, as interested parties to the transaction, they were precluded by the Company's articles from voting in such transactions. The Court of Appeal held that the transactions were valid, with Lord Justice Warrington noting that the five individuals were acting *qua* shareholders, and

"[it] was competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. [...] In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out. I agree that the appeal should be dismissed."

Similarly, Lord Justice Younger held (at 471) that:

"the company by the voice of all its shareholders became bound by this agreement, and I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so."

The Appellant therefore relied on *Express Engineering*, and its approval in *Duomatic*, as early authority for the proposition that the unanimous assent of shareholders to an act would become the binding act of the company, without needing to be formally ratified by action on the part of the directors. This would apply equally to transactions with third parties.

The second building block was that where the *Duomatic* principle applies, and shareholders unanimously agree to some act, it becomes an act attributable to the company. This was derived from *Meridian Global Funds Management v Securities Commission* [1995] 2 AC 500 at 506:

"It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution."

The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company." There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as:

> *"the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:" see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.*

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company."

On that basis, the Appellant argued that the Company could act in two ways under the "primary rules of attribution": first, acting in accordance with the articles of association; second, under company law, acting under the *Duomatic* principle and binding the company to anything which a company, under its articles of association, was empowered to do.

Finally, as the third building block, once an agent is cloaked with the appropriate authority, they are capable of directing acts of the Company as though they were standing in the shoes of all of the Shareholders, pursuant to *Ciban Management Corpn v. Citco (BVI) Ltd* [2021] AC 122. Indeed, Lord Burrows noted in *Ciban* that

> *"[a]pplying the Duomatic principle to our case, [the company] would have been bound had the sole shareholder, Mr Byington, consented to Mr Costa's having authority to give instructions."*

In summary, the Appellant's argument was as follows:

(1) As a matter of law, Mohammed and Majid, *qua* beneficial shareholders, could, by unanimous assent, contract directly on the Respondents' behalf with third parties. In other words, they had the power to authorise and/or authorise the execution of the Tenancy Agreement.

(2) By the second primary rule of attribution, Mohammed and Majid were not constrained by either the Respondents' articles of association, nor was formal ratification of a director required before the Respondents could be bound by the Tenancy Agreement with the Appellant.

(3) Following *Ciban*, shareholders could delegate their authority to act as shareholders to a third party, which Mohammed and Majid did so delegate by the Power of Attorney to Abdulla.

Therefore, as submitted to the Court of First Instance, *"Abdulla had authority to do what Mohammed and Majid did and that Mohammed and Majid had authority to bind the company"* (at [42]).

3 What Was Decided

A. THE COURT OF FIRST INSTANCE

The Court of First Instance decided against the Appellant:

> *"44. I do not think the article or legislation is a sound foundation for the submission, as they are concerned with division of decision-making functions and under the Duomatic principle the division of functions would be subject to decision of the shareholders in general meeting: Ciban is against the Defendants' reliance on the legislation. However, the thrust of the submission went further, and exposed that the question in this case is not simply a decision to enter into the Tenancy Agreement,* ***but the actual entry into it by Abdulla's signatures purportedly on behalf of the Defendants.***
>
> *45. The point of the submission was that execution, the act of signing the Tenancy Agreement, was not a matter for the shareholders in general meeting: it was not something for them as shareholders. If a company's board resolves to enter into an agreement, that is internal to the company and the company is not bound to the agreement unless and until the agreement is duly executed on its behalf, or becomes binding on it by some other means. It is the same if the resolution to enter into the agreement is by the shareholders in general meeting, and it is necessarily the same if the shareholders' assent is not by due resolution in general meeting but informally under the Duomatic principle. The Duomatic principle commonly arises where what is in question is a decision, such as the approval of the payment of directors' salaries in Duomatic itself or of a transaction allegedly in breach of directors' duty as in Multinational Gas and Petrochemical v. Multinational Gas and Petrochemical Services Ltd [1983] Ch 258. In this case there is more. It is not enough to say that, whether by inference of the assent of Mohammed and Majid or of assent of Abdulla on their behalves pursuant to the power of attorney, there was a decision of the Defendants to enter into the Tenancy Agreement. Abdulla's authority to sign it on behalf of the Defendants must still be found."*

...

"49. [...] But the Claimant's argument fails for a more fundamental reason. Let it be assumed that Mohammed and Majid informally resolved that the Defendants should enter into the Tenancy Agreement. Apart from the power of attorney, and in the absence of evidence from any of Mohammed, Majid and Abdulla, there is nothing to warrant finding that they informally resolved that it should be signed by Abdulla on behalf of the Defendants. The power of attorney is the essential link to that appointment of Abdulla, but it is a false link. It empowers Abdulla to act on behalf of Mohammed and Majid—not on behalf of the Defendants. Put another way, in the Claimant's reliance on the power of attorney as embodying Abdulla's authority, he signed the Tenancy Agreement not on behalf of the Defendants, but on behalf of Mohammed and Majid. To say that he signed on behalf of Mohammed and Majid in their capacity as beneficial shareholders does not work, because signing is not something for them in general meetings of the Defendants.

50. This is a fatal flaw in finding authority in Abdulla in the exercise of the powers of Mohammed and Majid as beneficial shareholders. [...]"

In arguing that Mohammed and Majid did not have the capacity to execute the Tenancy Agreement, Justice Roger Giles appeared to implicitly accept that the directors must execute that Tenancy Agreement.

In other words, while the Appellant might have informally resolved the Respondents should enter into the Tenancy Agreement, there still needed some execution of the Tenancy Agreement by the Respondents. In arguing that Mohammed and Majid did not have the capacity to execute the Tenancy Agreement, Justice Roger Giles appeared to implicitly accept that the directors must execute that Tenancy Agreement.

B. THE COURT OF APPEAL

Interestingly, the Court of Appeal decided the case on even broader grounds, holding that shareholders (here, Mohammed and Majid) may not even resolve to have a company enter into a tenancy agreement, let alone resolve to so execute an agreement and bind the company directly:

"83. The cases cited by the Respondents and the other cases mentioned above make the position clear. The shareholders could not by unanimous agreement do that which the Articles do not permit them to do unless they first amend the Articles. In this case the powers were limited not only by the Articles but also by the relevant statute. There is no suggestion that anything which was done by the shareholders or with their authority in this case constituted a decision to amend the Articles. The shareholders were not authorised to enter upon the preserve of the director of the Respondents and authorise the execution of the Shortfall Tenancy Agreement. A fortiori, they were not authorised to execute such an agreement.

84. What they did not have authority to do, they could not authorise someone else to do on their behalf. The Power of Attorney did not validly confer authority on Abdullah to do what he did in this case. The case of Duomatic which was relied upon by the Appellant is of no assistance. It does not confer a common law power on shareholders to override the division of powers between them and directors prescribed by statute and the company's articles. In Ciban Management Corporation v. Citco (BVI) Ltd,44 the Privy Council encapsulated the Duomatic principle thus:

"The Duomatic principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law [25th ed (2020)] paras 7.434-7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from In Re Duomatic Ltd [1969] 2 Ch 365, in which it was encapsulated by Buckley LJ at p 373 as follows:

'where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'"

85. The qualification embedded in the principle is that the matter to which the shareholders assent must be "some matter which a general meeting of the company could carry into effect." For the reasons already stated, the shareholders of the Respondents could not by unanimous resolution execute a tenancy contract nor resolve to execute such a contract without first altering the Articles of Association. They did not do that. They passed no resolution, formal or informal to that effect."

4 Why this Case Is Important

On the facts, the DIFC Courts may well have been right in holding the Tenancy Agreement was invalid. While not canvassed in this case comment, grounds relating to the Tenancy Agreement being a sham were raised and would have been raised at trial.

As a matter of law, the Court of Appeal were also probably right—the division of powers as between shareholders and directors is well-settled. Somewhat unsatisfactorily, neither the Court of First Instance nor the Court of Appeal substantially engaged with the sometimes confusing and broad dicta in cases applying the *Duomatic* principle. For example, the Privy Council's *dicta* in *Ciban* appeared to suggest that the company would be bound so long as the sole shareholder authorised it; similarly the *dicta* in *Multinational Gas* argued that shareholders may bind the company to do anything *"which the company under its memorandum of association has power to do"* (emphasis added). This *dicta* is not delineated by the suggestion that shareholders may bind the company to something which *shareholders* (as opposed to the company) may do. Indeed, the Appellant sought to rely on such *dicta* which cast the *Duomatic* principle in broad terms. While the Court of Appeal noted that both cases did not concern the division of powers as between shareholders and directors, it would have been helpful for practitioners to see further analysis from the Court.

After the rejection of the Court of Appeal of the Appellant's arguments, it is implicit that the *Duomatic* principle is therefore constrained to a more narrow ground that shareholders may only authorise certain acts which they *qua* shareholders had the power to authorise in a general meeting. In practice, this ruling will mean the *Duomatic* principle may only be used to cure irregularities in procedure, such as in the calling or conduct of a shareholders' meeting, or in replacing the need to have a meeting at all.

The practical implication of the Court's judgment in the UAE cannot be underestimated. The structure of the Al-Sari family's holdings is common practice in the UAE.

However, the practical implication of the Court's judgment in the UAE cannot be underestimated. The structure of the Al-Sari family's holdings is common practice in the UAE: often, a company will be incorporated to hold valuable assets, with a corporate director appointed. However, the corporate director will not manage the affairs of the company; rather, the beneficial shareholders will delegate their authority by a power of attorney to one individual (e.g., the patriarch of the family), who directs the company's day-to-day affairs with the consent of the beneficial shareholders. The Court of Appeal's decision in *IGPL Holdings* therefore calls into question whether all such similar acts directed by the nominated party holding the power of attorney are liable to be set aside, for want of authority on the basis that the shareholders did not have such power to donate in the first place.

طالب المدعي/ المستأنف في هذه القضية بإصدار أوامر محددة لتنفيذ الاتفاقيات التي قيل أنها تنشئ اتفاقية مضمونة قصيرة المدة لصالح المستأنف تتعلق بممتلكات معينة في لندن. لذا احتج المستأنف بأن المدعى عليهم ملزمين بإبرام عقود إيجار قانونية سارية لهذه الممتلكات. زادت هذه القضية من الاهتمام بتنفيذ مبدأ الـ Duomatic ونطاقه في الإجراءات التي يوافق عليها المساهمون مع تأثير بعيد المدى على الممارسة الشائعة في الإمارات العربية المتحدة.

BIOGRAPHY

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A Guide to Saudi Arabia's New Companies Law

The Saudi Cabinet issued the much-anticipated new Companies Law on 28 June 2022. The new law, which was drafted based on best international practices, aims to enact higher levels of efficiency in the corporate landscape and align the sector with Saudi Arabia's Vision 2030. In this article, we provide a guide to the main areas of reform in the law with respect to commercial and non-profit entities and analyze the impact of these reforms.

Le Cabinet saoudien a publié la nouvelle loi tant attendue sur les sociétés le 28 juin 2022. La nouvelle loi, qui a été rédigée sur la base des meilleures pratiques internationales, vise à adopter des niveaux d'efficacité plus élevés dans le paysage des entreprises et à aligner le secteur sur la Vision 2030 de l'Arabie saoudite. Dans cet article, nous proposons un guide des principaux domaines de réforme de la législation relative aux entités commerciales et à but non lucratif et analysons l'impact de ces réformes.

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1 Introduction

On 28 June 2022, the Kingdom of Saudi Arabia (**KSA**) issued Royal Decree No. 132/1443H enacting Saudi Arabia Cabinet Decision No. 678/1443 on the Approval of the Companies Law (the "**New Law**"), which will come into force 180 days following its publication on 4 July 2022 in the Official Gazette. In addition, the New Law's Implementing Regulations (the "**Implementing Regulations**") are currently expected to be issued 180 days, at most, following the date of the New Law's publication,[1] unless the timeline is subsequently extended.

Once it comes into force and effect, the 2022 Companies Law will not only replace its predecessor, Saudi Arabia Royal Decree No. M3/1437 on the Approval of Cabinet Decision No. 30/1437 (the "**2015 Companies Law**"), but also Saudi Arabia Royal Decree No. M17/1441 on the Approval of the Professional Companies Law.[2]

1. Saudi Arabia Cabinet Decision No. 678/1443, art. 277.
2. Saudi Arabia Cabinet Decision No. 678/1443, art. 280.

The New Law aims to implement procedures with higher efficiency and to align the Companies Law with Saudi Arabia's Vision 2030, including the core goals to encourage an influx of foreign investment into the KSA, and encourage innovation, technology and start-ups. The New Law is expected to enable companies to overcome the challenges presented in the modern era and assist them to grow and thrive in the KSA market by introducing contemporary corporate principles in addition to addressing challenges, limitations and ambiguities under the 2015 Companies Law and the 2019 Professional Companies Law.

This article aims to provide an overview on the main reforms implemented under the New Law, specifically with respect to commercial and non-profit companies.

2

Structure and Scope

The New Law consists of 281 articles and 14 chapters, including general provisions, chapters governing specific types of companies, non-profit companies, company de-mergers, transformation and mergers, liquidation, and penalties.

> *The scope of the New Law encompasses provisions relating to all types of juristic entities—commercial, non-profit and professional companies—in one legislative document.*

The scope of the New Law encompasses provisions relating to all types of juristic entities—commercial, non-profit and professional companies—in one legislative document. In addition to unifying all types of entities under one umbrella, the New Law has reformed the types of entities that may be incorporated in the KSA. Prior to the issuance of this New Law, the types of regulated entities were Joint Liability Partnership, Limited Partnership, Unincorporated Joint Ventures, Joint Stock Companies (**JSCs**) and Limited Liability Companies (**LLCs**). Unincorporated Joint Ventures are no longer acknowledged under the New Law as a legal form of company, meaning that shareholders in the KSA will be obligated to opt for one of the regulated incorporated forms of companies to benefit from the protection and rights granted under the New Law. Furthermore, a new form of company called the Simple Joint Stock Company (**SJSC**) will be introduced. Therefore, once the New Law comes into force and effect, the following five forms of companies will be regulated:

1. Joint Liability Partnership
2. Limited Partnership
3. JSC
4. SJSC and
5. LLC.[3]

In the following sections, we give a guide on the most prominent reforms set out in the New Law with respect to commercial and non-profit companies, including an introduction to the new provisions, changes enacted to the general provisions governing all types of companies, and specific reforms implemented with regard to the most commonly used regulated entities in the KSA, which are LLCs and JSCs.

A. GENERAL PROVISIONS

Among the most notable changes implemented in the New Law were enacted in the general provisions chapter, which were mostly enacted to align with best international practices, as follows:

I. Broader Choices of Trade Names

In the 2015 Companies Law, each corporate entity had separate requirements governing its trade name, which were read in conjunction with the Law of Trade Names.[4] Most notably, entities that were fully Saudi-owned were only allowed to choose Arabic names. The New Law allows shareholders a higher degree of flexibility when applying to register trade names for their companies. Company trade names may now be in a language other than Arabic, and may be derived from the entity's activity or the name of its current or former shareholders (or a combination of both), or can even be a distinctive name, provided it complies with the law of Trade Names and any other applicable regulations.[5] This reform is expected to decrease the timeline for incorporating entities, since it was sometimes challenging to reserve a name under the previous restrictions, especially in well-established industries.

II. Improving Flexibility

> *Company trade names may now be in a language other than Arabic, and may be derived from the entity's activity or the name of its current or former shareholders.*

While the Ministry of Commerce (**MoC**) previously required shareholders to use its template articles of association and closely scrutinized any special clauses inserted in the template, the New Law has relaxed these restrictions by giving shareholders the option to amend MoC's standard form of each company type's articles of association, with freedom to incorporate any agreed terms, provided they comply with the provisions of the New Law.[6] Moreover, the New Law

3. Saudi Arabia Cabinet Decision No. 678/1443, art. 4.
4. Saudi Arabia Royal Decree No. M15/1420 on the Approval of the Trade Names Law.
5. Saudi Arabia Cabinet Decision No. 678/1443, art. 5.
6. Saudi Arabia Cabinet Decision No. 678/1443, arts. 36, 52, 61, 140, 158.

formalizes the implementation of electronic procedures for submitting an application for incorporation, submitting amendments to the company's articles of association, attending general assemblies, and voting on decisions and submitting financial statements using modern technology and remote means of communication.[7] Electronic procedures had been tested in the era of the 2015 Companies Law, but not embodied within its provisions.

III. Regulation of Vesting Agreements

The New Law offered the possibility of issuing shares allocated to any party the presents services or works to the entity, such as employees, to attract and motivate talent[8], an issue that was formerly not regulated in the KSA and is expected to greatly impact the start-up scene, which globally depends on vesting agreements, especially in the seed fund and series A stages.

IV. Statutory Recognition of the Family Charter

While it was estimated that family businesses made up about 63% of establishments operating in the KSA in 2019,[9] and family charters have been utilized by family businesses in the KSA for decades, the definition of family business and the special instruments required by them, such as family charters, were not previously regulated by statute, and treated generally under Shariah Principles governing contracts.

The New Law now officially regulates family businesses and allows shareholders in a family business to agree to incorporate a family charter as an integral part of the company's articles of association, in order to regulate issues specific to these types of entities, such as family ownership, the management of the business, employment of family members, and distribution of profits to ensure the sustainability of these entities.[10]

V. Interim Dividends

With regards to LLCs, JSCs and SJSCs, the New Law now expressly allows distributable profits to be allocated to shareholders on an interim or annual basis.

With regards to LLCs, JSCs and SJSCs, the New Law now expressly allows distributable profits to be allocated to shareholders on an interim or annual basis. The New Law further safeguards creditors' rights by demanding shareholders to return any distributed profits to the company if the distribution violated the profit distribution provision in the New Law. Further clarity is expected in the Implementing Regulations upon their issuance.[11]

VI. Financial Statements

The New Law now unifies the statutory deadline for all types of entities required to issue and file their audited financial statements at six months following the end of its fiscal year. The Implementing Regulations are expected to provide further clarity on this matter upon their issuance.[12]

VII. Financial Auditor Exemptions

To encourage startups to incorporate in the Saudi market, the New Law exempts Small and Medium Enterprises (SMEs) and Joint Liability Partnerships from the requirement to appoint an auditor, unless the shareholders agree otherwise in the articles of association. However, foreign companies and SMEs listed in the stock market or SMEs able to issue debt instruments, in addition to Joint Liability Partnerships with shareholders who are only juristic entities, among other exceptions, will still be required to appoint auditors.[13]

VIII. Conflict of interest

While the 2015 Companies Law only regulates conflicts of interest in the context of certain companies, the New Law expressly prohibits the managers and board members in all types of companies from having any direct or indirect interest in any of the company's business and transactions. The New Law further prohibits managers and board members from participating in any competitive activities or taking advantage of their company position to gain business opportunities without first obtaining the express consent from the shareholders. The New Law provides exceptions to the above-mentioned rule, such as in public tenders, or ones that aim to meet personal needs within the company's usual activity, in addition to any exceptions provided for in the Implementing Regulations upon their issuance.[14]

B. ENTITY-SPECIFIC REFORMS

The provisions governing Joint Liability Partnerships and Limited Partnerships have undergone limited reform in the New Law, while material reforms were enacted with respect of JSCs and LLCs, which are generally the most commonly used commercial vehicles in the KSA. In the following section, we highlight key changes in this regard.

I. In respect of Joint Stock Companies (JSC)

- **Board of Directors:** In the 2015 Companies Law, the maximum number of board members of JSCs was limited to 11, with their compensation being capped at SAR 500,000 per year.[15] The New Law has eliminated both restrictions, allowing shareholders the flexibility to decide in the manner necessary and suitable for their company.[16]

- **Shares consolidation and division:** Although the 2015 Companies Law is silent on the issue of consolidation and division of shares, the New Law regulates the subdivision of shares in JSCs, so that they may represent a lower nominal

7. Saudi Arabia Cabinet Decision No. 678/1443, arts. 80, 83, 84, 277.
8. Saudi Arabia Cabinet Decision No. 678/1443, arts. 13(4), 72.
9. The Riyadh Chamber, *The Reality of Family Businesses and Their Impact on the National Economy, Their Future Trends, Challenges They Face and Their Relationship to the Kingdom's Vision 2030 (2020).*
10. Saudi Arabia Cabinet Decision No. 678/1443, art. 11.
11. Saudi Arabia Cabinet Decision No. 678/1443, art. 22.
12. Saudi Arabia Cabinet Decision No. 678/1443, art. 17.
13. Saudi Arabia Cabinet Decision No. 678/1443, art. 19.
14. Saudi Arabia Cabinet Decision No. 678/1443, art. 27.
15. Saudi Arabia Cabinet Decision No. 30/1437, arts. 68, 76.
16. Saudi Arabia Cabinet Decision No. 678/1443, art. 67.

value or consolidated to signify a higher nominal value, subject to the requirements that all shares in a class of shares have the same nominal value. This improves trading liquidity and makes the stock appear more affordable when needed, without affecting the underlying value of the company. The competent authorities may issue further regulations on the matter.[17]

- **Share lock-up period:** Under the 2015 Companies Law, shareholders were restricted from transferring their shares prior to the publication of financial statements for two full years, apart from certain exceptions stated in the provisions governing the sale of rights or in the case of death or bankruptcy of one of the founding shareholders. [18] The New Law has omitted this restriction, giving shareholders an unobstructed timeline to exercise their right to transfer their shares, unless stated otherwise in the Implementing Regulations upon their issuance.

- **New class of shares:** Unlike the 2015 Companies Law, wherein the classes of shares were restricted to ordinary and preferred shares,[19] the New Law permits JSCs, in addition, to issue a new class of shares named redeemable shares[20] with a built-in call option, allowing shareholders to exchange them for a value in the future. The New Law allows shareholders in JSCs to allocate or restrict the privileges and rights arising from each class of shares in the articles of association, while noting that the New Law still reaffirms the obligation that shares of the same class must give rise to equal rights and obligations. The Implementing Regulations will further specify the guidelines governing classes and types of shares issued by JSC.[21]

- **Squeeze-out rights:** Without prejudice to the Capital Market Law[22] and its Regulations, the New Law allows the company's by-laws, following agreement of at least 90% of shareholders who have voting rights, to adopt squeeze-out rights. The majority shareholders can then compel minority shareholders to accept an offer from a bona fide buyer to purchase the entire issued company shares, although subject to the same price and conditions as the sale of the majority shares to guarantee fair treatment.[23] This issue was formerly only governed by Ministerial Decisions.

II. In respect of Limited Liability Companies (LLCs)

As opposed to the cap of 50 shareholders imposed under the 2015 Companies Law, LLCs may be formed with as many number of shareholders without any limitation.

- **Total shareholders requirement:** The New Law has eliminated the maximum number of shareholders in LLCs. As opposed to the cap of 50 shareholders imposed under the 2015 Companies Law, LLCs may be formed with as many number of shareholders without any limitation.[24] Furthermore, the 2015 Companies Law imposed certain restrictions on sole ownership of LLCs, which have now been removed.

- **General assembly meeting:** The deadline to call for the statutory annual general assembly has been is now six months following the end of the company's fiscal year, as opposed to four months in the 2015 Companies Law. Moreover, all shareholders may also pass decisions through circulation without the need for a general meeting, as opposed to the 2015 Companies Law, where issuing resolutions through circulation is only permissible if the number of shareholders does not exceed 20. [25]

- **Mandatory statutory reserve:** The 2015 Companies Law imposes an obligation on shareholders to maintain a mandatory reserve of 10% of company's profit, until the value of the reserve reaches 30% of the LLC's capital.[26] The New Law has eliminated the mandatory statutory reserve requirement, giving shareholders the liberty to decide on whether to maintain a reserve, and if so, the agreed percentage deductible from the profit to serve as a reserve for purposes agreed upon in the company's articles of association.[27]

- **Introducing debt instruments:** Under the New Law, and subject to the Capital Market Law, LLCs are now permitted to issue debt instruments and financing instruments (*sukuk*), strengthening the financial capabilities of LLCs,[28] since this was a right previously only available to JSCs in this jurisdiction.

C. NEWLY INTRODUCED AND REGULATED SIMPLE JOINT STOCK COMPANY (SJSC)

Saudi Arabia has introduced and regulated the Simple Joint Stock Company in the New Law, which is a new corporate vehicle that meets the needs and requirements of entrepreneurship and venture capital growth.

In line with Vision 2030, and to keep abreast of the latest and most popular forms of entities recognized globally, Saudi Arabia has introduced and regulated the Simple Joint Stock Company in the New Law, which is a new corporate vehicle that meets the needs and requirements of entrepreneurship

17. Saudi Arabia Cabinet Decision No. 678/1443, art. 103.
18. Saudi Arabia Cabinet Decision No. 30/1437, art. 107.
19. Saudi Arabia Cabinet Decision No. 30/1437, art. 114.
20. Saudi Arabia Cabinet Decision No. 678/1443, art. 108.
21. Saudi Arabia Cabinet Decision No. 678/1443, art. 108.
22. Saudi Arabia Royal Decree No. 30/2003 promulgating the Capital Market Law.
23. Saudi Arabia Cabinet Decision No. 678/1443, art. 113.
24. Saudi Arabia Cabinet Decision No. 678/1443, art. 156. Current Companies Law, art. 151.
25. Saudi Arabia Cabinet Decision No. 678/1443, arts. 165, 166.
26. Saudi Arabia Cabinet Decision No. 30/1437, art. 176.
27. Saudi Arabia Cabinet Decision No. 678/1443, art. 177.
28. Saudi Arabia Cabinet Decision No. 678/1443, art. 179.

and venture capital growth. The SJSC is a useful vehicle for SMEs and an opportunity for non-profit companies to enter into the private sector, since it combines all the benefits of a LLC, in terms of having no minimum share capital and ease of incorporation and management, with the benefits of a JSC in terms of having tradeable shares and the possibility of listing on the capital market. Upon their issuance, the Implementing Regulations will outline the full details governing SJSCs,[29] but the following section provides a general overview on the main provisions governing them under the New Law.

I. Incorporation

An SJSC may be incorporated under the same rules as a JSC except for certain provisions. For example, an SJSC can be established by one or more persons, does not have a minimum capital requirement, and the amount of the share capital does not need to be fixed in its articles of association.[30]

II. Management

An SJSC is managed by one or more managers or directors or a board of directors, following the same management rules as an LLC.[31]

III. Shareholder Rules

The New Law allows shareholders to impose a lock-up period on its shares in the articles of incorporation, provided the period does not exceed ten years from the date of the share issuance.

Shareholders can issue the same classes of shares as JSCs, in addition to issuing shares in kind.[32] The New Law allows shareholders to impose a lock-up period on its shares in the articles of incorporation, provided the period does not exceed ten years from the date of the share issuance. In addition, shareholders can agree in the articles of association on the terms upon which they are able to oblige a shareholder to give up his or her shares for a fair value,[33] which was a much disputed issue under the old regime, and was previously left to the discretion of the competent court.

D. NON-PROFIT COMPANIES

Given its importance in economic and social development, the New Law allows non-profit companies to be included in its regulatory framework after high anticipation.[34] Previously, non-profit entities were not expressly regulated in the 2015 Companies Law and were governed by a wide range of Sharia principles and legislation, depending on their structure. In the regulatory vacuum, non-profits were structured in numerous ways, including companies with specific provisions in their articles of association or shareholders agreement governing distribution of profits, Islamic *waqf*, allocation of shares subject to *waqf* principles, or charity establishments. The New Law has dedicated 12 articles to govern and regulate non-profit companies, and the following sections introduce the general principles governing these companies under the New Law.

I. Form

A public non-profit can only take the form of a JSC and can only use its publicly collected funds to support its initiatives where they focus on community services and social benefits stated clearly in its articles of association.

On the other hand, **a private non-profit company** can take the shape of either a LLC, JSC, or an SJSC. Profits generated from the exercise of the private non-profit company's activities can be used in any non-profit outlet specified in its articles of association. However, neither private nor public non-profit companies are allowed to trade stocks in the stock market.[35]

II. Management

The provisions relating to the form of the company that the non-profit adopts apply to its management in a way that does not conflict with its nature. Any amendments to the public non-profit's bylaws regarding its management powers must be approved by the Minister of Commerce.[36]

III. Membership

Every shareholder or contributor to a non-profit company is a member. The articles of association can include provisions that govern the role of members in the company, such as determining the categories and conditions of membership, each category's powers, voting rights and annual fees or any mandatory contributions, provided the MOC has the rights to regulate the aspects of the memberships.[37] Each member category should have equal rights and obligations, including the rights to vote and access company records and documents.[38] The company must record each member in a private register to submit to the Commercial Register along with the company's commercial registration and any amendments thereto.[39] Moreover, a member's membership will lapse in cases stated in the New Law, including the death of a member, end of the membership term, and assignment of membership in private non-profit companies.[40] A member can request the termination of his or her membership in the company, provided that the member settles any obligations towards the company.[41]

IV. Other Provisions

Unlike commercial entities, non-profit companies are permitted to receive gifts and endowments, subject to the provisions of the company's articles of association and

29. Saudi Arabia Cabinet Decision No. 678/1443, art. 155.
30. Saudi Arabia Cabinet Decision No. 678/1443, arts. 138, 139, 150.
31. Saudi Arabia Cabinet Decision No. 678/1443, art. 142.
32. Saudi Arabia Cabinet Decision No. 678/1443, art. 141.
33. Saudi Arabia Cabinet Decision No. 678/1443, arts. 151, 152.
34. Saudi Arabia Cabinet Decision No. 678/1443, arts. 2, 185.
35. Saudi Arabia Cabinet Decision No. 678/1443, art. 185.
36. Saudi Arabia Cabinet Decision No. 678/1443, arts. 185, 187.
37. Saudi Arabia Cabinet Decision No. 678/1443, art. 188.
38. Saudi Arabia Cabinet Decision No. 678/1443, art. 189.
39. Saudi Arabia Cabinet Decision No. 678/1443, art. 192.
40. Saudi Arabia Cabinet Decision No. 678/1443, art. 190.
41. Saudi Arabia Cabinet Decision No. 678/1443, art. 191.

related regulations. Moreover, non-profit companies are exempted from tax and zakat levied according to the rules put by the Zakat Tax and Customs Authority.[42]

E. RE-STRUCTURING AND MERGER PROVISIONS

The 2015 Companies Law contained four brief articles pertaining to company mergers,[43] which generally require that:

a) the transaction terms and conditions be agreed on between the parties in the relevant agreement, which should specify the conditions, the method of valuation, and the number of shares which will be transferred after the transaction;

b) a merger resolution be issued by each company which is a party to the merger and published on MOC's online portal; and

c) the entities apply to the MOC for the restatement and notarization of the articles of association and the amendments to the commercial registration.

The 2015 Companies Law also granted creditors the right to object to a merger within 30 days from the date of the merger announcement but did not elaborate on this procedure. In addition, mergers and acquisitions were generally governed by the Saudi Arabian Capital Market Authority (**CMA**) under the Mergers and Acquisitions Regulations[44] if they involved open JSCs. In addition, the parties may be subject to the Competition Law[45] if the transaction is deemed an economic concentration activity or if it otherwise falls within the scope of this law and its implementing regulations.

The New Law has expanded the provisions relating to company mergers and restructuring, elaborating further on the manner on which a creditor or a shareholder of the merging parties may object to a company merger by sending an objection letter within 15 days from the date of the merger announcement, and on the obligation to settle any debts or offer debt guarantees to its creditors.[46] It also provides a wider framework regarding the timeline for completion of a merger, including when a merger will come into force and effect, and clarifies that the surviving company will carry on its former obligations and rights upon enforcement of the merger and hence become a successor of the merging company.[47] Finally, the New Law also allows companies to split into two or more entities, with the new entity being allowed to take any corporate form regulated under the New Law, allowing easier and more flexible re-structuring and corporate arrangement.[48]

42. Saudi Arabia Cabinet Decision No. 678/1443, art. 196.
43. Saudi Arabia Cabinet Decision No. 30/1437, art. 190.
44. CMA Board of Directors Decision No. 30/1424H issuing the Merger & Acquisition Regulations.
45. Saudi Arabia Royal Decree No. M75/1440 on the Approval of Saudi Arabia Cabinet Decision No. 372/1440.
46. Saudi Arabia Cabinet Decision No. 678/1443, art. 227.
47. Saudi Arabia Cabinet Decision No. 678/1443, arts. 228, 229.
48. Saudi Arabia Cabinet Decision No. 678/1443, art. 131.

F. LIQUIDATION PROVISIONS

The New Law has modified liquidation provisions to ease and facilitate these procedures, align with the provisions of the Bankruptcy Law, and set out the guidelines for the liquidation of non-profit companies.

The New Law has modified liquidation provisions to ease and facilitate these procedures, align with the provisions of the Bankruptcy Law,[49] and set out the guidelines for the liquidation of non-profit companies. The new provisions mandate company managers or board of directors, prior to the shareholder's decision to liquidate the company, to prepare a statement of the company's current state to verify the company's capacity to pay off its debts by the end of the suggested liquidation period. This statement will serve as a ground for the shareholders' ability to persist with the liquidation of the company.[50] In addition, unless the company was terminated on a final judicial ruling, the liquidator under the New Law is to be appointed by a board of directors or a general assembly resolution within a period of 60 days from the date of the company's termination, or else a judicial authority must appoint a liquidator for the company.[51] The New Law also limits the judicial liquidation to a maximum of three years, where the Current Laws only capped voluntary liquidation at five years.[52]

G. ALTERNATIVE DISPUTE RESOLUTION

Under the New Law, the shareholders may incorporate arbitration clauses, or agree to refer their disputes to other alternative dispute mechanisms whatever their nature may be, in the company's by-laws or articles of association.[53]

H. PENALTIES

The New Law restructured penalties into three categories: material crimes, less material crimes and penalties for other violations. The following sections provide a high-level overview:

- Material crimes will give rise to a penalty of three years' maximum imprisonment as opposed to five years in the 2015 Companies Law,[54] or a fine in the amount not exceeding SAR 5 million, or both. Material crimes in the New Law include company financial statement fraud by a board member, a director, an auditor or a liquidator, in addition to a board member or a director or a liquidator

49. Saudi Arabia Royal Decree No. 50/1439 promulgating the Bankruptcy Law.
50. Saudi Arabia Cabinet Decision No. 678/1443, art. 242.
51. Saudi Arabia Cabinet Decision No. 678/1443, art. 248.
52. Saudi Arabia Cabinet Decision No. 678/1443, art. 247. Saudi Arabia Cabinet Decision No. 30/1437, art. 205.
53. Saudi Arabia Cabinet Decision No. 678/1443, arts. 153, 173.
54. Saudi Arabia Cabinet Decision No. 30/1437, art. 211.

using company funds in a manner detrimental to the company's interest to achieve personal gain. The New Law has also removed the violation of failing to call for a general assembly upon becoming aware of company losses from the list of material crimes and now considers it to be of a crime that is less material.[55]

- On the other hand, less material crimes include:

  - falsely distributing dividends in bad faith in violation of company rules or the articles of association;
  - receiving a benefit or a guarantee for choosing a particular vote against the interests of the company or abstaining from voting;
  - impeding or causing to impede persons entitled under the law to access company documents.

  The aforementioned acts were considered a less serious violation in the 2015 Companies Law. Penalties for less material crimes have not changed from the 2015 Companies Law at one-year maximum imprisonment and a fine not exceeding SAR 1 million, or both.[56]
- Other violations imposing a penalty of not more than SAR 500,000 on the violator include financial auditors' failure to perform obligations stipulated in the New Law and failing to register the company in the Commercial Register in accordance with the provisions of the New Law.[57]

The New Law also includes alternative penalties decided by the competent judicial authority in addition to or in place of the above-mentioned penalties, such as issuing a warning to the violator or forcing the violator to refrain from carrying out the violation in question.

I. LOOKING FORWARD: THE IMPLEMENTING REGULATIONS

We expect the Implementing Regulations to provide more clarity on provisions of the New Law, especially regarding depositing financial statements, appointment of financial auditors and their obligations thereto, and board of directors' conflict of interest. In addition to further regulating provisions of JSCs concerning, among other things, classes of shares and their distribution, interim dividends, election of board members and their compensation and general assemblies. In addition, the Implementing Regulations should expand more on company mergers, the newly formed SJSC, and provisions relating to non-profit and professional companies.

J. CONCLUSION

The New Law is aimed at simplifying procedures and regulatory requirements in order to keep pace with international business developments and the KSA's Vision 2030, while utilizing new technological developments to streamline the process. The changes are therefore a fundamental step towards achieving business practicality and a more flexible diverse market by introducing new types of corporate entities, reducing restrictions on all stages of company incorporation, liquidation and exit from the market, stock trading, and dispute resolution.

55. Saudi Arabia Cabinet Decision No. 678/1443, art. 260.
56. Saudi Arabia Cabinet Decision No. 678/1443, art. 261.
57. Saudi Arabia Cabinet Decision No. 678/1443, art. 262.

أصدرت المملكة العربية السعودية نظام الشركات الجديد المنتظر في تاريخ 28 يونيو 2022، والذي تم صياغته بناء على أفضل الممارسات العالمية بهدف تحقيق كفاءة أعلى في قطاع الشركات ومواءمة القطاع مع رؤية المملكة 2030. وفي هذا المقال، نسلط الضوء على أبرز المواد في النظام، فيما يتعلق بالشركات التجارية والغير ربحية، ونحلل آثار ذلك.

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The Standing International Forum of Commercial Courts

In recent years, countries have been keen to create specialized commercial courts. In 2017, Lord Thomas established the Standing International Forum of Commercial Court. It is a forum that brings together the world's commercial courts.

Ces dernières années, les pays ont souhaité créer des tribunaux de commerce spécialisés. En 2017, Lord Thomas a créé le Forum international permanent des tribunaux de commerce. C'est un forum qui rassemble les tribunaux de commerce du monde.

Faisal Rashid Al-Sahouti
Chief Executive Officer
Qatar International Court
& Dispute Resolution Centre

The Standing International Forum of Commercial Courts (**SIFoCC**) was established in 2017 at the invitation and initiative of Lord Thomas—who previously served as Lord Chief Justice of England and Wales from 2013 to 2017, and who is currently the President of the Qatar International Court.

Lord Thomas appealed to all commercial courts in the world to establish a permanent international forum for commercial courts.

Lord Thomas appealed to all commercial courts in the world to establish a permanent international forum for commercial courts with the aim of enhancing cooperation among them, exchanging views and experiences in matters of implementing financial judgments, using modern technology in the courts, sharing the best judicial experiences and practices, and encouraging parties to resolve their disputes by alternative dispute resolution mechanisms.

Many countries with a specialized judiciary responded to the initiative of Lord Thomas. He participated in the first meeting of the SIFoCC on 4 May 2017 attended by representatives of numerous State courts, including:

- the Commercial Courts of New York State (USA)
- the Commercial Court of Delaware (USA)
- the Federal Court (Australia)
- the Supreme Court of the State of Victoria (Australia)
- the Supreme Court of the State of New South Wales (Australia)
- the Commercial Court of Singapore
- the Commercial Court of Ireland
- the Commercial Court of the United Kingdom
- the Qatar International Court
- the Abu Dhabi Commercial Court
- the Courts of the Dubai International Financial Center (UAE)
- the High Civil Court for Banking, Financial and Investment Disputes in the Kingdom of Bahrain
- the Astana International Financial Center Courts in Kazakhstan
- the Commercial Court in Hong Kong, the Netherlands, Uganda, Sierra Leone, Rwanda, Nigeria, Canada and New Zealand.

At the end of its first meeting, the SIFoCC stressed the importance of concerted efforts to strengthen the Rule of Law and to consolidate and raise international awareness of judicial integrity and international legal services.

At the end of its first meeting, the SIFoCC stressed the importance of concerted efforts to strengthen the Rule of Law and to consolidate and raise international awareness of judicial integrity and international legal services.

Lord Thomas stated in this first meeting that the SIFoCC was established:

- to help international courts keep pace with the rapid commercial changes taking place around the world;
- to provide a forum for international commercial courts to exchange experiences related to the best judicial practices;
- to overcome challenges facing the judicial sector;
- to increase cooperation between all commercial courts to enhance the Rule of Law and increase awareness of the importance of resorting to alternative means to resolve commercial disputes.

In 2019, the SIFoCC issued its first edition of the Multilateral Memorandum on Enforcement of Commercial Judgments for Money. It set out the way in which Commercial Courts can enforce a judgment in another jurisdiction. The Multilateral Memorandum was revised in 2021 with commentary from the International Working Group, which refined the common themes.

Since its founding, the SIFoCC has issued *Presumptions of Best Practice in Case Management*, to be used by individual courts to develop more particular approaches, rules or practice notes suitable for their individual requirements, situations, legislative contexts and circumstances.

The SIFoCC has also issued the SIFoCC COVID-19 Memorandum and SIFoCC COVID-19 Annex A, which detail the way courts from across the world have responded to the COVID-19 pandemic. These documents provide a concise snapshot of the different ways in which justice systems have dealt with the repercussions of the COVID-19 pandemic on the judicial process.

Commercial courts are distinguished by their efficient procedures, a modern case management system contributing to the quality of judicial rulings, and the speedy adjudication of cases allowing for prompt and effective justice.

In recent years, countries have been keen to create specialized commercial courts within their judicial system due to a global economy giving rise to sophisticated and complex commercial transactions requiring a specialized commercial judiciary. Commercial courts are distinguished by their efficient procedures, a modern case management system contributing to the quality of judicial rulings, and the speedy adjudication of cases allowing for prompt and effective justice.

The leadership in the State of Qatar has been keen to support a specialized judiciary to stimulate the country's investment and business climate. It initially established the Qatar International Court in 2009, and recently established the Investment and Trade Court in 2021, which began its work in May 2022.

The two courts will have a significant impact on increasing the attractiveness of investment in Qatar and simplifying and accelerating dispute resolution procedures to achieve the desired justice and to serve the interests of all members of society and meet the aspirations and goals of Qatar National Vision 2030.

حرصت العديد من الدول في السنوات الأخيرة باستحداث محاكم تجارية. في عام 2017، أنشئ اللورد توماس المنتدى الدولي الدائم للمحاكم التجارية . و يهدف المنتدى إلى تعزيز التعاون فيما بين المحاكم التجارية في دول العا لم.

BIOGRAPHY

FAISAL RASHID AL-SAHOUTI leads the strategic development and administration of the Qatar International Court, the QFC Regulatory Tribunal and the Alternative Dispute Resolution Centre.
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Faisal holds a Bachelor of Law from Qatar University and an LL.M in International Trade Law with Public International Law from Nottingham Trent University in the UK. He is also an accredited mediator by the Centre for Effective Dispute Resolution (CEDR) in London.

Financial Crime Challenges as We Enter Internet 3.0

The developing "crypto economy" will become a significant part of the real economy in a very short time. This new digital mechanism for assigning, buying, selling and transferring assets brings with it novel issues in respect of financial crime risk and security, while also mirroring some of the same vulnerabilities of the real economy. This article will explore some of the key areas as well as how the UAE is approaching them.

Le développement de la cryptoéconomie deviendra une partie importante de l'économie réelle en très peu de temps. Ce nouveau mécanisme numérique d'attribution, d'achat, de vente et de transfert d'actifs pose de nouveaux problèmes en matière de risque et de sécurité ainsi qu'en matière de criminalité financière, tout en reflétant certaines vulnérabilités de l'économie réelle. Cet article explorera certains domaines clés ainsi que la manière dont les Émirats arabes unis les abordent.

Karl Masi
Senior Associate
Charles Russell Speechlys LLP, Dubai

It is likely that history will define the opening years of the 2020s by reference to the seismic global impact of the COVID-19 pandemic. It introduced and accelerated change in how we operate, do business and live, from new working patterns to an increased sense of focus on health and relationships. Perhaps one of its most significant legacies will be the acceleration of technological innovation, particularly the mainstream emergence of "Web 3.0" and its subsequent impact in areas such as trade, commerce, and the exchange of digital assets. For many, the future of financial engagement is now the present and exciting and innovative steps are being taken to develop financial services technology for the benefit of all. However, with great strides come new risks and there remain those willing to take advantage of a sparsely regulated but potentially lucrative new financial landscape. The intention of this article is to provide an overview of some of the key financial crime risks emerging within the Web 3.0 sphere, to highlight what business should be looking out for and what steps the UAE is taking to address it.

1 Where Are We and How Did We Get Here?

The launch of the world wide web in the late 1990s consisted of a collection of read-only static web pages providing information and content on the internet for users to search for and digest. This was subsequently referred to colloquially as Web 1.0. In the early 2000s, the internet developed to increase user interaction enabling individuals and businesses to interact socially in communities as well as trade and provide services online - Web 2.0. The development of internet banking, e-commerce and electronic payments accelerated globalisation in so far as it enabled businesses to trade and reach audiences globally in a manner and at a speed not previously possible.

Cue the 2020s and the latest stage of internet innovation, an uncompleted web iteration based around the ideas of decentralisation, peer-to-peer lending, and transparency—or Web 3.0 to tech buffs. Central to this is the "blockchain", the distributed ledger technology used by cryptocurrency (interchangeable digital currencies utilising cryptography able to be used in much the same way as traditional fiat currency). Cryptocurrency can now be used to purchase a cup of coffee, trade with counterparties across the globe, and invest in innovative early stage startups. Other features of Web 3.0 include the emergence of digital assets such as non-fungible tokens (NFTs), which are in basic terms unique digital representations (often but not exclusively of a tangible real-world asset) that can be owned and traded online using cryptocurrency.

Underlying the concept of Web 3.0 is a niche financial economy based on the premise of decentralised finance (**DeFi**), a crypto-asset ecosystem which enables participants to replicate many of the traditional financial services such as credit services and investment products, only without the reliance on centralised intermediaries such as banks or third parties. The unregulated and decentralised nature of the DeFi ecosystem brings with it its own risks and challenges from a security perspective.

More broadly, profits from cryptocurrency speculation are being converted into mainstream government issued fiat currency, such as dollars or sterling, and used to purchase real-world assets such as property and art.

Together, this crypto economy will become a significant part of the real economy in a very short time. We are already seeing the trade in terms of transaction volume on a scale comparable with the equities markets – the total market capitalization of crypto assets increasing from USD 20 billion in January 2017 to more than USD 3 trillion in November 2021.[1] At a basic level this demonstrates a broad appeal beyond specialist tech-savvy institutional investors. As crypto moves to the mainstream we are entering a period of consolidation and the setting of regulatory standards for the industry.

This new digital mechanism for assigning, buying, selling and transferring assets brings with it novel issues in respect of financial crime risk and security, while also mirroring some of the same vulnerabilities of the real economy. We will now look at some of the key areas of risk and how the UAE is approaching them.

1. *See* Tara Iyer, "Cryptic Connections: Spillovers between Crypto and Equity Markets", January 2022, Global Financial Stability Notes, International Monetary Fund. Available at: https://www.imf.org/-/media/Files/Publications/gfs-notes/2022/English/GFSNEA2022001.ashx.

2

Financial Crime in Web 3.0

A. MONEY LAUNDERING – AML/KYC

In the UAE, the Dubai Financial Services Authority has recently highlighted fraud and money laundering among key risk factors when buying crypto assets and advises potential investors and consumers to undertake due diligence and exercise caution before entering a transaction.

According to the 2022 Crypto Crime Report produced by Chainalysis, money laundering remains the key criminal activity underpinning cryptocurrency-related financial crime,[2] particularly so with those platforms involved in DeFi projects. In the UAE, the Dubai Financial Services Authority has recently highlighted fraud and money laundering among key risk factors when buying crypto assets and advises potential investors and consumers to undertake due diligence and exercise caution before entering a transaction.[3]

The prevalence of money laundering (the process of transferring the proceeds of illegal conduct into legitimate assets and currency) within the crypto economy is no surprise given the anonymity of blockchain technology. In theory, cybercriminals can transfer and hide the proceeds of crime away from the authorities until eventually converting it into cash. However, the transparency and permanence of the blockchain technology enables the movement of cryptocurrency to be traced and the owners of addresses identified. That said, the sheer volume of transactions taking place on the blockchain means (much like the real economy) that businesses need to implement their own measures to mitigate risk by reducing their exposure to money laundering and other financial crime. The challenge will be in adapting traditional anti-money laundering (AML) and know your customer (KYC) procedures to take into account exposure to the crypto economy.

The real economy tenets of AML/KYC revolve around the twin issues of identity and source of funds. These are usually dealt with by the production of identity documents, bank

2. *See* page 10 of "*Chainalysis: The 2022 Crypto Crime Report",* which states that "*billions of dollars' worth*" of cryptocurrency is moving from illicit addresses each year. Available at: https://go.chainalysis.com/2022-Crypto-Crime-Report.html ("**Chainalysis Report**").

3. *See*, "Cryptos on the Rise' 2022 and The National, UAE, "DFSA sounds alarm on cryptocurrency fraud as UAE regulators consult on technology guidelines", 1 June 2021, https://www.thenationalnews.com/business/economy/dfsa-sounds-alarm-on-cryptocurrency-fraud-as-uae-regulators-consult-on-technology-guidelines-1.1233550.

statements and payslips. If a company has reason to suspect the legitimacy of the transaction based upon its review of these documents and the individuals concerned, then reports can be made to the relevant authorities with the potential for the asset or transaction to be frozen and seized. Traditional "red flags" include individuals exposed to political connections, sanctioned countries, terrorist financing, or the inherent nature of the business from which the funds are derived. These factors remain applicable to crypto-related risk assessments.

B. AML/KYC IN WEB 3.0

> *A business conducting a crypto-related risk assessment should be looking behind the transaction to identify the owner of the relevant wallet.*

New risk factors derive from the peculiarities of the crypto economy which itself centres around a set of novel concepts. For example, to send and receive crypto transactions access to a crypto wallet is required. A crypto wallet is an application or physical device program which stores the public keys (the wallet address) and the private keys required to send and receive crypto transactions.[4] These wallets are either hosted on a dedicated cryptocurrency exchange, or privately by individuals who in such circumstances effectively become their own bank. Either way, a business conducting a crypto-related risk assessment should be looking behind the transaction to identify the owner of the relevant wallet. This requires a specialist approach, adjusted depending on the type of wallet being dealt with and the risk appetite of each company.

As transactions from private wallets are set up by individuals with little to no KYC, they are particularly challenging from a risk assessment perspective and many organisations consider them inherently high-risk. However, steps can be taken to mitigate the risk. As the blockchain makes available publicly the history of the wallet, this information can be reviewed to identify potential risk factors and red flags. To this end, Blockchain Monitoring Providers (**BMPs**) have been established to provide sophisticated analysis enabling the wallets to be risk scored. For example, a BMP can investigate whether a specific transaction may have been routed through high-risk addresses such as those associated with ransomware attacks and the darknet. Such a history should ring alarm bells for any company reviewing the transaction. However, other factors may mitigate the risk of the same transaction, such as whether it passed through a public cryptocurrency exchange (see below).

In contrast to private wallets, most of the cryptocurrency exchanges implement high levels of due diligence and KYC before registering their user and employ dedicated compliance officers to monitor transactions. Any deemed suspicious can be reported to the authorities for onward tracing or recording for future investigation. On the face of it, funds flowing from or through these exchanges will provide a business with a degree of assurance regarding the identity of its owner.

It is worth noting that blockchain monitoring is an evolving process as not all wallet addresses are known to BMPs and only some of the main blockchains are covered. As a result, a risk assessment policy may mandate that the company only transact on blockchains monitored by reputable BMPs.

> *[...] the more detail a company can gather about who it is transacting with, even in the decentralised crypto world, the more informed a decision on risk will be.*

Considering whether this information changes the risk assessment of a transaction will ultimately remain the purview of each company dependent on its risk appetite. However, the more detail a company can gather about who it is transacting with, even in the decentralised crypto world, the more informed a decision on risk will be. In this sense, some things never change.

Even if not trading directly in cryptocurrency, businesses may increasingly find themselves involved in transactions where the source of real economy funds are derived from cryptocurrency profits. To what extent businesses are exposing themselves to money laundering and should be required trace the source into the blockchain is an issue that will surely evolve if cryptocurrency such as Bitcoin continues to deliver large (if erratic) growth for investors. A related problem is currently being considered by banks, who face the challenge of conducting traditional AML/KYC account-opening procedures for applicants whose declared source of (often quite large) wealth is cryptocurrency trading profits. An example of how this issue entering the mainstream can be seen in Dubai, where real estate developers announced in April 2022 that they would accept payment in Bitcoin and Ethereum.[5] The UAE Government moved swiftly by introducing reporting requirements to make sure that digital assets are covered by the region's anti-money laundering and anti-terrorism funding rules.[6] This means that real estate agents, brokers and law offices must notify the UAE's Financial Intelligence Unit (FIU) of any real estate transactions where payment is made in cash, in cryptocurrency, or in money earned from a virtual asset. While this cautious approach is sensible in principle, the practical effect of reporting any real estate deal involving cryptocurrency or derived from cryptocurrency remains to be seen. It would not be surprising to see similar reporting requirements expanded into the sale of other high assets such as artwork, supercars and yachts.

4. *See* "Cryptocurrency Wallet", 29 April 2022, Investopedia, https://www.investopedia.com/terms/b/bitcoin-wallet.asp.

5. "Dubai developer Damac Properties starts accepting Bitcoin and Ethereum", 29 April 2022, https://www.thenationalnews.com/business/property/2022/04/29/dubai-developer-damac-properties-starts-accepting-bitcoin-and-ethereum/.

6. "UAE's new real estate rule regarding payments using virtual assets and cash", 10 August 2022, https://www.arabianbusiness.com/gcc/uae/real-estate-rules-explained, Arabian Business.

For each business, the challenge will be in putting in place effective procedures that enable them to be satisfied of the identity of the transacting party and the legitimacy of the source of funds being used.

For each business, the challenge will be in putting in place effective procedures that enable them to be satisfied of the identity of the transacting party and the legitimacy of the source of funds being used. How this is done will develop over time and may involve collaboration with the cryptocurrency exchange they are dealing with. As in the real economy, much will depend on the company's risk appetite which is itself dependent on the nature of the business and its exposure to cryptocurrency.

C. "NEW" FINANCIAL CRIME?

The low barrier to entry is one reason that cryptocurrency is as popular with retail investors as institutional ones—all one needs is access to the internet. This combined with the pandemic accelerating the growth of digital economies has meant that more people are digitally connected and utilising cyber-space for their work and finances than ever before. Unfortunately, if not predictably, this mix has been exploited to the benefit of a new wave of cyber criminals specialising in crypto-related fraud.

The Chainalysis 2022 Crypto Crime Report found that cryptocurrency-based crime hit an all-time high globally in 2021, with illicit addresses receiving USD 14 billion over the course of the year, an increase of 79% from USD 7.8 billion in 2020. This figure must be placed in the context of Chainalysis's assessment that overall transaction volume grew 567% in the same period.

Digging down into the types of crime being committed in the crypto economy, one question that arises is how much of this illicit conduct is a "new" type of financial crime, and how much is a familiar crime dressed in new clothing.

However, digging down into the types of crime being committed in the crypto economy, one question that arises is how much of this illicit conduct is a "new" type of financial crime, and how much is a familiar crime dressed in new clothing. A recent study[7] conducted by the Dawes Centre for Financial Crime in London identified a distinction between cyber-enabled fraud and cyber-dependent fraud. The former is the use of cyber technology to *"magnify the scale and reach of offences that could also be committed offline"*, while crypto-dependent offences were defined as those considered only able to be committed using modern cyber technology. The distinction is more than academic as businesses exposed to the risk of crypto-related fraud need an understanding of what it is they are dealing with in order to properly assess the risk-managements procedures they have in place to prevent it. Assuming the same old cyber-related risks apply would be a brave approach in the context of a technology and criminals moving at a faster pace and in more jurisdictions than ever before.

Examples of cyber-enabled fraud include ponzi schemes, in which high returns are promised in return for investments in digital assets, and wash trading (market manipulation) where digital assets (i.e., NFTs) are bought and sold simultaneously by the same individual in order to artificially inflate the price of the asset. In every financial product traded, there also remains the inherent opportunity for insider trading, where those closely connected to a crypto token or asset can trade with information not otherwise publicly available. A high-profile example of this occurred in July 2022 when the United States Department of Justice (DOJ) charged three individuals with conspiracy to commit insider trading in cryptocurrency. The DOJ alleged that one of the charged individuals, a former Coinbase employee, tipped-off his brother and a friend regarding crypto assets that were going to be listed on Coinbase Exchange.[8] With the growing number of exchanges in the MENA region, this is something the authorities will no doubt be examining closely. Other examples of popular crypto cyber-enabled fraud include:

- *Rug-pull:* a developing form of scamming, in which fraudsters market a new crypto-related investment project, usually in the form of a new crypto token, enticing investment to ramp up the price before withdrawing all of the coins, leaving the asset's value (and investors' money) to drop to zero. Sophisticated businesses or individual investors may be able to utilise blockchain monitoring providers (see above) to track the history of the asset's price rise to see who lay behind the price escalation.
- *Theft*: as the adoption of cryptocurrency grows at an astonishing rate, hackers are operating at pace to hijack wallets—it should be noted that of the USD 3.2 billion worth of cryptocurrency stolen in 2021,[9] 72% was stolen from the less regulated DeFi protocols. Despite efforts by exchanges to maintain security around the wallets on their platforms, cryptocurrency experts are increasingly advising individual investors and businesses with significant investments in cryptocurrency to rely on the use of "cold" wallets to secure their cryptocurrency, effectively storing their coins or tokens offline, away from prying hacks.
- *Crypto-ransomware:* perhaps the least subtle of all crypto-related frauds, ransomware is a malware that enables a harmful program with the ability to lock and encrypt files stored on a computer for the purpose of allowing those responsible to extort cryptocurrency.

7. Trozze *et al.*, "Cryptocurrencies and future financial crime", Crime Science Journal (2022) 11:1, available at: https://crimesciencejournal.biomedcentral.com/articles/10.1186/s40163-021-00163-8.

8. "Three Charged In First Ever Cryptocurrency Insider Trading Tipping Scheme", July 21, 2022, https://www.justice.gov/usao-sdny/pr/three-charged-first-ever-cryptocurrency-insider-trading-tipping-scheme.

9. Footnote 2, Chainalysis Report.

Ransomware attacks have been described as the *"defining criminal typology in the virtual asset world"*,[10] and are often used to target critical infrastructure. The Middle East has seen a rise in ransomware attacks since the onset of the pandemic. In the UAE, a recent study suggests that 77% of UAE organisations have suffered at least one ransomware attack in the last 24 months.[11]

In contrast, "new" crypto-dependent crimes are those that can only be committed using modern cyber technology. An example of this is crypto-mining fraud, where specialist malware is embedded on a victim's computer, enabling the attacker to use the victim's computational resources to mine cryptocurrencies.[12] Another example includes cybercriminals developing technology to impersonate legitimate wallet and exchange services to steal money from victims. These can come in the form of fraudulent cryptocurrency investment apps or even a fraudulent cryptocurrency, such as the scam which sought to claim it was Dubai's official cryptocurrency in order to phish data and money from crypto investors.[13] We are likely to see more of these types of crypto-dependent crimes as the technology develops and as long as the demand for cryptocurrency as an asset class remains strong.

3

UAE and Crypto-Related Financial Crime

The growth in the Middle East of businesses derived from Web 3.0 technology is astounding, with a 30% growth rate in the FinTech sector in 2021 as but one example.[14] This rapid growth is not solely due to the impact of the global pandemic and changing consumer habits but is as a result of a mix of government-backed support and friendly regulations in the region.

These efforts have been combined with policies intended to stem the tide of crypto-related financial crime. The UAE has been at the forefront of these developments, implementing recommendations from the Financial Action Task Force (FATF), an international monitor of AML standards. The UAE's approach is being led by the specially formed UAE Cybersecurity Council, created in November 2020 to oversee the Emirates' implementation of a strategy to build a secure cyber infrastructure.[15] In June 2022, the Council signed multiple collaboration agreements with external service providers including Huawei, Amazon Web Services (AWS), and Deloitte. In what has been described as a *"service-centric model"*[16] these agreements will lead to the outsourcing of cyber security operations to specialists and allow businesses to focus on their core objectives and targets.

The Cybercrime Law includes a number of offences prevalent in crypto-asset fraud, from hacking and compromising information systems to the unauthorised obtaining of passwords, to the fabrication of websites, mail and electronic accounts.

Criminal legislation has also been revised within the UAE to incorporate the risk of cyber-related financial crime. On 2 January 2022, Federal Decree-Law No. 34/2021 Concerning the Fight Against Rumours and Cybercrime (the "Cybercrime Law") came into effect. The Cybercrime Law includes a number of offences prevalent in crypto-asset fraud, from hacking and compromising information systems to the unauthorised obtaining of passwords, to the fabrication of websites, mail and electronic accounts.[17] The Cybercrime Law also criminalises acts related to unlicensed cryptocurrency trading, and behaviour that promotes or encourages the unlicensed dealing in cryptocurrency not officially recognised in the UAE.[18]

In addition, to help combat the rise in crypto fraud, on 22 August 2021, the Dubai Courts announced the establishment of a specialist criminal court focused on combatting money laundering. This was followed in October 2021 by the Dubai Police launching a specialist Virtual Asset Crime department to investigate crypto fraud[19] and announcing that it will be collaborating with a cryptocurrency trading platform and other industry experts to fight crime within the space.[20]

Furthermore, the UAE's civil courts may be able to assist victims of fraud. The DIFC and ADGM Courts have the full arsenal of interim measures available to common law courts,

10. "Ransomware in the UAE: Evolving threats and expanding responses", The Middle East Institute, 27 July 2022, https://www.mei.edu/publications/ransomware-uae-evolving-threats-and-expanding-responses.

11. "UAE organisations suffer ransomware attack" (11/08/2022) https://www.zawya.com/en/press-release/companies-news/90-of-uae-organizations-that-suffered-ransomware-attack-and-paid-ransom-were-hit-a-second-time-vmle3zdc.

12. "What is Cryto Malware & How to Detect It" https://www.forenova.com/malware/what-is-crypto-malware ForeNova Security

13. "Cryptocurrency Scam: the short lived fame of Dubaicoin", 12 August 2022, https://www.analyticsinsight.net/cryptocurrency-scam-the-short-lived-fame-of-dubaicoin/.

14. "The Future of FinTech in the Middle-East: Trends that are here to Stay", The Middle East Institute, 21 October 2021, https://www.mei.edu/publications/future-fintech-middle-east-trends-are-here-stay.

15. Dubai also has its own Cyber Security Strategy - https://www.desc.gov.ae/cyber-strategy/m

16. "Ransomware in the UAE: Evolving threats and expanding responses", 27 July 2022, https://www.mei.edu/publications/ransomware-uae-evolving-threats-and-expanding-responses.

17. Federal Decree-Law 34/2021 *Concerning the Fight Against Rumours and Cybercrime* articles 2, 5 9 and 11.

18. *Ibid.*, arts. 41 and 48.

19. Unlock Media, "Dubai Police first in MENA Region to launch virtual asset crime department", 10 October 2021, https://www.unlock-bc.com/81035/dubai-police-first-in-mena-region-to-launch-dedicate-virtual-assets-crime-department.

20. Arab News, "Dubai crypto platform teams up with police to combat crypto fraud", 3 October 2021, https://www.arabnews.com/node/1940551/business-economy.

including freezing and proprietary injunctions and asset disclosure orders. These interim measures have been successfully used in other common law jurisdictions and, provided the jurisdictional requirements of the UAE's common law courts are met, it is likely that similar measures could be wielded by the DIFC and ADGM under their existing laws and court rules. The UAE's Onshore Courts may also be able to make orders in support of claims by fraud victims, notable in the form of the precautionary attachment, which is similar to a freezing order in the common law courts and can be easily notified to banks and other financial institutions under existing processes.

As the world enters this new age of financial services technology, there is much to be learned about how best to monitor and protect ourselves against financial crime. This short article can only focus on a small selection of issues concerning financial crime within the crypto economy and the UAE's response to them. It is hoped that this provides an insight to businesses and individuals about the risks deriving from Web 3.0, so that all can be better prepared.

سيصبح "اقتصاد العملة المشفرة" المتطور جزءًا مهمًا من الاقتصاد الحقيقي في المستقبل القريب جدًا. تثير هذه الآلية الرقمية الجديدة التي تستخدم لتخصيص الأصول وشرائها وبيعها ونقلها مشكلات جديدة تتعلق بمخاطر الجرائم المالية والأمن. كما تعكس أيضا بعضا من نقاط الضعف في الاقتصاد الحقيقي. تستكشف هذه المقالة بعض مجالاتها الرئيسية وكيفية تعامل الإمارات معها.

BIOGRAPHY

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New Regulation of Musataha Agreements over Commercial Land in the Emirate of Dubai

In this article, we look in more detail at musataha arrangements in Dubai and assess the changes made regarding the granting of *musataha* rights over commercial land by government or government-related entities through the promulgation of Dubai Decree No. 23/2022 on the Regulation of Granting of Musataha Rights on Commercial Lands in the Emirate of Dubai against its stated objectives.

Dans cet article, nous examinons plus en détail les accords de musataha à Dubaï et évaluons les changements apportés concernant l'octroi de droits de musataha *sur des terres commerciales par le gouvernement ou des entités liées au gouvernement grâce à la promulgation du décret de Dubaï n° 23/2022 sur la Réglementation de Octroi des droits de Musataha sur les Terrains Commerciaux dans l'Émirat de Dubaï par rapport à ses objectifs déclarés.*

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Partner
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Important changes have been made regarding the granting of musataha rights over commercial land by government or government-related entities through the promulgation of Dubai Decree No. 23/2022 on the Regulation of Granting of Musataha Rights on Commercial Lands in the Emirate of Dubai (the "**New Law**").

1 Introduction

The objectives of the New Law are set out in Article 3 and include the regulation of the use of commercial lands in the Emirate of Dubai and the enhancement of investment in the real estate sector, in order to sustain Dubai's international standing as a destination for real estate investment.

Musataha are a common form of leasehold ownership in the Emirates and are of particular value where the land may be of a strategic nature and therefore the landowner (usually a government-related entity) may not wish to permanently dispose of the land. Examples of such land could be schools, hospitals, port facilities or other strategic infrastructure.

A musataha or leasehold arrangement allows the landowner to bring in foreign or non-government investment while ensuring that the land use does not change and that ultimate ownership of the land does not leave government hands. Such leasehold arrangements are therefore common in BOT transactions and other PPP arrangements.

For such arrangements to be attractive to investors, the leasehold rights need to be secure and bankable and therefore musataha and similar leasehold arrangements are usually treated as real estate interests and registered at the relevant land registry.

In this article we look in more detail at musataha arrangements in Dubai and assess the New Law against its stated objectives.

2

Musataha Rights – An Overview

Musataha rights are already a common form of real estate right in the United Arab Emirates and are addressed in Federal Law No. 5/1985, better known as the Civil Code.

The musataha agreement gives the right to the recipient (known as a musateh) to use and benefit from the land for the term, usually by making improvements to the land.

A musataha is a right over land that is similar in nature to a ground development lease. The musataha agreement gives the right to the recipient (known as a musateh) to use and benefit from the land for the term, usually by making improvements to the land. At the expiry of the musataha agreement the rights under the musataha expire. Subject to the terms of the musataha however, the rights to the improvements may rest with the musateh.

A. THE CIVIL CODE

Articles 1353 to 1360 of the Civil Code state:

- a musataha right is a right *in rem*, and therefore must be registered in the real property register at the Dubai Land Department;
- the term of a musataha cannot exceed 50 years; and
- unless otherwise agreed, the improvements made by the musateh will remain the property of the musateh upon the expiry of the term.

B. RIGHTS OF FOREIGN NATIONALS TO OWN MUSATAHA RIGHTS

As a musataha is a real property right, a number of other Dubai real estate laws are applicable to musataha. In particular, Article 4 of Law No. 7/2006 on Property Registration in the Emirate of Dubai is applicable.

Article 4 of Law No. 7/2006 states that the right to own interests in land in the Emirate of Dubai is limited to nationals of the United Arab Emirates, other Gulf Cooperation Council members, and Public Joint Stock Companies, unless the land is designated by the government for ownership by other nationalities.

Although a musataha right resembles a lease arrangement, because it is registered in the real property register at the Dubai Land Department, it is considered a right *in rem* and therefore cannot be registered where the musateh is a foreign national or a company with foreign shareholders, unless the area has a designation allowing foreigners to own.

A musataha cannot be granted or transferred to a foreign national or to any corporate entity with foreign shareholders unless the land is in a location designated for foreign ownership.

Logically therefore, a musataha cannot be granted or transferred to a foreign national or to any corporate entity with foreign shareholders unless the land is in a location designated for foreign ownership. Such areas are often referred to as the foreign freehold areas and are typified by the many residential and hospitality themed areas in Dubai where foreign nationals can own.

Importantly, from an industrial and commercial perspective, most of the TECOM Group business parks as well as parts of Dubai South and the Jebel Ali Free Zone are designated for foreign ownership, even if transfers of freehold interests are rare. These lands therefore fall very much within the ambit of the New Law.

C. REGISTRATION OF MUSATAHA RIGHTS AT THE DUBAI LAND DEPARTMENT

To register a musataha with the Dubai Land Department, the relevant plot of land will need to have its own affection plan approved by the applicable planning authority. Once the affection plan is approved, the approval can be issued to the Dubai Land Department and the musataha registered.

Registration should take place within 60 days of the date of the musataha contract and penalties may apply if this deadline is not adhered to.

The registration fees payable to the Dubai Land Department are set down in Executive Council Decision No. 30/2013 and will be 1% of the value of the musataha. The same fee would appear to apply on the transfer of any musataha interest, though the Dubai Land Department has in the past treated developed musataha properties as "usufruct" which are a separate category of leasehold ownership of developed real estate. The fees applicable to the transfer of usufruct are 2% of the transaction value.

A potential complication arising can be where no bullet payment for the musataha interest applies as there is a rental stream in lieu of such a payment. In these circumstances, the interpretation likely to be favoured by the Dubai Land Department is that the 1% shall apply to the entire rental stream for the term of the musataha. This formula is likely to give rise to a far higher registration fee than would be the case for a bullet payment.

Once registered, the Dubai Land Department will issue a musataha title certificate and the musataha rights can thereafter be mortgaged and transferred in a similar way to freehold rights.

Once registered, the Dubai Land Department will issue a musataha title certificate and the musataha rights can thereafter be mortgaged and transferred in a similar way to freehold rights, subject to any restrictions that may apply to such transfers or mortgages set out in the musataha agreement.

D. DO THE DUBAI LANDLORD AND TENANT LAWS APPLY TO A MUSATAHA?

While elements of the Civil Code applicable to leases may in some instances apply, the special Dubai landlord and tenant laws such as Dubai Law No. 26/2007 Regulating the Relationship between Landlords and Tenants in the Emirate of Dubai, will not apply.

This has been confirmed to be the case by the Dubai Land Department who have cited Article 6 of Dubai Decree No. 26/2013 on the Rental Disputes Settlement Centre in the Emirate of Dubai, which provides that the Rental Disputes Settlement Centre does not have jurisdiction over long-term leases. A long-term lease was further defined in Dubai Administrative Decision No. 134/2013 as a lease of more than ten years.

The key implication of this is that disputes involving musataha agreements will be addressed by the Courts of Dubai, rather than the Rent Disputes Settlement Centre. Arbitration can also be used as a means of dispute resolution for disputes arising in relation to a musataha agreement.

3

Application of the New Law

Below we consider the application of the New Law and how this may affect the position outlined above.

A. FROM WHEN DOES THE NEW LAW APPLY?

The New Law was published in the Official Gazette on the 22nd of July 2022 and came into effect from this date. The New Law does not apply retrospectively.

B. TO WHOM DOES THE NEW LAW APPLY?

The New Law applies to the grant of musataha rights over commercial land by 'Government Entities' which are defined as:

> *"the government departments, and public entities and institutions, as well as the government councils and authorities, and any other public agency reporting to the Government, including the authorities supervising the Special Development Zones and Free Zones including the Dubai International Financial Centre."*

Due to the definition of "Commercial Land" (see below), it is probable that the intention is that the New Law also apply to commercial land owned by government-owned or partially government-owned companies and could extend to government related parties such as the Dubai Holdings group of companies or the Dubai World conglomerate.

C. TO WHAT DOES THE NEW LAW APPLY?

The New Law only applies to "Commercial Land" which is defined as:

> *"a land plot designated for industrial or commercial purposes, and owned by the government, or a governmental entity, state-owned company or a company in which the Government contributes."*

4

The Relevant Provisions of the New Law

Whereas the rights and obligations between the owner of the land and the musateh were, prior to the New Law, predominantly governed by the terms and conditions agreed in the musataha agreement, a musataha to which the New Law applies is mandated to include the following:

- a maximum term of 35 years, provided this may be renewed by agreement to a maximum of 50 years;

- two year's notice must be given should the musateh wish to renew the musataha agreement unless another period is agreed between the parties;
- the musateh must complete the improvements contemplated in the musataha agreement within five years of the date of registration of the musataha agreement and a penalty of 1% of per year of the market value of the musataha shall apply from this date;
- the musataha agreement can only be mortgaged with the approval of the owner and the Dubai Land Department;
- the musateh is prevented from any disposition of its musataha interest (except for a mortgage) until the improvements are completed;
- the ownership of any improvements to the land shall vest in the owner at the expiry of the term of the musataha agreement unless otherwise agreed (this reverses the position set out in the Civil Code); and
- no dispositions of the musataha or transfer in the shares in the musateh shall be permitted without the approval of the owner, the Dubai Land Department, and any licensing authority applicable to the musateh.

In any case where the mustateh does not complete the improvements a further three years from the initial five years referred to above (therefore eight years from the date of the registration of the musataha), Article 12(a)(5) of the New Law provides that the musataha shall be terminated.

It is notable that Article 12 does not expressly state that such a termination is at the discretion of the landowner and therefore landowners may not have a discretion as to whether they terminate in such circumstances.

5

Other Issues of Note

A. APPLICATION OF THE NEW LAW TO GRANTED LAND

Article 10(b) of the New Law provides that Dubai Decree No. 31/2016 on Mortgaging Granted Lands in Dubai shall apply *"without limiting the terms of the musataha agreement".*

"Granted land" is industrial or commercial land that is granted by the Government of Dubai, usually to nationals of the United Arab Emirates who are native to Dubai. The rights granted tend to be in perpetuity but there are restrictions on transfer of these rights unless a fee of 30% of the value of the land is paid to freehold the land. Dubai Decree No. 31/2016 clarified however that granted land can be the subject of a mortgage provided the mortgagee would pay the 30% in the event they complete mortgagee sale proceedings.

Article 10(b) of the New Law is drafted broadly and therefore its application is uncertain and several interpretations are possible. Further enquiries will need to be made of the Dubai Land Department to obtain clarity should the musataha be associated with granted land or a mortgage is to be taken over a musataha interest over granted land.

B. EXECUTIVE REGULATIONS

The Director General of the Dubai Land Department shall be entitled to make executive regulations pursuant to the New Law. Any such regulations must be published in the Official Gazette.

6

Conclusion

The New Law does not result in a large departure from the current understanding of musataha and many of the provisions now mandated by the New Law would feature, as a matter of contract, in existing musataha agreements. While the New Law does provide the landowners with more guidance as to the parameters applicable to the granting of musataha rights, it is the author's view that the Law Law could have been more expansive in its application. In particular, the following could have been addressed:

Strategic land is often in areas not designated for foreign ownership. Allowing foreign ownership of Musataha rights would allow greater foreign participation in such areas.

- **Allowing landowners to grant musataha rights to foreign entities in areas that are not designated for foreign ownership in certain circumstances –** Strategic land is often in areas not designated for foreign ownership. Allowing foreign ownership of Musataha rights would allow greater foreign participation in such areas. The fact that the musataha is limited in time would also preserve the government's strategic interest in such locations.Clarification as to how musataha or long leases with rental streams should be treated when calculating the fees to be charged by the Dubai Land Department – Calculating the net present value of such rental streams should give a better basis for determining an appropriate level of fees in such circumstances;
- **Clarification as to whether musataha properties convert to usufruct (from a fees perspective) once the development obligations are fulfilled.** Greater clarity as to the rules applicable to granted land – While we surmise that the beneficiaries of granted land will be able to grant musataha interests to third parties and that these interests will not be the subject of the 30%

freeholding fee payable by the musateh, we would assume that the consideration received by the land-owner from the musateh should be applied towards the freeholding fee.

Given that the Director General of the Dubai Land Department has the power to make regulations, it may be that some of the above issues will be addressed in due course through such regulations.

The New Law will be of particular interest to the Government Entities to which it applies as they will now be required implement the provisions of the New Law. Third parties acquiring musataha rights over commercial or industrial land will also be interested in the New Law as the terms of any musataha agreement must be consistent with the provisions of the New Law and the New Law will prevail to the extent of any inconsistency between the New Law and the contractual terms agreed.

Banking institutions should also be aware of the provisions of the New Law, as should any party that is the beneficiary of any land grant or intends to take a musataha over granted land.

في هذه المقالة، نلقي نظرة تفصيلية على إجراءات المساطحة في دبي ونعاين التغييرات التي أجريت على منح حقوق المساطحة المتعلقة بالأراضي التجارية من قبل الحكومة أو الجهات ذات الصلة بالحكومة من خلال إصدار مرسوم دبي 23/2022 بشأن تنظيم منح حقوق المساطحة على الأراضي التجارية في إمارة دبي مقابل أهدافها المعلنة.

BIOGRAPHY

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A Solution to Executive Succession in UAE Family Businesses: The Board of Directors

Family-owned businesses, which are uniquely important to the United Arab Emirates, face the challenge of transitioning to the second or third generation. Conflicts around ownership and management of the business can result in destructive family disputes and even disintegration of the business. Proactive executive succession planning—a responsibility of the Board of Directors—is key to eliminating such conflicts and ensuring business continuity. This article[1] assesses the rules and regulations regarding corporate governance in the UAE, including the composition of the .../...

Les entreprises familiales, qui sont particulièrement importantes pour les Émirats arabes unis, sont confrontées au défi de la transition vers la deuxième ou la troisième génération. Les conflits autour de la propriété et de la gestion de l'entreprise peuvent entraîner des conflits familiaux destructeurs et même la désintégration de l'entreprise. Une planification proactive de la relève de la direction et une responsabilité du conseil d'administration est essentielle pour éliminer ces conflits et assurer la continuité des activités. Cet article évalue les règles et réglementations en matière de .../...

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1. This article is part of a series of publications. In a separate article, the issue of executive succession in UAE family businesses will be considered from a comparative law and practical perspective.

Board and its role in succession planning, undertaken by the Nomination and Remuneration Committee. Finally, it sets forth a series of recommendations on empowering the Board to facilitate smooth transition of power amongst family businesses.

gouvernance d'entreprise aux EAU, y compris la composition du conseil d'administration et son rôle dans la planification de la succession, entreprise par le comité de nomination et de rémunération. Enfin, il énonce une série de recommandations sur l'habilitation du conseil d'administration pour faciliter une transition en douceur du pouvoir entre les entreprises familiales.

1

Legislative Developments Pertinent to Family Businesses

Family-owned business ("Family businesses") account for the majority of commercial activities in the UAE,[2] from holding franchises of supermarket chains and car dealerships to agriculture, real estate, construction and manufacturing companies,[3] accounting for a 90% share of the country's private sector.[4] In 2021, the UAE accounted for the second-highest number of prominent family businesses in the Middle East, with 25 of the 100 top Arab family businesses in the Middle East, according to Forbes.[5]

To ensure business continuity over successive generations, UAE authorities have committed to developing bespoke legislative structures to better organize the operations of family businesses and private wealth.

To ensure business continuity over successive generations, UAE authorities have committed to developing bespoke legislative structures to better organize the operations of family businesses and private wealth. Recent legislative developments include the introduction of trusts[6] and foundations[7] in financial free zones: Dubai International Financial Center (DIFC) under DIFC Law No. 4/2018 and Abu Dhabi Global Markets (ADGM) under Trusts (Special Provisions) Regulations 2016, the enactment of a federal law under which family businesses may establish trust structures in mainland UAE,[8] the issuance of waqf decrees[9] in the Emirates of Sharjah and Dubai as well as a federal law[10] containing specific modern provisions to organize awqaf for family businesses.

Further, the UAE government is encouraging family businesses to list on local exchanges, in an effort to increase liquidity on local stock exchanges as well as enable succession among family businesses.[11] Recent amendments to key federal laws move the needle in this regard. An amendment to Federal Law No. 2/2015 on Commercial Companies in the UAE (the "**2015 CCL**") reduced the free float requirement from 55% to 30% capital, encouraging family businesses to list on the local bourses. In addition, Federal Law No. 18/1981 (the "**UAE Commercial Agency Law**") was amended to permit family businesses not 100% owned by UAE nationals to register as commercial agents in the UAE, assuming they are structured as a Public Joint Stock Company (**PJSC**) with 51% national ownership or as a private company owned by such a

2. Bloomberg, "UAE Intends to Remove Monopolies of Some Family Businesses: FT", December 2021, https://www.bloomberg.com/news/articles/2021-12-26/uae-intends-to-remove-monopolies-of-some-family-businesses-ft.

3. Abu Dhabi Chamber, "Family Business in Abu Dhabi", November 2019, https://abudhabichamber.ae/-/media/Project/ADCCI/ADCCI/Media-Center--Publications/Research-and-Reports/2019/Family-business-sector-report_December-English.pdf.

4. Financial Times, "UAE pushes merchant families to open up to competition", December 2021, https://www.ft.com/content/116b083a-1811-4501-ad9b-2f6a3183db3e.

5. Forbes Middle East, "Top 100 Arab Family Businesses in the Middle East", https://www.forbesmiddleeast.com/lists/top-100-arab-family-businesses-in-the-middle-east-2021/.

6. DIFC Law No. 4/2018 in DIFC and ADGM Trusts (Special Provisions) Regulations 2016.

7. DIFC Foundations Law No. 3/2018, and ADGM Foundations Regulations 2017.

8. Federal Law No. 19/2020 Concerning Trusts.

9. Sharjah Law No. 8/2018 and Dubai Law No. 14/2017 Regulating Endowments and Gifts.

10. Federal Law No. 5/2018 on Endowment.

11. According to Dr. Ahmad Belhoul Al Falasi, UAE Minister of State for Entrepreneurship and Small and Medium Enterprises, *«Once you list that company, the level of data that goes into the processes makes it easier as well for succession, for inheritances, because you are now being listed, you're reporting and auditing, you're in a shareholder structure that makes it much more friendly for succession as well»*. He added that *«It is difficult to understand that you can still be a family business and listed...when you list you are not giving away your company, you are becoming much better structured.»* Source: The National, 'UAE urges family-owned businesses to list on local bourses', May 2022, https://www.thenationalnews.com/business/2022/05/19/uae-urges-family-owned-businesses-to-list-on-local-bourses.

PJSC.[12] The broadened scope for commercial agents also facilitated family businesses to list on the local bourses without losing their status as registered commercial agents.

> *Under the Dubai Family Ownership Law, family members, who are bound by common ownership of movable or immovable property [...] may opt to enter into a legally binding and notarized family ownership contract.*

Emirates are also devising legal frameworks to promote ownership and succession among family businesses, most notably by enacting family business-specific laws such as Dubai Law No. 9/2020 Regulating Family Ownership in the Emirate of Dubai (the "**Dubai Family Ownership Law**") and Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses in the Emirate of Abu Dhabi (the "**Abu Dhabi Family Business Law**"). Under the Dubai Family Ownership Law, family members, who are bound by common ownership of movable or immovable property—including stocks and shares in commercial companies, civil companies and assets of sole proprietorship with the exception of PJSCs[13]—may opt to enter into a legally binding and notarized[14] family ownership contract (a "Family Ownership Contract"). The law regulates the articles of the Family Ownership Contract with respect to disposition of shares, formation of board of directors, appointment of a manager to manage the family property and functions and obligations thereof.

Additionally, the UAE is in the process of drafting a new federal decree-law on the regulation of family businesses in the UAE, under the Ministry of Economy, that seeks to institutionalize a "Family Business Register" to be established and supervised by the Departments of Economic Development of the various emirates. The draft law includes provisions for management of family business assets before or after the passing of a founder, and may mandate the clear provision of succession plans.[15] The anticipation of this law has sent a positive signal in the ecosystem.[16]

Further, free zones—over 40 of which exist in the UAE and which were originally created to permit 100% foreign ownership of companies in addition to other tax and infrastructure benefits—are enhancing dispute resolution institutions for family businesses. In Dubai, the Dubai Courts' Center for the Amicable Settlement of Disputes, the Dubai Chamber of Commerce and Industry, and the Dubai International Arbitration Center are proposing an ADR scheme to Dubai Courts to provide more efficient and confidential dispute resolution, and in DIFC Courts, litigating parties in family business disputes may request judge-led mediation.[17] In Abu Dhabi, ADGM Courts are developing tailored mediation services to family businesses, providing a Sharia-compliant and confidential platform for dispute resolution, which family businesses will be able to access regardless of incorporation in ADGM. In August 2022, DIFC announced plans to launch a global Family Business and Private Wealth Center on 1 September 2022. The Center aims to provide a range of services, from advisory, and education services to networking opportunities, to support family businesses with succession planning.[18]

2 Definition of a Family Business

Until recently, there was no clearly defined legal concept of family businesses in the UAE, with the exception of niche references, for instance in the DIFC Single Family Office Regulations.[19] A definition for family businesses was clearly formulated for the first time in the UAE under the Abu Dhabi Family Business Law, published in the Official Gazette of Abu Dhabi on 30 September 2021. Under the law, a family business is defined around ownership of capital, starting with a standard definition for family based on lineage or affinity:

> *"A company shall be deemed as a Family Business, regardless of its legal form, in case it meets the following:*
>
> *1- The members of the same Family own the whole capital of the company.*
>
> *2- The members of the same Family own a company owned by many juristic entities which are totally owned by the members of such Family.*
>
> *3- The Founder solely owns a single shareholder company and allocates all or some of its benefits to the members of his Family.*
>
> *4- The Family owns the majority of the capital or keeps the majority of votes in case of involvement of new partners from outside the Family to the extent stipulated in this Law.*
>
> *5- The Family Business allocates a part of its profits to the Beneficiaries as agreed by the Founders or as prescribed in the regulations of the company."*[20]

12. Federal Law No. 11/2020, art. 2.
13. Dubai Law No. 9/2020, art. 4.
14. Under Article 6 of Dubai Law No. 9/2020), the Family Ownership Contract must be ratified by a notary public, in accordance with the rules and procedures set out in Dubai Law No. 4/2013 on Notaries Public in the Emirate of Dubai.
15. Financial Times, "Succession dramas add impetus to UAE's draft family business law", March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d.
16. According to Omar Alghanim, Chair of the Family Business Gulf Council, *"successful family businesses thrive across generations, so any law that can support families to manage their generational transfer is welcomed and could arguably, resolve many disputes within families."* Source: Financial Times, 'Succession dramas add impetus to UAE's draft family business law', March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d.
17. FBCG, "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United" (May 2020), 10, https://www.fbc-gulf.org/mediafiles/articles/doc-1578-2020_06_17_06_52_13.pdf.
18. DIFC Press Release, "DIFC Launches First Global Family Business and Private Wealth Center", August 2022, https://www.difc.ae/newsroom/news/difc-launches-first-global-family-business-and-private-wealth-centre/.
19. DIFC Single Family Office Regulations, art. 2.4.5.
20. Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses, art. 3.

The owners, founder or family members who jointly own a family business established in any legal form recognized under the 2015 CCL may opt into the provisions of the Abu Dhabi Family Business Law.

The Abu Dhabi Family Business Law provides that the family business ceases to be entitled to the capacity and benefits granted to it by virtue of its provisions when new shareholders from outside the family own over 40% of the shares. The owners, founder or family members who jointly own a family business established in any legal form recognized under the 2015 CCL may opt into the provisions of the Abu Dhabi Family Business Law.[21] Article 5 of the Abu Dhabi Family Business Law states that the founders may prohibit sale of shares or dividends to parties outside the family in the Articles of Association and Article 6 stipulates prior approval of family business partners before shareholders sell their respective equity stake to outsiders.

It is to be noted that the laws regulating family businesses and ownership are silent on shareholder nationality, making no distinction between Emirati versus non-Emirati shareholders. Notwithstanding the influence of cultural sensibilities, the cosmopolitan demography of the UAE has paved the way for foreign businesses, including family businesses from the Gulf, the Arab world in general, India, the UK and elsewhere, to succeed. Currently, UAE Federal Decree-Law No. 32/2021 on Commercial Companies (**CCL**)[22] provides that any company incorporated in the UAE shall hold UAE nationality, although this shall not necessarily entail that the company enjoys rights limited to UAE nationals.[23] It is yet to be seen whether the anticipated federal-level law regulating family businesses and establishing a special registry for such businesses will make a distinction based on national ownership of family businesses.

3 Corporate Governance Requirements

Transmission of power is a critical issue for all businesses, particularly family businesses in which disputes may arise between one or multiple members of the family business over the ownership or management and controls rights of the business. Such instances include the question of valuation of a member's stake in the business, the desire of certain members of a family conglomerate to "cash out" by selling their stake elsewhere, poor business performance, the identification of assets previously a part of the family business, or when the apportionment of family wealth, including assets and business profits, upon the death or retirement of the founder, is perceived as unfair.[24]

[...] in the UAE, courts, mediation centres and arbitration centres do not generally differentiate family business disputes from other commercial disputes.

To resolve disputes, family businesses may then seek litigation or ADR mechanisms. However, in the UAE, courts, mediation centres and arbitration centres do not generally differentiate family business disputes from other commercial disputes.[25] Article 23 of the Dubai Family Ownership Law somewhat addresses this gap by providing that all disputes arising from the Family Ownership Contract shall be heard by a special judicial committee composed of financial and legal experts, and with exclusive competence in Dubai to consider such disputes.

A business can avoid business disruption and expensive litigation by proactively implementing robust corporate governance structures. In the UAE, corporate governance standards are included in the CCL, free zone regulations for companies incorporated in any of the over forty free zones in the country, and in the federal securities law promulgated by the Securities and Commodities Authority (**SCA**).

A. CORPORATE GOVERNANCE FOR MAINLAND COMPANIES

Under the CCL, family businesses may exist in the mainland in any of the following permissible forms,[26] each with its own corporate governance provisions:

- Partnerships: Joint Liability Companies, and Limited Partnership Companies;
- Limited Liability Companies (LLCs);
- PJSCs;
- Private Joint Stock Companies; and
- Holding Companies and Investment Funds

Historically, family businesses in the UAE have often been incorporated as sole proprietorships; however, with growth in scale and sophistication, LLCs have become increasingly common. The CCL sets forth the default option for the specific corporate structure adopted by the family business,

21. Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses, art. 2.

22. The CCL was published in the Official Gazette of the UAE, issue no. 712 on 26 September 2021, and replaced the 2015 CCL, as amended by Federal Decree Law No. 26/2020.

23. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 8.

24. P. Smith, "Building the Case for Family Business Arbitration in the GCC Region", Kluwer Arbitration Blog, Charles Russell Speechlys LLP, June 2022, http://arbitrationblog.kluwerarbitration.com/2022/06/17/building-the-case-for-family-business-arbitration-in-the-gcc-region/.

25. One recommendation laid out by the FBCG (in the same report cited in footnote 47) is to enforce mandatory alternative dispute resolution in family business disputes, which would require parties to move directly to mediation at the outset as a pre-condition of instigating formal court proceedings. A mandatory arbitration provision may also be considered as an alternative to litigation if mediation fails to conclude the dispute.

26. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 3.

Historically, family businesses in the UAE have often been incorporated as sole proprietorships; however, with growth in scale and sophistication, LLCs have become increasingly common.

whose detailed framework is determined by the articles and bylaws of the business. With its stated objective[27] of advancing regulation of companies, especially that related to governance to protect the rights of shareholders, support foreign direct investment and enhance the social responsibility of companies, the CCL places the responsibility for compliance on the Board of a company.[28] To ensure compliance, the law permits penalties of up to AED 10 million on a company, its Chairman, Board Members, managers and auditors for contravention of corporate governance rules issued within it.[29] The CCL repealed its 2015 equivalent and amended a few key aspects of corporate governance for LLCs and PJSCs.

(i) LLCs

The CCL describes the management requirements, including corporate governance for LLCs under Articles 83-91. Article 83 of the CCL states that in the case of multiple managers as determined by company partners in the Memorandum of Association, a Board of Directors[30] may be appointed. Further, the Board may extend its term for a period up to six months post term expiration and in case a new Board is not reappointed. The CCL also increased the number of shareholders necessitating appointment of a "Supervisory Board" to 15 partners[31] up from seven in the 2015 CCL. The Supervisory Board must consist of at least three partners for three years and is responsible for supervising the balance sheet, annual report and profit distribution of the company, and is required to submit its report to the general assembly.

(ii) PJSCs

Articles 143-172 of the CCL enlist the management stipulations for PJSCs. In the event of a vacancy in the Board of Directors, a replacement director must be appointed within 30 calendar days for the remaining term of the former director.[32] On the matter of remuneration, a director may be paid remuneration of up to 10% of the company's net profits for that fiscal year. The CCL added an exception to the 2015 version, stating that a Board Member may be paid a lump sum fee not exceeding AED 200,000 as remuneration at the end of a financial year in which the company fails to achieve profits or if the Member's share in those profits is less than AED 200,000.[33]

B. CORPORATE GOVERNANCE FOR FREE ZONE COMPANIES

Article 5 states that the provisions of the CCL do not apply to companies incorporated in the free zones. A special provision is stipulated to this effect in the regulations of the concerned free zone and to the extent that free zone companies do not conduct their activities in mainland UAE. Family business structures in the UAE commonly include operating and holding companies in the DIFC and ADGM, among other free zones. The corporate governance of DIFC companies is monitored under DIFC Law No. 5/2018 (the "**DIFC Companies Law**") and that of ADGM companies under the regulatory regime of Companies Regulation and Commercial Regulations 2020 (the "**ADGM Companies Law**"), which sets out the key duties and liabilities of directors of companies incorporated in ADGM.

The DIFC Companies Law recognizes two types of entities: private and public companies.[34] It mandates at least one director for private companies and two directors for public companies, and sets out an extensive set of duties on directors based on the provisions of the UK Companies Act 2006. Directors are obliged to exercise independent judgment and are required by law to promote the success of the company.

Similarly, the ADGM Companies Law requires private and public companies[35] to have one and two directors respectively, setting out an extensive set of duties and responsibilities for the directors.

C. CORPORATE GOVERNANCE FOR LISTED COMPANIES

Corporate governance in the UAE is primarily focused on publicly listed companies and regulated under the Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual[36] (the "**SCA Code**"). The SCA Code aims to promulgate key principles of corporate governance: company accountability towards shareholders and stakeholders, equity or protection of shareholders' rights, transparency and timely disclosure of matters related to the company's affairs, and responsibility towards ensuring business continuity.

The SCA Code sets out binding requirements for listed companies to enforce shareholder protection for its securities and financial regulators, namely the SCA and the Central Bank of the UAE (CBUAE). The SCA Code applies to all local PJSCs, i.e., all public shareholding companies listed on financial markets regulated by SCA (the Abu Dhabi Securities Exchange or the Dubai Financial Market)[37] excluding foreign companies listed on local markets. Additionally, banks and

27. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 2.
28. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 6.
29. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 7.
30. It is to be noted that in the original publication in Arabic, the terms for "Manager" and "Director" are the same. Therefore, in the English translation of the CCL, these terms are often used interchangeably.
31. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 88.
32. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 145.
33. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 171.
34. DIFC Law No. 5/2018, arts. 27(1) and 27(2). In addition, foreign companies may be registered as "Recognized Companies" subject to meeting certain conditions.
35. As understood under Article 3 of the ADGM Companies Regulations 2020.
36. The SCA Code was published on 27 February 2020 and in effect from 28 April 2020, repealing the 2016 CG Rules (Security and Commodities Authority Decision No. 7/RM/2016 concerning the Standards of Institutional Discipline and Governance of Public Shareholding Companies).
37. It might be noted that companies listed on NASDAQ Dubai are regulated by the Dubai Financial Services Authority (DFSA) under DIFC Regulatory Law.

financial institutions are subject to separate rules issued by the CBUAE.

4

Board of Directors in Listed Companies

The Board is far from a commonly used corporate governance mechanism among private UAE family businesses, with less than half UAE family businesses reporting a formal Board.

The Board is the custodian of corporate governance responsible for governance of companies.[38] Should the Board fail to exercise appropriate corporate governance over a family business and its subsidiaries, financial and reputational risk can ensue, as was the case when the Dubai Financial Services Authority (DFSA), DIFC's financial regulator, imposed sanctions against Damas International Limited in 2010.[39] However, the Board is far from a commonly used corporate governance mechanism among private UAE family businesses,[40] with less than half UAE family businesses reporting a formal Board.[41]

The SCA Code sets out the requirements and terms of establishing a Board in a listed company. Article 6 of the SCA Code states that the Company shall be managed by a Board whose method of formation, membership number, and membership terms are specified within the Articles of Association. The Board members are elected by the general assembly, or if the UAE government holds 5% or greater capital, it may appoint its representatives in the Board pro rata to such percentage from the number of Board members. At least one member must be appointed if the percentage required for appointing a member exceeds that percentage.

Under the UAE's laws, the overarching role of the Board is to approve the company strategy, oversee management, and ensure that a robust corporate governance framework is in place.[42] The second function, i.e., executive management oversight, entails monitoring executive management to ensure that the company strategy is implemented and Key Performance Indicators are met, electing and dismissing or replacing the CEO, electing other key executives or setting out guidance for the CEO to elect other key executives, and finally, succession planning.

5

Board's Role in Succession for Listed Companies: Nomination and Remuneration Committee

Pursuant to Article 58 of the SCA Code, all publicly listed companies in the UAE are required to establish two permanent committees, namely a Nomination and Remuneration Committee (**NRC**) and an Audit Committee.[43] Each committee must be formed in accordance with procedures established by the Board and must be composed of at least three non-executive Board members, at least two of whom must be independent. The committees must be chaired by an independent Board member who is not the Board Chairman.

The NRC is entrusted with preparing policies relating to remuneration, benefits, and incentives of the Board and company employees as well as the succession of company executives and the Board.

The NRC is entrusted with preparing policies relating to remuneration, benefits, and incentives of the Board and company employees as well as the succession of company executives and the Board. It is a permanent committee required to hold its meetings once during the year or whenever the need arises. The responsibilities of the NRC include developing and implementing a membership policy for directors and executives, ensuring independence of independent directors on an ongoing basis, and preparing and reviewing remuneration for directors and executives.

Pursuant to Article 54 of the SCA Code, the NRC is responsible for identifying the company's competency needs at the level of senior executive management and for identifying the basis of selecting senior executive management. With regard to succession, the NRC is entrusted with the following responsibilities:

38. "The Financial Aspects of Corporate Governance" (Cadbury Report), the Cadbury Committee, 1992, at 14.

39. "DFSA Takes Action Over Damas Failures", DFSA Media Release, 21st March 2010, https://dfsaen.thomsonreuters.com/rulebook/21-march-2010-dfsa-takes-action-over-damas-failures.

40. R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020, https://www.researchgate.net/publication/339172085_Family_Business_Ecosystem_in_UAE.

41. *Ibid.*

42. "Board Best Practices in the Middle East", Hawkamah Institute for Corporate Governance and Diligent, (December 2019), https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_15122019.pdf.

43. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 58.

- to develop (and report to the SCA) a policy to apply for Board membership and executive administration, considering gender diversity and encouraging women through incentives and training programs;
- to identify the company's needs of competencies at the level of senior executive management and staff (executive succession) and the basis of selecting them.[44]

6

Requirements for Board Structure and Composition for Listed Companies

A. BOARD STRUCTURE IN THE UAE

For publicly listed companies, the UAE permits a two-tier board in addition to a unitary board. Under Articles 54-57, the SCA Code[45] introduced provisions for a PJSC, if it so chooses, to implement a dual governance structure under which the management and supervisory functions are separated from each other, by virtue of establishing two distinct Board committees (hence "dual structure") as follows:

- a **Control Committee (CC)** i.e., composed of Non-Executive Members responsible for supervising the Executive Committee and appointing or dismissing its members; and
- an **Executive Committee (EC)** composed of Executive Board Members and responsible for day-to-day operations of the company and for developing and implementing the company strategy as approved by the CC.

In order to adopt the dual management structure, the Board of the listed company must approve the change by majority votes. A change to the company's Articles of Association is required and disclosures concerning the changes must be published on the company's website once adopted. The two committees are expected to maintain close cooperation and coordination (Article 57) for instance, the EC must submit reports on the company strategy and its implementation to the CC on a quarterly and annual basis, and the CC must be in regular contact with the Chairman of the EC to discuss topics around strategy, planning, business development, risk situation, risk management and compliance.

B. INDEPENDENT DIRECTORS

Director independence is considered in terms of a director's independence from corporate management and in terms of employment, family, and significant economic or personal connections to the company. The SCA Code requires that the Chairman of publicly listed companies be independent.[46]

> *Under the SCA Code, the Articles of Association will determine Executive Board members, Non-Executive Board members and Independent Board members, provided that the majority of Board members are non-executive Independent Board members.*

Under the SCA Code, the Articles of Association will determine Executive Board members, Non-Executive Board members and Independent Board members, provided that the majority of Board members are non-executive Independent Board members. A majority of Board members must be Non-Executive Board members with the technical skills and experience required to serve the interests of the Company. In all cases, when selecting Non-Executive Board members of the Company, it must be taken into consideration that a Board member must be able to dedicate adequate time and effort to the role and that such role is not in conflict with the candidate's other interests.[47]

The SCA Code also specifies the independence requirements under Article 19(1). A Board Member is not deemed independent in the event of any of the following circumstances during the two years prior to nomination date:[48]

- employment of self or of a second-degree relative as an executive of the company, its parent company, or any of its sister companies, associate companies or subsidiaries ("associated companies");
- direct or indirect interest of self or of a first-degree relative in contracts above five percent of the company paid-up capital or the amount of AED 5 million, concluded with the company or its associated companies, unless under natural business circumstances or without preferential conditions;
- employment at the company or its associated companies;
- employment or partnership with a company that performs consulting services for the company or its associated companies;

44. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, arts. 59, 41.

45. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 54:"[...] 2. *The company may opt to adopt a dual governance structure consisting of internal committees composed of its Board members, in the form of two committees, one of which is the control committee and the second is the executive committee. 3. A decision of dual governance structure adoption shall be issued by majority votes of all Board members and shall be approved by the Annual General Assembly. The chairman shall inform the Authority and Market about the decision, and disclose the same in the company website. 4. Both the control committee and the executive committee shall be responsible for the company governance and compliance to this regulation."*

46. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 9(5).

47. *Ibid.*

48. Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 19.

- personal service contracts with the company or its associated companies;
- direct link to a non-profit that is recipient of a huge amount of funding from the company or its associated companies;
- kinship or partnership of self or of relatives with an employee of the company's auditor;
- over 10% ownership of company's capital by self, by minor children of self, or by both;
- selection for a fourth consecutive term.

C. NATONALITY OF DIRECTORS

The SCA Code, under Article 6 requires that the Chairman and majority of Board Members for publicly listed companies be UAE nationals. Furthermore, Article 151 of the CCL states that requirements for Board formation under the SCA Code must be considered for PJSCs. In the event the percentage of UAE nationals in the Board falls short of the required percentage, such deficiency must be rectified within a maximum of three months, otherwise any decisions of the Board will be deemed null and void upon expiry of this period.

The provision for a UAE national majority on the Board deviates from what is observed under international corporate governance standards when it comes to Board composition requirements.

A strong Board reflects diversity of thought, backgrounds, skills, experiences and expertise and a range of tenures amongst its members, in order to enable effective oversight of the company and its executive management.[49] The provision for a UAE national majority on the Board deviates from what is observed under international corporate governance standards when it comes to Board composition requirements. Instead, what is more frequently observed is the requirement for "resident directors" on the Board of the company, i.e., directors who have stayed in the country for a stipulated period of time in the previous calendar year.[50]

D. THE CASE FOR FEMALE DIRECTORS

Until 2021, the SCA Code (Article 9, Clause 3) required publicly listed companies to have at least 20% of Board membership.[51] However, pursuant to an amendment (Securities and Commodities Authority Decision No. 8/RM/2021 concerning Amendment to the Joint Stock Companies Governance Guide issued on 28 March 2021, Boards of PJSCs must have at least one female member and this must be disclosed in the annual governance report.

> *"3. The company's articles of association shall define the method of forming the board of directors, the number of its members and the term of membership, provided that the representation of women shall not be less than one member in the formation of the board of directors. Moreover, the company shall be obligated to disclose this representation in the annual governance report."*[52]

7 Recommendations on Future Direction

An examination of UAE's laws in comparison with international standards is the adoption of a "hard law" approach to regulate the Board, whereby requirements and composition for the Board are mandated by statutory requirements.

A. A QUOTA FOR FEMALE DIRECTORS?

In June 2022, the European Union agreed on a Directive to ensure women have 40% seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges.

One of the recommendations in this regard is to implement a quota for female directors up to at least 30% of the Board and clarifying penalties upon violation, in line with international standards, particularly the UK and the European Union. EU benchmarks have mandatory female quota ranging from one third in countries including the UK, Belgium, Greece, Italy and Portugal[53] to 40% of Directors on the Board in countries such as France,[54] Norway, Denmark, Sweden and Iceland,[55] for

49. Harvard Law School Forum on Corporate Governance, "Principles of Corporate Governance" (September 2016), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/.

50. For instance, under the Indian law, there are no restrictions with regard to the nationality of the director. However, under Article 149(3), there must be at least one resident director on the Board of every company. A resident director is defined as **"director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year"**. The (Indian) Companies Act 2013, Chapter XI, Article 149 (6), 98. Available at: https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf.

51. "3. ***[...] Females shall represent at least 20% of the Board membership.*** *The Company shall disclose the reasons behind not achieving this percentage and disclose the percentage of female representation in the Board in its Annual Governance Report."*

52. Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 9.

53. The Corporate Governance Codes of Belgium, Greece, Italy, Portugal and the UK set a quota of 33% for women Directors on Boards.

54. Law n° 2011-103 of 27 January 2011, on balanced representation of men and women on boards of directors and supervisory boards and on gender equality in the workplace, https://www.legifrance.gouv.fr/jorf/id/JORF-TEXT000023487662.

55. "Board Best Practices in the Middle East", Hawkamah & Diligent (December 2019) at 21, https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.

corporate Boards. In June 2022, the European Union agreed on a Directive to ensure women have 40% seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges.[56]

Although there are differing opinions on the implementation of quotas for women on boards in the UAE, academics have cited unfavourable cultural attitudes and family laws influencing economic regulations as further complicating the business environment for women.[57] Therefore, an institutional approach that attempts to facilitate and support women's leadership—which could include board position that could facilitate smooth transition of power among family businesses—may be a way forward.[58] The UAE has witnessed key initiatives in this direction, for instance with the Aurora50, co-founded by H.E. Sheikha Shamma bint Sultan bin Khalifa Al Nahyan and Diana Wilde in 2020.[59] We expect such initiatives to contribute towards further discussion on the issue and mandatory female representation on Boards to be potentially integrated into the law.

B. BOARD INDEPENDENCE: RATIO AND REQUIREMENTS

With regard to independence, the SCA Code for public companies sets out independence requirements in line with international practices such as those in the UK, which requires that independent non-executive directors constitute at least half of the Board.[60] In fact, the most prevalent voluntary standard is for the Board to be composed of at least 50% independent directors with countries such as the United States, India, Hungary, South Africa and Korea having binding requirement of at least 50% or more independent directors, and with at least 30% of the Board subjected to legal requirements for independence in jurisdictions including the Kingdom of Saudi Arabia.[61]

While independence requirements apply exclusively to publicly listed companies in the UAE, soft law guidelines, such as those promulgated by the Family Business Council Gulf (**FBCG**), a leading platform to strengthen governance among family businesses, and Hawkamah Institute, a Dubai-based non-profit think tank that advises regional governments and companies on corporate governance solutions, also advocate for independence within the Board of family businesses. The **GCC Corporate Governance Code** promoted by the FBCG recommends a Board with qualified family members, non-family executives and at least a third of its members completely independent, provided the members have required expertise and key skills.[62] It also outlines two alternatives: one being the Board in family businesses being entirely composed of external directors rather than family members, while another being the majority of the Board being composed of independent directors.

The GCC Corporate Governance Code promoted by the FBCG recommends a Board with qualified family members, non-family executives and at least a third of its members completely independent, provided the members have required expertise and key skills.

The UAE can further push the independence agenda among family businesses through education and awareness initiatives as well as by encouraging family businesses to clearly define independence requirements, ideally within the family charter. The requirements for independence could also be promulgated under the CCL itself, with a clear definition and criteria for independence, as seen in other jurisdictions.[63]

The OECD has noted that some jurisdictions link the independence requirement of the Board with the ownership structure of the company.[64] Specialized research[65] has indicated that the optimal composition of the Board in a UAE family business is a combination of non-executive directors in proportion to the shareholding structure and independent non-executive directors, such that the majority of the Board is independent.

C. BOARD MEMBER NATIONALITY

As noted in section 6(C) of this article, the requirement around nationality of Board Members may be reconsidered and revised with a residency condition i.e. relevant experience, understanding of the country's rich culture and business sensibilities, and contribution to the economy that comes with having lived in the UAE, even if the individual is from a different nationality. Permitting non-UAE nationals to sit on Boards of UAE family businesses as directors will bring international experience and expertise to family businesses, many of which also operate outside the UAE. Such appointments could be given for shorter periods to reduce risk.[66]

56. On 7 June 2022, the EU agreed on a Directive to ensure women have 40% of seats on a corporate Board. The Directive sets a share of 40% of the under-represented sex among non-executive directors and 33% among all directors, for EU companies listed on the EU stock exchanges.

57. Hawkamah Institute, "UAE Women Board Directors: Careers, Board Experiences and Recommendations for Change" (2013) at 138, https://www.hawkamah.org/uploads/1469026449_578f909163a4b_UAE_Women_Board_Directors-Research_Report.pdf.

58. *Ibid.*

59. Aurora50 led a successful initiative to increase the number of women on boards in the UAE through the Pathway20 accelerator programme and Manarat, invite-only club for regional women who are independent board directors. See https://aurora50.com/about-us/.

60. UK Corporate Governance Code, Chapter (2) Division of Responsibilities, Provision (11) *"At least half the board, excluding the chair, should be non-executive directors whom the board considers to be independent."*

61. OECD Corporate Governance Factbook 2021, OECD, 14, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

62. *See* the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBGC, 2021, at 42., *"Ideally, a board of directors will have well qualified family members, non-family executives and at least a third of the members should be completely independent - provided they have the required expertise and key skills."*

63. Examples include India: The (Indian) Companies Act 2013, Chapter XI, Article 149 (6), 98. Available at: https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf.

64. OECD, OECD *Corporate Governance Factbook* (2021) at 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

65. These solutions and associated considerations were discussed with experts in the field (lawyers, wealth advisors, government officials, research institutes etc.) over a series of interviews.

66. Hawkamah Institute, "UAE Women Board Directors: Careers, Board Experiences and Recommendations for Change" (2013) at 88, https://www.hawkamah.org/uploads/1469026449_578f909163a4b_UAE_Women_Board_Directors-Research_Report.pdf.

Abolishing the nationality requirement is in line with the UAE's broader economic agenda to bring highly skilled talent to the country. Various measures that the UAE has introduced for international talent attraction and retention, notably the introduction of the "Golden Visas" or long-term residency visas starting in late 2020, remote work visas, and the establishment of the Abu Dhabi Resident's Office by the Abu Dhabi Department of Economic Development, a government initiative to support the attraction, onboarding and retention of expatriates in Abu Dhabi.

D. INTRODUCTION OF A NATIONAL CORPORATE GOVERNANCE CODE OR SET OF PRINCIPLES

While corporate governance standards are included in the CCL and the SCA Code, which set out additional binding requirements for listed companies, there is perhaps an opportunity for the UAE to formulate a national corporate governance code or set of principles. Dubai SME, a division within the Dubai Department of Economy and Tourism responsible for supporting small and medium enterprises, co-developed with Hawkamah Institute the Corporate Governance Code for SMEs in 2011.[67]

The UAE may also explore—similar to other jurisdictions which have some variation of the "comply or explain" approach[68] — developing its own national corporate governance guidelines, applicable to all companies, including family businesses.

67. Dubai SME, "Corporate Governance Code for SMEs" (2011), https://sme.ae/SME_File/Files/Code_of_Corporate_Governance_for_Dubai_SMEs.pdf.

68. OECD, OECD *Corporate Governance Factbook* 2021, Table 2.2. at 47, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

تواجه الشركات المملوكة للعائلة، والتي تعتبر ذات أهمية فريدة لدولة الإمارات العربية المتحدة، تحدي الانتقال إلى الجيل الثاني أو الثالث. يمكن أن تؤدي النزاعات حول ملكية الشركة وإدارتها إلى نزاعات عائلية مدمرة بما ذلك تفكك الشركة. إن التخطيط الاستباقي للتعاقب الإداري هي مسؤولية من مسؤوليات مجلس الإدارة وهي المفتاح للقضاء على مثل هذه الخلافات وضمان استمرارية الأعمال. تقيّم هذه المقالة القواعد واللوائح المتعلقة بحوكمة الشركات في دولة الإمارات العربية المتحدة، بما في ذلك تكوين مجلس الإدارة ودوره في تخطيط التعاقب الذي تقوم به لجنة الترشيحات والمكافآت. أخيرًا، تحدد سلسلة من التوصيات حول تمكين مجلس الإدارة لتسهيل الانتقال السلس للسلطة بين الشركات العائلية

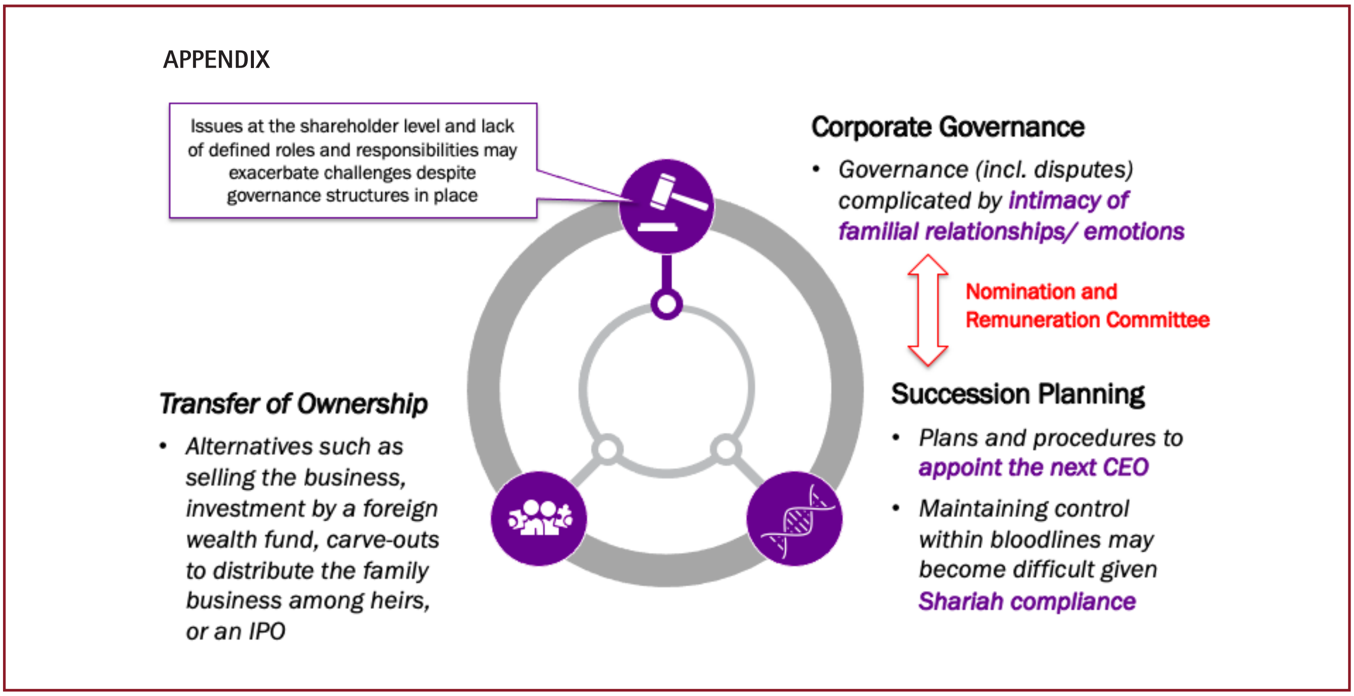

Figure 1: Range of options available to family businesses on succession.
Source: the authors.

AREA	RELEVANT LAWS AND REGULATIONS REGARDING CORPORATE GOVERNANCE		
Commercial Mainland	Federal Decree-Law No. 32/2021 on Commercial Companies (**"CCL"**)		
Capital Markets	Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual (**"SCA Code"**)		
Trusts and Foundations	DIFC Law No. 4/2014 on Trusts	ADGM Trust Regulations of 2016	
	DIFC Law No. 3/2018 on Foundations	ADGM Foundations Regulations 2017	
Free zone laws[2]	DIFC Law No. 5/2018	ADGM Companies Regulation 2020	RAK International Corporate Center
Industry-specific laws	Central Bank of UAE Circular No. 83/2019 Corporate Governance Regulations		
Family-business specific laws	Dubai Law No. 9/2020 (**"Dubai Family Ownership Law"**)	Abu Dhabi Law No. 10/2021 (**"Abu Dhabi Family Business Law"**)[3]	

Legend: *Federal* *Emirate-level* *Free zone* Non-exhaustive

(1) Repeals Federal Law No. 2/2015, which was amended by Federal Decree-Law No. 26/2020
(2) There are various other free zones e.g., DMCC, KIZAD, JAFZA etc., that are self-regulated
(3) Under amendment; additionally, there is a federal law currently being drafted

Figure 2: Relevant laws and regulations regarding corporate governance in the UAE.
Source: the authors' review and analysis.

BIOGRAPHY

DAVID CHEKROUN is Professor of International Business Law at ESCP Business School, Paris, France. David received his Doctor of Law from Sorbonne Law School, and Master in European Business from ESCP Business School (UK & France). He is Adjunct Professor of Law at Paris Sorbonne Abu Dhabi, Former Visiting Professor of Law at NYU Abu Dhabi, and has taught at several other institutions across the Middle East, Europe and the United States. His research interests are mainly, International Business Law, Law & Business, FDI screening, and Corporate governance. He has published a number of articles in the field of international Business Transactions and he is one of the editors-in-chief of the International Business Law Journal.
David is admitted to the Paris Bar and worked in the Litigation and Arbitration department of Herbert Smith LLP. In addition, he was Scholar-in-Residence to the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP in the London office. He has also advised law firms and companies in international business transactions and corporate governance.

TANYA BANSAL is currently a Strategy Associate at the Office of H.E. Sameh Al Qubaisi, Director General of Economic Affairs at the Abu Dhabi Department of Economic Development (ADDED), the principal entity responsible for economic strategy, policymaking, and regulation in the UAE's capital. Prior to her role with the ADDED, she worked as a Management Consultant in the Dubai office at Monitor Deloitte, where she specialized in public sector strategy, particularly economic competitiveness, sector development, and investment attraction across Saudi Arabia and the UAE.
Originally from New Delhi, India, Tanya moved to the UAE in 2014. She received her B.A. (cum laude) in Economics with a specialization in Finance from NYU Abu Dhabi, and is currently pursuing her J.D. from NYU School of Law as a Jacobson Leadership Program in Law and Business Scholar and as a Nordlicht Family Scholar for Law and Social Entrepreneurship. Her interests lie at the cusp of economic development, policy and the law, and she plans to continue exploring how the right legal frameworks, including corporate governance regulations, policies and business incentives can accelerate inclusive economic development.

MEGHA BANSAL is a Senior Associate with the Tax & Legal practice at a Big 4 accounting firm (Dubai office). Having lived in the UAE for eight years, she specializes in international tax advisory, including economic substance matters, permanent establishment reviews, corporate migrations and redomiciliation, and in-bound UAE tax and paralegal aspects as well as M&A support from a tax due diligence and structuring perspective.
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Legal Conferences

UAE

14–18 November 2022 Dubai

Dubai Arbitration Week

With the support of the **Dubai International Arbitration Centre**, the 2022 edition of Dubai Arbitration Week is set to take place from 14-18 November 2022.

Dubai Arbitration Week is being put together by some of the leading global arbitral bodies, organisations and practices doing business in the region, and will include conferences, symposia, working lunches, and networking opportunities. Most events are open to the public and free of charge. Attendees will hear from some of the world's leading arbitration practitioners sharing their news and views on developments in the field of international arbitration.

For more information, visit: http://dubaiarbitrationweek.com/

QATAR

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Conference on International Commercial Litigation

Qatar University College of Law in partnership with **Ministry of Commerce and Industry** and the **United Nations Commission on International Trade Law (UNCITRAL)** is holding a conference on "International Commercial Legislation: Trends and Perspectives".

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The conference will cover the following main themes:

- The Role of UNCITRAL in the Harmonization of National Laws
- The Impact of Model Laws and International Principles and Guidelines in Drafting National Laws
- The Impact of the UNCITRAL Model Law on International Commercial Arbitration
- The Impact of UNCITRAL Texts on Electronic Commerce
- New Trends in Small and Medium Enterprises
- The Impact of the United Nations Convention on Contracts for the International Sale of Goods (CISG) on Private Transactions
- The Broader Adoption and Use of the CISG in Arab countries
- Other related topics.

For more information and to register, contact mmattar@qu.edu.qa

KUWAIT

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OMAN

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The conference will gather leading professionals from the Omani legal and business community. We invite you to join this unique event, which will offer you an opportunity to connect with and establish stronger business relationships with existing and potential clients.

For more information and to register, visit: https://www.lexis.ae/events/oman-business-law-forum-2022/

LexisNexis on the Ground

Book Launch:
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On 20 September 2022, LexisNexis® Middle East in partnership with the **DIFC Academy**, officially launched its latest book, *Women in Law in the Arab World*, the first book of its kind in the MENA region!

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