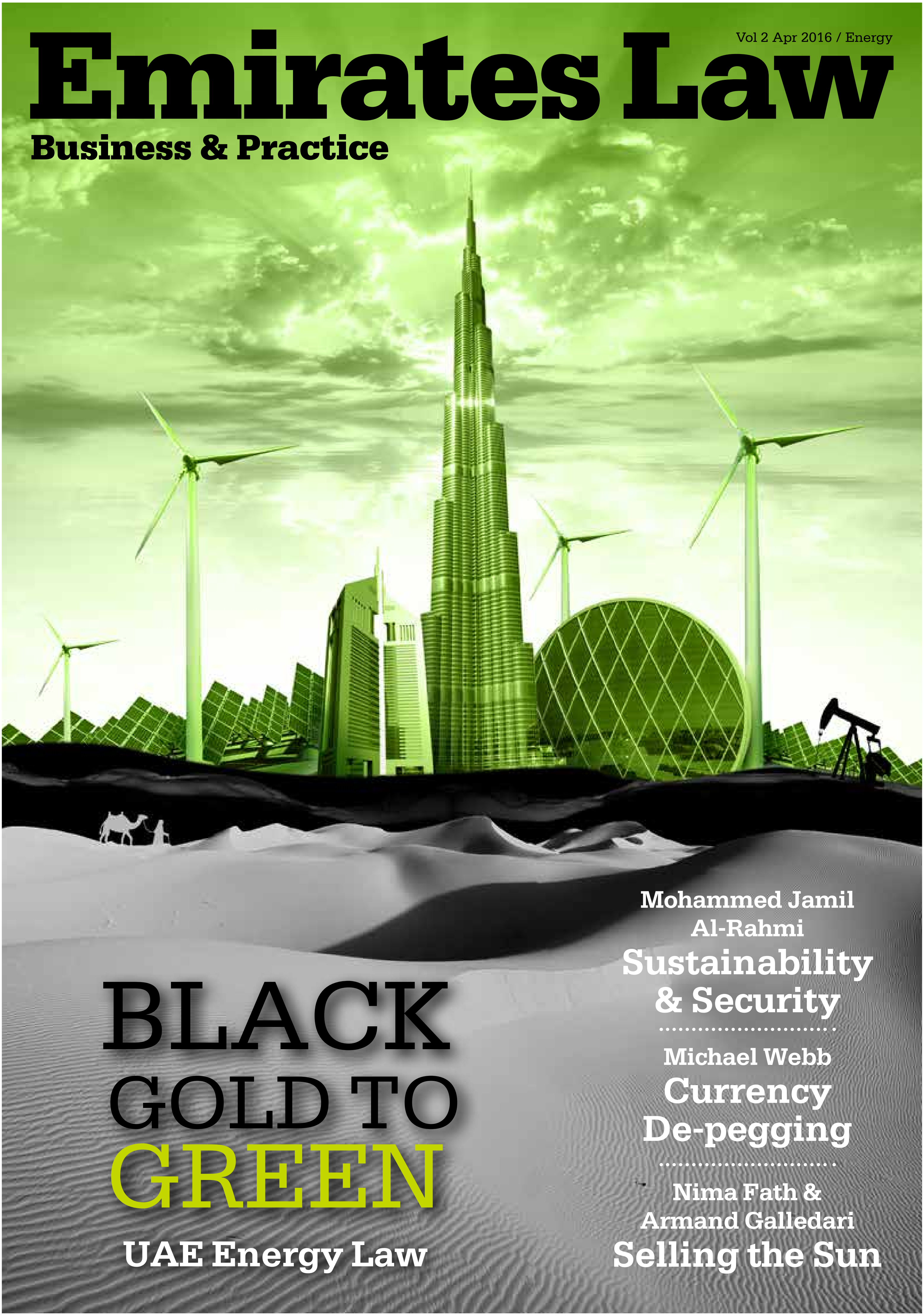
Vol 2 Apr 2016 / Energy

Emirates Law

Business & Practice



BLACK GOLD TO GREEN

UAE Energy Law

Mohammed Jamil Al-Rahmi
Sustainability & Security

Michael Webb
Currency De-pegging

Nima Fath & Armand Galledari
Selling the Sun

Why the UAE: Is A Place of Powerful Change

Justice Dr. Jamal Al Sumaiti
Director General, DJI

In 1967 the UAE became a member of OPEC and our country has been long associated with the energy industry. In 2015, our national oil reserves were estimated as being over 98 billion barrels and we have a strong natural gas industry. It is hardly surprising therefore that many of the companies and individuals who have come from overseas to work here are upstream and downstream oil and gas specialists, and this is one of the reasons we were so keen to take energy as the theme for our magazine's second issue.

The UAE has a comprehensive and robust energy regulation regime, which takes into account not just the licensing of companies, who wish to operate in this field but also environmental and safety concerns. However, with our Constitution recognising each individual Emirate owns its own natural resources, including oil and gas reserves, these regulatory regimes in the main are at an Emirate rather than Federal level, making it even more important that investors from overseas fully understand them.

In the energy industry, in particular the world is changing, in part this change has come as a result of the dramatic fall in oil prices last year but growing environmental concerns have also played a part. One of the UAE Government's key aims is to support economic diversification and even in the energy industry, this can be clearly seen.

What many people will be surprised at, particularly given the strength of our oil and gas sector, is the pioneering role our country is playing in the field of renewable energy. The UAE recently increased its clean energy target by almost 500 per cent and has been involved in a large number of ground breaking initiatives to help development renewable and sustainable power. The global headquarters of the International Renewable Energy Agency, IRENA are found here, as is the pioneering carbon neutral MASDAR City, and just as we have developed laws to support the oil and gas sector, we are now developing laws and agencies to help support and regulate the development of green energy initiatives, in particular solar power.

And that is not all, legislation has also been put in place to support the peaceful use of nuclear energy and ensure international obligations in this area are respected. As part of this work the UAE's first nuclear power plant is expected to be operational by later this year.

As I hope you will see from this issue of our magazine, when it comes to energy, there is a lot more to the UAE than simply oil and gas these days.

Justice Dr. Jamal Al Sumaiti

Emirates Law Business and Practice
Emirates Law Business & Practice is a free quarterly printed publication reporting on recent legal developments in U.A.E. and around the world. Articles are practitioner oriented and non-academic. The magazine covers specialist subject areas offering independent analysis by experts in their field, such as the judiciary, academics, solicitors, barristers, in-house lawyers, government lawyers, corporate lawyers, and law graduates. Our aim is to be an international legal magazine, making a significant contribution to legal debate. Emirates Law Business & Practice provides its readers with a wide selection of relevant law disciplines, addressing various aspects of law.

Dubai Judicial Institute
P.O. Box 28552
Dubai, U.A.E.
Tel +97142833000
Fax +97142827071
editorial@dji.gov.ae
www.dji.gov.ae

Publisher
LexisNexis Middle East
Head of Middle East
Publishing: Hussain Hadi
hussain.hadi@lexisnexis.co.uk
Editorial Consultant:
Claire Melvin claire.melvin@lexisnexis.co.uk
Photographer: Mostafa Samir

Printed by Royal Printing Press, PO Box 2839, Sharjah

Circulation
Emirates Law Business & Practice can be accessed online free of charge from dji.gov.ae.
To be added to our controlled print circulation
E-mail: editorial@dji.gov.ae

GOVERNMENT OF DUBAI

Black Gold to Green

Energy Law

As you would expect from a hydrocarbon powerhouse the UAE has a detailed framework of specific and general legislation covering oil and gas production.

Our expert panel explains this and the legislative and regulatory regime being created to help support nuclear and renewable energy.

"When you have your own law firm it's a 24 hour job. You need to make sure you spoil your clients and make them feel unique."

Key Laws

Oil Laws

Abu Dhabi Law No. 8/1978, On the Preservation of Oil Resources in Abu Dhabi covers exploration, and extraction. Oil and gas companies must follow operating regulations and take precautions against environmental damage and loss of oil resources. In addition, Abu Dhabi Law No. 1/1988, established the Supreme Petroleum Council which manages the Emirate's oil affairs. However, Abu Dhabi Circular No. 3/1987 On the Authorities of Petroleum Companies in Abu Dhabi exercising their Powers, gives oil companies independent corporate facility to manage employment, administrative and financial work without having to refer to the Abu Dhabi Government's Petroleum Department.

Gas Laws

Abu Dhabi Law No. 4/1976, On the Ownership of Gas by the Emirate of Abu Dhabi details national oil company ADNOC's rights to exploit and use defined gas types. ADNOC can establish joint ventures if it owns at least 51% of the capital. Gas production in Dubai is regulated by the Dubai Supply Authority (set up by Dubai Decree No. 2/1992) who are responsible for sourcing, producing and distributing natural gas and liquefied natural gas (LNG) there.

Black Gold To Green

The UAE has been diversifying its energy sector, so hydro carbons are no longer the sole focus. Our expert panel highlights the key laws and regulators investors need to be aware of.

KEY ENERGY LAWS?

"The UAE does not have unified Federal oil and gas laws," explains Arman Galledari of Jones Day. "Article 23 of the Constitution recognises each Emirate owns its natural resources, including the oil and gas reserves in its territory. So, they retain sovereignty over these reserves and are responsible for regulating their respective oil and gas industries."

"The various Emirates generally pursue their own policies on energy produced from natural resources like oil and gas," says Andrej Kormuth of Clifford Chance. "Although Federal bodies and legislation play an important role, particularly in nuclear energy regulation, at Emirate level there is no comprehensive legislative framework or single piece of legislation governing production and use of oil, gas, nuclear and renewable energy. However, various laws impact these industries including those on tax, health and safety, the environment, export, customs, building and transport. Regulatory powers have also been delegated to various government entities, whose regulations are not always publically available and development of resources can be supplemented by individually negotiated concession agreements."

Kerrie Receveur
Solicitor (Non-practising)
Hadef & Partners

"More than 95% of the UAE's oil reserves, and over 90% of its gas reserves, are in Abu Dhabi. The Environment Agency in Abu Dhabi is in charge of environmental permits there, and the Dubai Municipality is the equivalent body in Dubai," Kerie Receveur of Hadef and Partners explains.

"In Abu Dhabi the oil and gas industries are administered by the Supreme Petroleum Council (SPC), which regulates extraction and sets policy," says Galledari. "The equivalent body in Dubai, the Dubai Supreme Council of Energy, has similar powers and responsibilities."

"The SPC implements the Conservation of Petroleum Resources law," adds Kormuth. "Companies or projects in the oil and gas sector need SPC approval, and it has management control over the Abu Dhabi National Oil Company (ADNOC)."

"The Federal Ministry of Energy has limited powers to set policy at a Federal level, including powers to fix gasoline retail prices. However, the Federal Environmental Law (Federal Law No. 24/1999) sets environmental protection standards, which safeguard the environment against the effects of oil and gas projects," says Galledari. "The UAE Energy Minister has announced the Federal government is developing a comprehensive legal framework to regulate this sector which will regulate and define energy production, resources, waste recycling, energy saving and all other issues. Although, details of this framework are yet to be released"

ARE THERE ANY LAWS ON NUCLEAR ENERGY?

"The UAE adopted the Federal Law On Peaceful Uses of Nuclear Energy (by Federal Decree No. 6/2009), which enabled development of a licensing and control system for nuclear material," Galledari adds. It established the Federal Authority of Nuclear Regulation (FANR), an independent entity which oversees regulation of the whole UAE nuclear energy sector, including nuclear safety and security, radiation protection and necessary safeguards."

"UAE obligations under relevant international treaties or agreements are carried out by FANR," adds Angela Croker of Norton Rose Fulbright.

"In 2015, the Integrated Regulatory Review Service (IRRS) mission of the International Atomic Energy Agency (IAEA) reviewed the UAE regulatory system and concluded FANR is continuing to improve the regulatory system on public nuclear and radiation safety," Andrea Tithecott of Al Tamimi

explains. "It has also recommended the development of a national policy and strategy for managing and disposing of spent nuclear fuel and radioactive waste."

"In addition, FANR is developing regulations on administrative liabilities, decommissioning, import and export controls and operational test surveillance and reporting," Christina Lee of Al Tamimi adds.

"After the Fukushima disaster the UAE Energy Minister also confirmed there was a commitment to ensuring nuclear energy generated here is safe, and there is greater scrutiny to ensure safety requirements are met."

"The first license awarded by FANR was to the Emirates Nuclear Energy Corporation," Receveur adds.

"This Corporation is responsible for producing and delivering nuclear energy and electricity supply using nuclear energy in Abu Dhabi," Croker explains

"The UAE's first nuclear power plant, the Barakah plant in Western Abu Dhabi, will be operational later this year," Tithecott adds.

"FANR's regulatory powers also include radioactive material and radiation sources used in medicine, research, oil exploration and other industries," explains Paul Mansouri of Norton Rose Fulbright. "All users of radioactive material and sources of ionsing radiation in the UAE must have FANR licenses."

"Nuclear energy is mainly governed at Federal Level but Dubai has its own Nuclear Energy Committee regulating nuclear energy use, and which is responsible for setting up power generation and desalination plants using nuclear power," says Kormuth.

"This committee, an affiliate of the Supreme Energy Council (SEC) was formed as a result of Dubai Decree No. 26/2009," explains Lee. " But there are no current nuclear power projects planned for Dubai."

Andrej Kormuth
Senior Associate
Clifford Chance

COMPANY OWNERSHIP?

"Under UAE general company ownership restrictions found in Federal Law No. 2/2015, not less than 51% of UAE companies' shares must be owned by UAE nationals," Receveur explains. "However, these minimum requirement may be reduced to 25% in the case of certain companies operating in the energy sector."

"Most oil and gas companies in Dubai are government owned, so Dubai Law No. 6/1997 (on Government Contracts) is important to them," Kormuth adds. "Dubai Government entities cannot enter into arbitration agreements or contracts governed by laws outside Dubai without the Ruler's approval. This Law also regulates tender and bid processes for those contracting with Dubai Government entities, although Dubai Law No. 6/2011 (IWPP Law) covers tenders on electricity and projects."

Angela Croker
Senior Associate,
Norton Rose Fulbright

TAX AND CUSTOMS?

"The individual Emirates have issued corporate tax decrees which in practice have only been applied to producing companies in the oil and gas sector and foreign banks' operating branches," Receveur explains.

"Taxes on companies producing in the oil and gas sector are imposed at the rates in their specific agreement with the Government of that Emirate, which also detail any applicable royalty payments. "However, some parts of large energy projects may qualify for exemption from the generally levied 5% customs duty, although exemptions are negotiated on a case-by-case basis."

Key Laws

Environmental Laws

Federal Law No. 24/1999, On the Protection & Development of the Environment sets out environmental standards, including those on the environmental impact of oil and gas projects. Abu Dhabi Law No. 17/2009, On the Protection of Safety Zones around Oil Facilities and Artificial Islands in the Emirate of Abu Dhabi is also important. It sets out a safety area of 500m from the borders of offshore oil fields. Entry into these zones is forbidden without a license. Other relevant legislation includes the Abu Dhabi Executive Council Order of 2010, On Pearl Standards which requires all new property developments to comply with the Pearl Community rating standards. Abu Dhabi has also issued Abu Dhabi Law No. 22/2007, Establishing Abu Dhabi Future Energy Company (ADFEC) and the Masdar Institute for Science and Technology, which set up two bodies to invest in the renewables sector. Dubai Order No. 1/1991 On Systems of Protection of the Environment of Dubai, supports Federal Law No. 24/1999 and is relevant to energy producing companies or energy related projects in Dubai. The Executive Regulations issued in line with Dubai Order No. 211/1991 which regulate use and disposal of waste water and air pollution can also be relevant.

Nuclear Laws

Federal Decree No. 6/2009, On Peaceful Uses of Nuclear Energy developed a licensing and control system for nuclear material. Meanwhile, Dubai Law No. 19/2009, Establishing the Supreme Council of Energy (DSCE) set up the primary energy policy regulator in Dubai and coordinates the Emirate's Integrated Energy Strategy 2030 which governs production and supply of oil, gas, renewable and nuclear energy.

ELECTRICITY

"Abu Dhabi Law No. 2/1998 (the Electricity Law) regulates the electricity sector in Abu Dhabi and implements a private sector investment programme. The law established Abu Dhabi Water and Electricity Authority (ADWAE) which is responsible for the generation, transmission and supply of the Emirate's electricity as well as the Regulation and Supervisory Bureau," says Kormuth.

Arman Galledari
Global Head of Projects & Infrastructure
Jones Day

"This Bureau issues licenses to conduct regulated activities, monitors licensees, ensures compliance with license terms and makes regulations on the regular, efficient and safe supply of electricity," Receveur notes. "Regulated activities under the Electricity Law include electricity generation, transmission and supply, and entities wishing to carry out these activities need a license."

"In Dubai, the Supreme Council of Energy is the main energy activity activity regulator, and the Regulatory and Supervision Bureau which is part of it, licences, regulates and administers energy service there. Dubai Electricity and Water Authority (DEWA) is authorised to establish, manage, operate, maintain and own electricity generating plant, power transmission and distribution networks there," Receveur adds. "Under the Dubai Electricity Privatisation Law, regulated activities include any activity related to generating electricity in order to supply the Transmission System with produced electricity. The 'Transmission System' is defined as high voltage electricity cables and electricity installations and facilities owned or operated by DEWA and used to transmit electricity. All activities relating to electricity generation, transmission, distribution and supply of electricity need a licence."

Nima Fath
Senior Associate
Jones Day

"Dubai Law No. 6/2011 or the IWPP Law provides a framework for private sector participation in the electricity and water industries," Kormuth says. "It allows DEWA to establish project companies itself or with third parties, and private companies to be licensed to produce or supply electricity, although they must sell it to DEWA. The RSO 2012 IWPP Code applies to all independent private sector power producers, and power and water generators connected to the transmission system. It has a minimum set of technical, design and operational requirements. There are also detailed RSO Renewable standards."

"Meanwhile, the Federal Electricity and Water Authority (FEWA) is responsible for generation, transmission and distribution of electricity in Ajman, Ras al-Khaimah, Fujairah and Umm al-Quwain, and is authorised to establish private power generation there," Receveur explains. "While in Sharjah an authority called Sharjah Electricity and Water Authority is responsible for the generation and distribution of electricity, water and gas."

RENEWABLE ENERGY

"Currently, there are no federal level laws which specifically relate to and regulate renewable energy," Nima Fath of Jones Day explains. "However, the UAE has recently increased its clean energy use target by almost 500 per cent, which would see the renewable energy share of its energy mix increase to 24 per cent by 2021. To achieve this, the Federal government will potentially need to enact formal legislation to regulate the development of renewable energy, especially if it wants to attract private investment into the sector."

"Internationally the UAE has ratified various international conventions aimed at ensuring climate sustainability, including the Kyoto Protocol to the UN Convention on Climate Change, and was one of the first major oil-producing countries to do so," Receveur explains.

Adrian Creed
Partner
Clyde & Co

"However, internationally the International Renewable Energy Agency (IRENA) will probably be the UAE's main catalyst for driving renewable energy sector initiatives as its mandate is to promote widespread, increased adoption and use of all renewable energy forms. IRENA's headquarters are in MASDAR City Abu Dhabi."

"The Ministry of Foreign Affairs' Directorate of Energy and Climate Change (MOFA-DECC) is the UAE's international lead on energy and climate change

Key Laws

Port Laws

Abu Dhabi Law No. 12/1973 On Petroleum Ports regulates use of oil ports, oil shipping and vessels carrying oil products. It also imposes environmental and health and safety requirements on companies operating in oil ports. Regulations involving oil pollution in commercial ports are found in the 2010 Transport Regulations.

Tax Laws

Abu Dhabi Tax Decree of 1965 is general in scope, but in practice it is only applied to oil companies and operating branches of foreign banks. There is also Abu Dhabi Law No. 2/1972 which imposes tax on oil and gas carriers operating in Abu Dhabi ports. The position, in Dubai under the Dubai Income Tax Ordinance 1969 and Dubai Decree 1970 is the same. In Dubai oil companies' tax rate is based on the concession agreement (and can be up to 55%). There is a royalty on production, although certain oil companies can get a tax exemption from the Ruler.

matters. It determines domestic policy and is the UAE IRENA representative," says Tithecott. "The recently broadened regulatory framework includes various regulators at Federal and Emirate level, such as the Ministry of Environment and Water (MOEW), the Supreme Energy Council (SEC), Dubai Electricity and Water (DEWA) and the Regulation and Supervision Bureau (RSB)."

Andrea Tithecott
Head of Regulatory
Al Tamimi & Company

"The most notable differences in approach to implementing renewable energy projects in Abu Dhabi and Dubai are that very specific laws have been implemented in Abu Dhabi which have seen the appointment of councils and government owned companies undertaking renewable energy projects, so private sector participation is not significant," says Croker.

Christina Lee
Senior Associate,
Al Tamimi & Company

"Dubai has been more proactive in engaging with the private sector and is allowing private development of small and medium scale renewable projects, like roof top solar."

"The Regulatory and Supervision Bureau (RSB), the independent water and electricity sector regulator in Dubai, works under the auspices of the Dubai Supreme Council of Energy to support the renewables sector and help Dubai achieve its targets," Croker notes.

"It licenses and regulates the independent power producers, IPPs in Dubai."

"One of RSB's key roles is ensuring all power and water facilities in the sector can demonstrate an economic procurement process and appropriate tariff for a given technology. With renewables projects, the RSB reviews both CAPEX and OPEX costs over projects' lifetimes to determine an agreed levelised cost of electricity, and appropriate tariffs for particular projects," Mansouri explains.

Paul Mansouri
Partner
Norton Rose Fulbright

"Renewable energy generators must comply with RSB issued Renewable Standards which govern connection of renewable energy projects to the DEWA network."

"There are various incentives to encourage renewables including Government backing, tax incentives and feed-in tariffs. The UAE also established the Zayed Future Energy Prize in 2009 to celebrate achievements in the renewable energy and sustainability fields. A renewable energy company called MASDAR operating in numerous renewable and sustainable technology areas has also developed a carbon neutral city," Receveur notes.

FREEZONE POSITION

"None of the Abu Dhabi or Dubai freezones, except Masdar City and the Dubai Green Zone were specifically set up to cater for energy companies," says Adrian Creed of Clyde & Co. "However, the Fujairah Oil Industry Zone (FOIZ) in Fujairah focuses on all aspects of petrol, petroleum products and the hydrocarbon industry (including oil and gas) and aims to strengthen private sector involvement and support companies and research centres in the petroleum industry. The Future Energy Company PJSC, known as MASDAR aims to invest and foster the new energy industry in Abu Dhabi and worldwide. It has invested in a number of renewable energy projects including the Shams 1 solar project joint venture in Abu Dhabi and the London Array, an offshore wind farm in the Thames Estuary.The Masdar City freezone is a designate investment zone for businesses in the renewable sector, with the usual freezone incentives including full foreign ownership and certain tax breaks. Dubai has what is called the Dubai Clean Energy Strategy 2050. Its initiatives include setting up a new freezone called the Dubai Green Zone, although the Dubai Science Park operated by the TECOM Group also includes energy science in its remit."

"UAE freezones are subject to both Federal Laws and the laws of the Emirate they are within, unless there is a special carve out in the relevant law or regulation, although there are exemptions for the financial freezones which are not relevant to the energy sector. This means in FOIZ, Masdar City and the Dubai Science Park Federal laws and regulations on different types of energy apply, as none of these freezones has special legislation on regulation of energy, although Masdar City and the Dubai Science Park have supplementary employment regulations, and there are regulations around business licensing and the types of entity which can set up in all three of these zones."

Key Precedent

Calculating oil spill compensation?

Calculating oil spill compensation can be complicated. Sogol Kaveity looks at [2014] EWHC 1973 (TCC), a case which saw record damages awarded to an African community.

Over 15,000 Ogoni farmers and fishermen from the Bodo and Gokana community in the Niger Delta's lives were devastated by two oil spills from Shell's pipelines in 2008 and 2009, which had caused them to loose their main sources of income, from fishing and farming.

THE ISSUE

The claimants alleged the pipelines, were old, poorly maintained and Shell had failed to take reasonable steps after being warned about them. Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC) admitted liability for the oil spills under the Nigerian Oil Pipelines Act 1956, and accepted the jurisdiction of the English courts.

However, they argued bunkering and sabotage were the spills' main cause, and disputed the affected area and volume spilt. The community wanted Shell to clean up the environment and compensation for the impact on their health and lands. After an initial offer was made but dismissed, Shell had offered £18 million but the community wanted £300 million, so papers were filed at the High Court in London in a case called Bodo Community and others v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC).

THE QUESTIONS

The issues included whether:

- claimants were only entitled to compensation for the 2008 spills under the 1956 Act.
- individual claimants could recover compensation under that Act for shock and fear; annoyance, inconvenience, discomfort and illness; distress and anxiety; aggravated damages; and exemplary damages.
- just compensation recoverable for damage arising from oil spills (except loss of earnings claims) would be assessed in line with the diminution in value of the land and/or interest in land which had been damaged and/or the loss of the land's amenity or interests in it and/or consequential loss and, if not, what measure would be used;
- awards of just compensation, or of general damages at common law, should be valued with reference to previous awards which had been made by the English courts or using Nigerian land value and/or cost of living;
- both pecuniary and non-pecuniary damage, alleged to have been suffered was recoverable in claims (whether brought individually or by representative action) for damages in public nuisance.
- Shell could be liable under the Oil Pipelines Act 1990 to pay just compensation for damage caused by oil released from its pipelines as a result of illegal bunkering and/or illegal refining.
- the court lacked jurisdiction to try some or all the claims (as pleaded) on behalf of the Bodo community and the claims by individuals under the 1990 Act and/or in nuisance and/or in negligence;

THE DECISION

The court ruled on the Nigerian case law, the Nigerian Federal High Court had exclusive jurisdiction to deal, not only with any cases at common law, but also any claim for statutory compensation under the Act insofar as there were separable remedies. The 1956 Act provided a sufficiently wired code to cover a range of activities involved in the oil business. Documents submitted to the UK High Court revealed Shell had been warned about the pipeline's risks before the spill, although, Shell dismissed having knowingly continued to use a pipeline which was not safe to operate. Neglect by the licensee was needed but neglect by a licensee in protecting the pipeline could be proved as it had enabled preventable damage to it by people illegally stealing oil, which caused spillage and could give rise to a liability.

The court also ruled compensation was not recoverable under the 1956 Act by individual claimants on a stand-alone basis for shock and fear; annoyance, inconvenience, discomfort and illness, distress and anxiety. They had no entitlement to aggravated or exemplary damages or to sums representing their equivalent as such under the 1956 Act's compensation provisions. The amount of just compensation recoverable under the 1990 Act involving damage arising from the oil spills (except claims for loss of earnings) could be assessed by reference to the diminution in value of the damaged land and/or interests in that land and/or its loss of the amenity value or interests in it and/or consequential loss.

In English case law, awards, for example, for inconvenience tended to be moderate, although they could relate to all the years during which successful claimants were affected by the damage, subject to limitation.

So compensation awards under the 1965 Act, or, if applicable, awards of general damages at common law, had to be valued primarily by reference to the value of land and/or the cost of living and/or incomes in Nigeria but quantification would be by way of English law procedures and approaches. Based on the case's facts, it would be inappropriate to rule on which claims the court had jurisdiction to try. The Court would need to be astute in analysing individual claims to form a view about that and, once individual claims were clearly capable of being analysed, a decision could be made if, as a matter of fact and degree, a particular claim was barred jurisdictionally. No damage was recoverable for public nuisance in this case as there was no right to sue for public nuisance for oil spills from licensed pipelines. Since there was no stand-alone entitlement for example, for inconvenience unless it was quantifiable, damages for distress, shock or fear, falling short of personal injury would not be recoverable. In 2015 SPDC agreed a £55 million settlement (£20 million was awarded to the Bodo community and £35 million to the individuals, who received £2,100 each). According to the communities' legal representative in an interview with the Guardian newspaper it "is thought to be the largest payout to the African community following environmental damage". It was also the first time oil spill compensation was paid directly to affected individuals rather than local chiefs.

In Comparison

GCC Energy Law

With all the GCC states considered global energy powers, the Al Tamimi & Company team in Qatar, Kuwait, Bahrain, Oman and Saudi compare the different regimes in the UAE's five neighbours.

QATAR OIL

Qatar has significant oil reserves and its main law governing oil exploration and production is Qatar Decree Law No. 10/1974 (or the QP Law), which established Qatar Petroleum. However, there is no specific oil regulator in Qatar. Effectively, Qatar Petroleum is the state's investment arm in the oil and gas sector, and is entrusted with its management and development. Typically, it (acting for the state) grants rights to explore, develop and produce petroleum via a exploration and production sharing agreement (EPSA) or a development and production sharing agreement (DPSA). It determines the basis on which an entity participates in Qatari natural resources (including natural gas). Neither the QP Law nor the Natural Resources Law, Qatar Law No. 3/2007 which covers gas include much detail on how Qatar Petroleum, which manages upstream, mid-stream and downstream oil and gas operations for the Qatari Government must undertake its responsibilities.

QATAR GAS

Qatar has the world's third largest known gas reserves and is the world's leading producer of liquefied natural gas (LNG) and liquid fuels using gas-to-liquids technology. Under Qatar Law No. 3/2007, the key law in this area, which contains some aspects of the regulatory regime, natural resources (including natural gas) are the public property of the state. Qatar has no gas regulator but the Ministry of Industry and Energy regulates Qatar's natural gas policy, subject to the Emir's ultimate control.

Stephen Landsdown
Head of Qatar Office
Al Tamimi & Company

QATAR ELECTRICITY

Peak demand for electricity in Qatar is expected to grow at 6 to 8% this year, from 2015's daily highs of around 7,000MW. However, there is spare capacity and more coming online in the next two years, which should take capacity to 11,000MW by 2018. Qatar General Electricity and Water Corporation (Kahramaa) which is part Government owned was established by Qatar Law No. 10/2000 to regulate and maintain the supply of electricity and water, and is the sole transmission and distribution system owner and operator for the electricity sector. Its powers and responsibilities are wide, and include production, transport, purchase, distribution and sale of electricity to consumers, acquisition, construction, operation and maintenance of electricity facilities and transmission and distribution networks, and any other tasks associated with achieving these objectives. It transferred its electricity production and water desalination facilities to Qatar Electricity & Water Company (QEWC) in 2002, to focus on transmission and distribution. There is no dedicated electricity regulator in Qatar so individual companies in this sector are self-regulated. Plans to create an independent electricity regulator were announced in 2014, but have not yet happened so the Ministry of Industry and Energy effectively acts as regulator.

QATAR RENEWABLES

Qatar wants to save its natural gas and oil reserves for export, so the substantial increase in per capita energy consumption has made it necessary to to reduce the impact of energy use on the environment, help conserve natural resources, and boost efficiency. It has ample solar power, so this plays a key part in the state promoted renewable energy programme, which began in 2011 and aims at producing at least 2% of the electricity generation from renewable energy by 2020. Kahramaa is currently planning to build around 1,000MW of solar generated power through a joint venture with Qatar Petroleum. Qatar also has moderate wind power generation opportunities (5-7 m/s, 3.9 hours of full-load wind on average daily) and wind turbine installations are being considered on the Qatar-Bahrain causeway. It is also thought to offer reasonable geothermal potential. However, it has not yet adopted any specific renewable energy laws, to facilitate its development or introduce a regulatory framework. This may change and it may consider feed-in-tariffs, electric utility quota obligations, heat obligations, fiscal incentives, investment or production tax credits, or energy production payments. There could also be more public competitive bidding.

QATAR NUCLEAR

Nuclear power is not governed by specific Qatari legislation. The country has investigated the viability of nuclear power but announced in 2008 the case for proceeding was not sufficiently strong. There have been discussions on the possibility of a regional project for nuclear generation but limited progress has been made.

QATARI LEGISLATION

Compared to the EU, Qatar (like other GCC countries) has a much lighter energy regulation regime. For example, there are no regulations on power consumption and sustainable development, and no independent regulator. However, activities in Qatar are increasingly being brought in line with international standards, and the National Development Strategy adopted for the Qatar National Vision 2030 proposes a number of initiatives, including regulatory reform and procedural efficiency improvements. As in Saudi Arabia with Saudi Aramco, Qatar Petroleum's dominance affects the Qatari economy, especially energy and renewable energy projects, impacting on market structures, at all levels, and the associated regulatory regimes. Qatar Law No. 30/2002 (the Environmental Protection Law) is the main law in Qatar covering environmental protection and is similar to environmental laws in other GCC countries. Most industrial projects in Qatar require approval from regulatory entities such as the Ministry of Environment. The Environmental Protection Law and the Executive Regulations following Qatar Ministerial Decision No. 4/2005 require all plans for public and/or private development projects to be submitted to the Ministry of Environment for approval.

Under Qatar Law No. 30/2002 all organisations undertaking activities involving exploration, drilling, extraction, production, refining and processing crude oil fields need to follow international standard specifications on the methods and safe operation for all matters involving the storage and transportation of petroleum, petrochemicals or gas, and water and other dispensable substances while avoiding loss of petroleum or gas.

There is a variety of other regulations issued by different Qatari Government entities which may also apply. Generally speaking, contractors have health, safety and environmental requirements imposed on them by their contractual counterparties or by international companies. Employers in every sector, including the energy industry, must comply with primary health and safety legislation. Any company engaged in energy and renewable energy projects must also ensure all applicable health and safety approvals have been issued by the competent authority. These approvals are similar to those in the UAE. Penalties for non-compliance can be severe, and may include travel bans and similar sanctions.

BAHRAIN OIL

Bahrain has had an oil based economy since 1935. However, in 1993, the government estimated oil reserves would be depleted by 2005 and sought to revive matured fields by a joint venture, with three strategic partners Bahrain-based Nogaholding, US-based Occidental Petroleum and Abu Dhabi-based Mubadala Petroleum, which did increase oil production. However, with recent reductions in oil prices Bahrain has looked at ensuring the supply of sustainable alternative clean energy, including wind and solar power, as well as developing the oil sector. There are three projects aimed at boosting energy production the Refinery Modernisation Project, which aims to boost refinery production, a new oil pipe line project spanning 115 km between Bahrain and Saudi Arabia, and the Bahrain Harbour for Liquefied Natural Gas (BHNLG) project.

"With reductions in oil price Bahrain has been looking at ensuring a supply of sustainable clean energy."

BAHRAIN GAS

The Bahrain National Gas Company (Banagas) was established to open a gas liquefaction plant which collected this gas and turned it into propane, butane, and naphtha.

A large amount of gas has also been discovered in the Khuff field and over 15 wells have been drilled to tap into the gas, which is used to power the oil refinery, electric generators, and the water desalination plant.

Some of this gas has also been re-injected into existing oil fields to help maintain reservoir pressures and improve production. In 1990, total natural gas reserves were estimated at 209 trillion cubic meters.

BAHRAIN RENEWABLES

Bahrain has some major solar energy projects including the Pilot Solar Power Project developed by Bapco and NOGA. There are no specific laws governing green power, but the Supreme Council has issued decisions to encourage a safe, green environment. These include Bahrain Decision No. 6/2013 amending Bahrain Decision No. 4/2008 on Management of Hazardous Chemical Substances and Bahrain Decision No. 7/2013 amending Bahrain Decision No. 3/ 2006 on management of Hazardous Waste.

BAHRAIN REGULATORS

The main authorities involved in energy regulation are the National Oil and Gas Authority and the Supreme Council for the Environment which replaced the General Authority for the Protection of Marine Wealth, Environment and Wildlife. The Supreme Council's main responsibility is to issue environmental regulations across all Ministries, entities, and authorities, and includes oil and gas in its remit. Its regulations are mandatory. In addition, the Ministry of Labour which regulates employee health and safety also covers employees working in energy companies.

Raj Pahuja
Senior Associate
Al Tamimi & Co, Bahrain

BAHRAIN ENERGY LEGISLATION

Article 11 of the Bahrain Constitution states 'natural wealth and resources are the property of the Kingdom. The Kingdom shall protect them and invest in them for the benefit of the land'.

Bahrain Law No. 63/2005 covers the incorporation of the National Oil and Gas Authority (NOGA) which has replaced the former Ministry of Oil and Gas. It adopted the former Ministry's obligations, including regulating, supervising, organising and developing the oil and gas sector, and controlling oil and gas exploration and production. This authority issues licenses, permits and approvals to third parties involved in the oil and gas industry. Bahrain Law No. 78/2005 (as amended) covers the formation of NOGA's board.

While, Bahrain Law No. 28/2006 on the Next Generation Reserve provides a framework for the reservation scheme the Bahraini Government must implement. This requires $1 to be deducted from every barrel of oil produced which costs more than $40. Bahrain does not have any laws governing nuclear power.

Although the Bahrain Constitution states there is no gender discrimination, Bahrain Decision No. 5/1977 states women are prohibited from working in any hazardous and industrial environment which may affect their safety and health, which would include the oil and gas sector. Energy companies coming to operate in the country also need to be aware that Bahrain has a Bahrainisation policy, requiring all establishments, including energy firms to employ specific proportions of Bahraini nationals.

Bahrain Law No. 21/1996 which sets out general principles on the preservation and protection of the environment, can also impact this sector, as can Bahrain Decisions, including Bahrain Decision No. 10/1999 on the Standards or Air and Water Regulations which place limits on waste disposal and emission in water or air from any Bahrain industry. Energy companies in Bahrain also need to be aware of Bahrain Law No. 6/2000 on Industial Safety. It requires a qualified occupational safety manager, who is responsible for ensuring employees comply with internal standards of safety to be appointed. Businesses, with more than 100 employees also need to set up an occupational safety committee which is responsible for implementing their safety practices, policies and protocols and for raising awareness of safety standards and training employees. The Minister of Labour and Social Affairs' Decision No. 15/1977 on identifying and organising necessary services to protect those working with dangerous machines may also be relevant.

SAUDI ARABIAN OIL

The Basic Law of Governance (Royal Order No. A/91 of 1 March 1992) confirms the state owns all natural resources and revenues attributable to them in order to exploit, protect and develop them in its best interests, security and economy. Oil exploration, drilling and production are still on the 'negative list' maintained by the Saudi Arabian General Investment Authority (SAGIA), who regulate foreign investment there, so are not available for direct foreign investment. However, foreign entities can participate in the oil and gas field services sector, subject to SAGIA licensing and compliance with the new Companies Law (Saudi Arabia Royal Decree No. M3/1437). In Saudi Arabia a distinction must be made between activities which fall under Saudi Aramco (the state owned oil company) and other activities regulated by the Ministry of Petroleum. For example, Saudi Aramco, has a well-developed set of standalone principles for engaging with contractors and the supply chain on its own business. New laws have recently come in covering their governance. Other activities in Saudi, not involving them are subject to the laws of general application. Saudi Aramco's dominant effect on the economy and its central role in commerce must be recognised, although there is some debate on its future status, and which of its parts could be suitable for a public offering of shares.

The Ministry of Petroleum and Natural Resources has general regulatory authority over Saudi Arabia's hydrocarbons and minerals sector, although in 2015 Ministry oversight of Saudi Aramco was replaced by a new Supreme Council for Saudi Aramco, which has members drawn from key ministries and other stakeholders.

Phillip Kotsis
Partner
Al Tamimi & Company, Kuwait

Grahame Nelson
Head of Saudi Arabia Office
Al Tamimi & Company

It is expected the Ministry will continue to represent Saudi at international bodies such as the Organisation of the Petroleum Exporting Countries.

SAUDI ARABIAN ELECTRICITY

The Electricity law (Saudia Arabia Royal Decree M/56/1426) and its 2007 Implementing Regulations Related to the Duties of Electricity and Cogeneration Regulatory Authority (ECRA), (who are the main regulator for electricity production) are key regulations in this area. There are also a range of subsidiary codes and standards including the Transmission and Distribution Codes (which were approved ECRA on 1428 and 1429H respectively). The Distribution Code details the procedures for planning and operational purposes and covers normal and exceptional circumstances. This law is intended to provide a clear, stable and non-discriminatory regulatory framework for the electricity industry. It also promotes consumer-oriented electricity services (including choice of supplier in a fully competitive but regulated market), protection of consumer rights and encourages domestic and foreign private sector investment and participation in the systematic expansion and development of this industry. It regulates investment and enables fair economic returns on investment. It also ensures security of supply, economic development and social welfare; and supports electrification schemes. Environmental codes and standards are among the law's stated aims. The ECRA administered Law also provides a licensing regime for industry participants, competition controls (including merger approval for licensed entities) and covers anti-competitive conduct. This law also contains mediation and dispute resolution provisions.

Subsidiary provisions are found in various places including the KPI Manual which sets standards for license holders on generation, transmission and distribution. ECRA's licensing and regulatory powers are fundamental to this industry. To date it has issued nine generation licenses, two transmission licenses, two distribution licences and ten cogeneration licences. The Ministries of Petroleum and Mineral Resources; Water and Electricity; Finance, and Municipal and Rural Affairs and local municipalities are also key governmental stakeholders in the electricity industry.

SAUDI ARABIAN RENEWABLE AND NUCLEAR ENERGY

The King Abdullah City for Atomic and Renewable Energy (K.A.CARE) was established by Royal Order in 2010 and has a mandate to contribute to sustainable development in Saudi of industries involved in renewable and atomic energy for peaceful purposes. With its close links with hydrocarbons, some overseas investors may be surprised by the institutional and regulatory framework which has been created by K.A.CARE. The K.A.CARE Charter establishes an all-encompassing approach to contributing to a sustainable energy mix which emphasises education, research, global collaboration, local integration, commercialisation and social benefit. Domestically, K.A.CARE looks to the Council of Ministers, the Shura Council, relevant Ministries and other government agencies for help and guidance. SAGIA, the Royal Commission for Jubail and Yanbu, and Saudi Basic Industries Corporation (SABIC) provide investment support and ECRA and the Saudi Electricity Company, cover electricity. At an international level, K.A.CARE liaises with the International Atomic Energy Agency, the International Renewable Energy Agency, and with governments of countries closely involved in nuclear power generation. The Finnish Radiation and Nuclear Safety Authority has worked with K.A.CARE to establish the Saudi Arabian Atomic Regulatory Authority.

SAUDI ARABIAN ENERGY LEGISLATION

The General Environment Law (2001) and its Implementing Regulations (2003), together with the Environmental Protection Standards (1982) are key environmental laws which can apply to the energy sector, in addition to any rules or directions issued by ECRA which reference particular licensed activities. As in most jurisdictions, before a project begins an environmental impact assessment is required.

"Oman is the Middle East's largest non-OPEC oil exporter."

There is also a wide body of product technical related standards to consider promulgated by the Gulf Standards Organization. The 2005 Saudi Arabian Labour Law, which was recently updated sets out certain mandatory steps and procedures employers must adhere to, some general and others sector specific. These, including those involving workers working in the extreme summer heat can be relevant to this sector.

KUWAIT ELECTRICITY

Kuwait Law No. 39/2010 On the Establishment of Kuwait Joint Stock Companies Which Undertake the Construction and the Implementation of Electrical Power Plants and Sweetening of Water in Kuwait (the IWPP Law), and Kuwait Decree No. 465/2010, Kuwait Decree 465/2010, Kuwait Decree 28/2012 and Kuwait Law No. 19/2015 which also cover the IWPP law are all important laws in this sector. Under the IWPP law the Council of Ministers appointed by the Ministry of Electricity and Water, is responsible for regulation of this sector. In line with Article 4 of Kuwait Law No. 39/2010 and Kuwait Decree No. 28/2012, the Council of Ministers appointed by the Ministry of Electricity and Water enstrusts a government body to undertake the incorporation of one or more joint stock Kuwaiti companies based in Kuwait to build, execute, operate, manage and maintain electric power and desalination plants in there. However, there is no specific legislation governing generation of electrical power in Kuwait (by solar or other means).

KUWAIT ENERGY LEGISLATION

The responsibility for overseeing Kuwait PPP projects rests with the Kuwait Authority for Partnership Projects (KAPP), who are the primary driver of the project implementation process. Its governing board (the Higher Committee) has broad authorities. Kuwait Law No. 116/2014 or the the New PPP Law) was issued to provide a clear regulatory framework for the implementation of PPP projects in Kuwait, and was used on the Az-Zour North Independent Water and Power Project (Phase 1), (Phase 2 of this project is currently open to tenders). Invitations have also been sent to potential contractors to participate in a waste-to-energy facility in the Kabd area. Before the New PPP Law, Kuwaiti law was seen as overly restrictive as it prohibited the mortgage of project land, buildings and possibly even equipment found on the land. This effectively, prevented lenders from being able to have adequate security over material project assets and made them less willing to finance such projects. The New PPP Law has relaxed restrictions and prohibitions and clarified what may be pledged as security. It has codified some of the financing techniques applied in Phase 1 of the Az-Zour North Project, such as assignment of proceeds, pledge against shares in both the Project Company and the Consortium Company (even during the initial two-year lock-out period) and mortgages over project assets (other than the land). It has also given more clarity on the procedures to take if projects need to be transferred to a new consortium, and has codified the 'warehousing' concept which was used in Az-Zour North Phase 1. KAPP now has the authority to own shares on behalf of Kuwaiti citizens, as the PPP Law includes provisions on the public offering of shares in Project Companies to Kuwaiti citizens once relevant projects achieve a commercially viable state of operations.

Frank Patalong
Senior Associate
Al Tamimi & Co, Saudi Arabia

There is no specific Kuwaiti legislation on nuclear power or renewable energy. Environmental Law is found in Kuwait Law No. 42/2014 or the new EPA Law covers environmental protection and can be relevant to the energy industry. For example, Article 28 of Kuwait Law No. 42/2014 prohibits the combination, transportation or disposal of municipal solid wastes, hazardous wastes, health care waste, and sludge resulting from sanitary and industrial drainage without prior authorisation from the Kuwait Environment Public Authority. The Executive regulations to Kuwait Law No. 42/2014 are expected to set out the rules and procedures for obtaining these approvals, licenses, and mechanisms for dealing with these types of substances. Article 29 of Kuwait Law No. 42/2014 also requires this type of waste to be disposed of according to the environmental conditions and standards in the the New EPA Law executive regulations and explicitly prohibits disposal of this waste in landfills and sites which are not allocated for such disposal.

OMAN OIL

Oman is the Middle East's largest non OPEC crude oil exporter and one of the world's top 25 producers of oil. In 2015 its petroleum and other liquids production exceeded one million barrels per day, most of which was exported to the Far East, particularly China and Japan. It has one form of export, which is a medium-light and high sulphur crude.

Although, Oman is the 22nd largest proven oil reserve holder in the world, a recent report by the US Geological Survey indicated over 370 million barrels, 315 billion cubic feet of natural gas and over 40 million barrels of natural gas liquids remain undiscovered there. Enhanced oil recovery techniques, using steam and miscible injection, have helped keep production levels high.

Petroleum Development Oman, in which the State has a majority stake alongside Shell and Total, holds most of Oman's oil reserves and is responsible for over 70% of its crude oil production. Oman Oil Refineries and Petroleum Industries Company (ORPIC), controls the country's refining sector and owns its operating refineries. Capacity has been increased at ORPIC's refinery in Sohar and work has also started to upscale facilities in Duqm, so it is one of the largest crude oil storage facilities in the world. There are also plans to expand Oman's refining capabilities through development of a major storage terminal in Sohar and exploit the country's geographic location outside the Strait of Hormuz.

Arif Mawany
Senior Associate
Al Tamimi & Company, Oman

OMAN GAS

The Omani natural gas sector has grown over the last two decades. In January 2016, Oman had over 24 trillion cubic feet of proven natural gas reserves. The Khazzan-Makarem gas field, which BP holds concession rights to is estimated to hold between 15 Tcf and 20 Tcf of recoverable natural gas resources. Oman exported 375 Bcf of natural gas in 2014. However, to meet rising domestic demand all currently exported natural gas will be diverted towards domestic consumption by 2024. Liquefied natural gas (LNG) is imported through the Dolphin pipeline from Qatar and Oman has signed a $60 billion memorandum of understanding with Iran to supply gas to Iran from 2017.

OMAN ENERGY LEGISLATION

The Oil and Gas Law, Oman Sultani Decree No. 8/2011 sets the framework for ownership of natural resources, awarding concessions, restrictions on exploitation and environmental protection. Ministerial decisions passed by the Ministry of Oil and Gas also regulate activities and form part of the overall framework.

This law sets out some of the criteria required by operators in the sector, such as the need for technical expertise, conformity with international standards, recruitment of the national workforce and, indirectly, a requirement to contribute to in-country value.

Activity in the oil and gas sector is a licensed activity which can only be conducted by technically skilled operators who have been awarded a concession arrangement.

Ownership of all reserves, commercial discoveries and concession area land is reserved to the Sultanate of Oman. The law specifies minimum content requirements for binding concession agreements relating to oil and includes a specific provision on situations where operators discover natural gas. While ownership and strategy on oil and gas ultimately rests with the Sultan of Oman, the Ministry of Oil and Gas (MOG) has administrative responsibility for managing the concession and licensing regime, although the Directorate General of Petroleum and Mineral Resources has specific responsibility for the licensing aspect.

At the first stage, MOG puts blocks out to tender and assesses applicants' technical and financial qualifications before awarding concessions. Once awards are made MOG acts as the operator's counterparty under contractual arrangements and has remit to enforce the Oil and Gas Law and impose penalties.

However, the Council for Financial Affairs and Energy Resources also lays down broad guidelines to fulfil the Government's objectives. Like other GCC states, the Omani Government has Omanisation quotas which impose a high threshold for employment of nationals in the oil and gas sector, so numbers of expatriates working in this sector have fallen. An offset regime, administered by the Omani Authority for Partnership for Development has also recently been implemented to help support diversification plans, requiring foreign companies tendering for contracts issued by Governmental departments to re-invest a portion of profits derived from that contract back into Government approved schemes or projects. Various enviromental regulations issued by different Government authorities apply and in practice, contractors have health, safety and environmental requirements imposed on them by their contractual counterparties or by international companies higher up the supply chain. These requirements are consistent with international practice.

OMAN RENEWABLE AND NUCLEAR ENERGY

The focus of most of the power sector has been on oil and gas, rather than on newer forms of energy. However, use of different forms of energy has been initiated in the oil and gas space. Solar Enhanced Oil Recovery (EOR) in Southern Oman was supported by the State General Reserve Fund. This project involved production of emissions free stream feeding by directing into the thermal EOR operations, reducing the need to use natural gas. GlassPoint is also currently building one of the world's largest solar plants in conjunction with PDO which is expected to produce 1021 megawatts of peak thermal energy. Nuclear power is not currently governed by any specific Omani legislation.

Sustainablity & Security Masdar

Mohammed Jamil Al-Ramahi, Chief Executive Officer (CEO) of Masdar, explains how the Abu Dhabi renewable energy company's innovative work has been helping the UAE to pursue its strategic aim of achieving energy security and sustainability.

HOW DO YOU SEE THE FUTURE WHEN THE LAST BARREL OF OIL LEAVES THE UAE? WILL THE UAE OPEN UP FOR NEW INVESTMENTS?

Securing energy resources and maintaining market stability is a major concern for many countries in the world. It prompts them to take several measures to help cope with these factors.

A lot of countries pursue specific and strict policies on energy consumption, and create mechanisms which balance the many factors and variables affecting energy security and supply. These mechanisms also enable them to achieve sustainable economic growth and preserve the environment.

The UAE has sought to improve its energy efficiency, reduce carbon emissions, and create a stable base for the advancement of the renewable energy sector. It has also tried to merge this vital sector, so it can serve as one of the basic components of the available energy infrastructure here.

"Masdar's vision is to lead change using new technology."

Our country believes this is the best way to achieve energy security and sustainability.

Despite being one of the world's major oil-exporting countries, the UAE has taken a leading role as a regional pioneer in achieving excellence in the field of clean and renewable energy projects. The state also has strategic plans to develop peaceful nuclear energy programmes, and clean energy initiatives (low carbon) through the Masdar company, a subsidiary of Abu Dhabi's multi-faceted Renewable Energy Initiative.

Masdar has made great progress inside and outside the UAE in the diversification of energy sources, and has helped highlight the importance of renewable energy's role in nurturing sustainable resources, which also have a positive impact both economically, socially and environmentally.

WHERE IS THE UAE LOCATED ON THE GLOBAL ENERGY MAP?

The UAE Government has a wise outlook on this matter and has taken a number of pre-emptive measures to ensure it is shielded from future volatility in the energy sector. I believe the approach they are taking is likely to maintain the country's leading position in all kinds of energy.

Diversification is the right path and it is also the path which other Gulf states are taking. Although, the UAE is one of the largest exporters of oil in the world, it is also the first OPEC country to export renewable energy technologies and it is helping to advance their application locally, regionally, and globally.

GLOBAL INVESTMENT IN RENEWABLE ENERGY WAS LESS IN 2014 THAN 2011, HOW DO YOU EXPLAIN THE FLUCTUATION IN INVESTMENT LEVELS?

The renewable energy sector, like other sectors, goes through different stages in terms of the size of investments devoted to it. However, what is different about this sector, is that it has witnessed qualitative leaps in the last ten years.

Renewable energy technology, particularly solar technology has seen a remarkable development in recent years. For example, prices of photoelectric solar energy have fallen compared to the costs of traditional fossil fuel generatated energy by more than 75% since 2009.

The cost of rooftop solar power systems has also reduced by 65% compared to 2008, and the cost of electricity generation by photoelectric solar energy in large scale services has decreased by 50% since 2010.

WHAT HAS BEEN MASDAR'S ROLE?

Since its inauguration in 2006, Masdar has helped put Abu Dhabi at the forefront of research into clean energy. The value of its investments in this sector have risen to about $ 1.7 billion. It has also set up several projects which have helped provide 1.5 gigawatts of renewable energy in various parts of the world.

WHAT IS THE FUTURE FOR MASDAR?

The UAE has a comprehensive development plan for renewable and clean energy. We have ambitious aspirations for the future and want to achiveleadership in the field through a number of 'mega projects' which launched 10 years ago. Within this context, Masdar's vision is to lead change using new technology. We are constantly striving to achieve the best, as we focus on expanding the limits of our work, to improve the methods being used currently and also find new solutions.

"We have reinforced this by creating a sustainable city which is efficient and profitable and by providing a model for how to use clean energy."

I think we have created a completely different market for sustainable energy, and our work is also making a significant social impact by helping to provide energy security and reducing carbon emissions.

We have reinforced this by creating a sustainable city which is efficient and profitable, and by providing a pioneering model for how to use clean energy.

ARE THERE OTHER AREAS YOU ARE LOOKING INTO?

We are also working on water security for the long term, including water desalination using renewable energy technologies and other technologies designed for waste water treatment and sustainable use of water. In addition, we have been active in developing commercially viable solutions which will help manage supply and demand, and reduce consumption.

WHAT ELSE IS IMPORTANT TO MASDAR?

Education is also a key element, as we work to train future leaders within the UAE energy sector and provide them with new specialised skills. We also want to expand technological innovation and research,

Masdar's work covers all stages of the value chain, as we invest in various fields. It is because of this 'Masdar' is emerging as a preferred destination for companies who are looking for solutions to many of the world's most pressing issues.

HOW DOES THE UAE SHOW ITS COMMITMENT TO CLEAN ENERGY?

"The entire region is uniquely positioned in the so called solar belt, and every square meter absorbs solar radiation which is equivalent to six kWh per day".

Abu Dhabi's hosting of the International Renewable Energy Agency (IRENA) also shows the UAE's full commitment to renewable and clean energy on an international level. The UAE is also actively participating in the relevant international forums in this field and is keen to play a pivotal role in the enactment of legislation and laws which will facilitate the establishment of these sustainable projects.

WHAT NEEDS TO BE CONSIDERED?

Global trends and the growing challenges in the areas of climate change and natural resource sustainability need to be taken into account. Our efforts to build a sustainable future will have to take into account the importance of renewable energy, innovation, and investment in the field, as well as projects and programmes other governments have pursued within their strategies and public policies.

HOW WOULD YOU ASSESS THE UAE'S EFFORTS IN THE FIGHT AGAINST CLIMATE CHANGE?

The scale of the huge challenge imposed by climate change on all countries of the world is expanding year by year. Studies indicate the growing consequences of melting ice and rising sea levels, as well as the severe changes in weather conditions which are closely associated with rising greenhouse gas emissions, as the main cause of global warming.

As a result, the international community continues to make the issue of climate change a top priority, and has encouraged every state to take tangible steps in this area. Individual countries must take responsibility for measures to mitigate global warming given that this grave development is mainly caused by human activity, not least the impact of an industrial and urban construction boom we are currently witnessing.

In this context, the recent historic Paris global agreement on climate change has outlined the basic features of a new phase in international efforts designed to minimise the impact of climate change. The UAE was one of the countries which was quickest to offer an ambitious national plan, in line with the Paris agreement, to diversify its economic resources and develop clean energy solutions.

Renewable energy projects significantly contribute to the reduction of carbon emissions, and at the same time, help create economic and social opportunities.

The UAE has made great efforts in this vital sector. In addition to its leading position in the global oil and gas markets, it has laid down solid foundations in the clean energy sector due to its importance and its key role in the national energy strategy, with the aim to diversify and secure the country's energy supplies for the future.

HOW MUCH COORDINATION IS THERE BETWEEN THE GCC COUNTRIES IN THIS FIELD?

There has been excellent coordination between the GCC countries in the field of renewable energy, and there are also established mechanisms for the exchange of expertise and experience between these countries. This has made sense because in addition to their oil wealth, the Arab Peninsula countries enjoy other natural resources, particularly solar energy. Their excellent spectacular geographical position means they are within the scope of the so-called solar belt.

In this region every square meter absorbs solar radiation equivalent to up to six kWh per day. As a result, this means the entire region is ideal for solar power generation projects, particularly when you take into account the decline in the cost of solar energy technology and the high demand for electricity which is being seen in the rapidly growing Gulf States.

Industry View

Dubai Electricity and Water Authority

Ahmed Talaat of the Dubai Electricity and Water Authority explains the legal framework the electricity industry in Dubai operates within.

"As a sole owner and operator of all electricity and water segments in Dubai, including generation, transmission and distribution, Dubai Electricity and Water Authority (DEWA) was established by Dubai Decree No. 1/1992, as an independent public authority. It is fully owned by the Dubai government, and managed by a board of directors. Various regulatory bodies have also been established and major steps taken to create an energy legal framework. Under Dubai Law No. 19/2009 On Establishing the Supreme Council for Energy, the Supreme Council was created to achieve, among other things, the effective planning of the energy sector. It is responsible for proposing a Dubai strategic plan for power and managing, developing and sanctioning policies involving the energy sector. In addition, the Regulatory and Supervisory Bureau was established by Dubai Executive Council Resolution No. 2/2010 to license entities operating in Dubai, control their activities, regulate water and electricity in Dubai and enable energy privatisation.

However, the most significant development in the legal structure for energy was the enactment of Dubai Law No. 6/2011, On the Organisation of Private Sector Participation in the Production of Electricity and Water in the Emirate of Dubai (or the Privatisation Law). This regulates private sector participation in electricity and water production in Dubai, although activity regulated by it is limited to generating electricity and/or desalination of water, or 'Regulated Activity', and does not cover transmission or distribution. Anyone, including any company established in accordance with the Privatisation Law (called a Project Company), has to be licensed by the Bureau to conduct Regulated Activities. The Council can also issue environmental, health and technical standards on Regulated Activities, and determine the Regulated Activities and facilities a Project Company can manage or establish.

There are no specific restrictions specified in the Privatisation Law on foreign ownership of Project Companies, except the usual ones in the Company Law, Federal Law No. 2/2015, that 51% of shares in any company must be owned by UAE nationals, unless DEWA or another government entity owns 25% of the shares in it. However, 100% foreign ownership of a Project Company, is possible if the company operates in a UAE free zone, and has the required license. In such cases it is permitted to conduct Regulated Activities, if it satisfies conditions, which are still to be issued by the Cabinet in line with the Company Law. (Project Companies should already have an arrangement with DEWA as they are prohibited from selling their produced electricity or water to any entity other than them.)

In order to encourage community members to produce electric power from solar power, increasing amounts of renewable energy, the Dubai Executive Council Decision No. 46/2014, On the Regulation of the Link between Electrical Power Production Units from Solar Energy and the Power Distribution System in the Emirate of Dubai (or the Connection Resolution) has been issued. This regulates the connection of photovoltaic generation units to the power distribution system. It allows any person, known as a producer who generates electric power from solar power (known as the Generation Unit) to export this power to the Distribution System (which is owned by DEWA). The Producer does this by entering into a connection agreement between themselves and DEWA. A Producer is entitled to a set-off between the power exported by their Generation Unit and exported to the Distribution System, and power consumed through the system by same property for which Generation Unit is producing power. The Connection Resolution sets out a Producer's obligations and penalties which are imposed on them if there is any violation. Producers must meet all equipment requirements for the Generation Unit, including safety and environmental specifications but these are only mandatory for Generation Units connected to the Distribution system. Up until now, lots of work has been carried out establishing a regulatory body for the energy sector in Dubai, with the creation of the Supreme Council for Energy and in supervising the electric and water sectors via the Bureau. However, those bodies need to play more effective role especially on safety and environmental standards. (For example, with solar Generation Units which are not connected to Distribution System). There is also already a legal framework for privatisation which is in line with international standards. However, here too additional efforts need to be made to encourage further private sector participation particularly in the area of renewable energy, e.g. by giving project companies tax and customs fee exemptions, if Dubai is to achieve its ambitious clean energy strategy targets, which are to provide 75% of the Emirate's energy through clean energy sources by 2050."

XYZ Bank v Mr ABC

The energy sector should be interested in the impact of DCC No. 117/2015 which is a remarkable case on enforcement of security interests as Mohamed El Khatib, Mazen Boustany and Ghada El Ehwany of Baker & McKenzie Habib Al Mulla explain.

Under the UAE Commercial Transactions Law (Federal Law No. 18/1993), a bank can only enforce a share pledge securing a debt after following a procedure whereby the debtor must be given seven days' prior notice by the lender prior to seeking authorisation from the court to proceed with the sale of pledged shares in the manner the court determines. However, Article 172(ii) of the Commercial Transactions Law states on the maturity of all or part of the debt, debtors can relinquish pledged property to the lender for the purpose of repaying a matured debt.

Case Detail

Citation
DCC No. 117/2015

Hearing date
February 2015

Court
Dubai Court of Cassation

The Dubai Court of Cassation has re-affirmed an interesting principle. If a debtor authorises a lender to bypass the specific pre-scribed procedure in Article 172 of the Comercial Transactions Law, the lender may directly sell the shares without following the court procedure. However, the Dubai Court of Cassation has ruled failure to produce written evidence proving debtor authorisation has been sought is not sufficient to rule out that the authorisation has not been granted. Lenders are entitled to ask the court to investigate the facts to consider the lender's claims and the Court of Appeal must either accept the request or reject it, as long as the rejection is based on solid grounds.

Mazen Boustany
Head of Banking & Finance
Baker & McKenzie Habib Al Mulla

THE FACTS

The party obtained credit facilities from a Bank against a pledge over the shares of a UAE listed public joint stock company. In 2011, he and the bank signed a re-scheduling agreement according to which the bank would partially release the pledged shares each time a repayment instalment was made by the debtor, in accordance with the method set out in the rescheduling agreement. In 2012, the debtor asked the Dubai Court of First Instance to order the bank to release the share pledge over a number of shares, in proportion to the repaid instalment. The bank submitted a counterclaim ordering the debtor to repay his outstanding debt plus 12% interest in line with the re-scheduling agreement. During the course of the hearing in February 2013, the bank sold a portion of the pledged shares to a third party by virtue of the power of attorney issued by the debtor in favour of them, covering the value of the outstanding debt. The bank then deposited the sale proceeds into the debtor's bank account.The debtor, revisited his claims and asked for the annulment of sale of the pledged shares on the basis such a sale was a violation of Article 172 of he Commercial Transactions Law, in addition to the partial release of the share pledge, plus compensation for the losses he had sustained.

The bank argued that subsequent to the counterclaim advanced by them, the debtor had approved the sale of the pledged shares and was made aware of the sale process. Both the Dubai Court of First Instance and the Dubai Court of Appeal held the sale of the pledge of shares was null and void on the basis procedures of Article 172 had not been followed, the value of the shares sold exceeded the debt amount and the sale was made in breach of re-scheduling agreement. The Dubai Court of Appeal also stated the fact the sale was made using the irrevocable power of attorney did not support the bank in its claim. The bank then filed an appeal against the debtor before the Dubai Court of Cassation.

THE DECISION

The Dubai Court of Cassation overturned the decision of the Court of Appeal. The Dubai Court of Cassation did not abolish or ignore the requirement to follow the procedures in Article 172 nor legitimise the sale of the pledged shares effected through the use of the powers of attorneys customarily issued by borrowers in favour of lenders in similar transactions. However, this judgment contains useful guidance on when exceptions can be made to following the procedures and the means of defense in support of such a position. The key points are:

- The aim of Article 172 is to allow borrowers seven days' grace if they decide to repay the outstanding debt before empowering the lender to take harsh enforcement action, i.e. make a forced sale authorised by the court. The Dubai Court of Cassation asserts the objectives of Article 172 are achieved if the borrower authorises the lender to sell the shares and so, the procedures in Article 172 may not be followed in such cases.
- Even if a lender has failed to independently prove the borrower's authorisation has been duly obtained, the Dubai Court of Appeal is not entitled to reject - without cause - the lender's request to open an investigation or interrogation 'without cause' if this is the sole evidentiary means enabling the lender to prove such a material defense. A material defense is one that could change the direction and outcome of the case. Under the UAE Law of Evidence, Federal Law No. 10/1992, as amended, parties may ask the court to examine the opposing party. In such cases, the court conducts its own eamination in addition to the exmination suggested by the requesting party. Minutes of the examination are transcribed.

Mohamed El Khatib
UAE Head of Dispute Resolution
Baker & McKenzie Habib Al Mulla

"An analogy is worth drawing with the recently enacted Federal Law No. 2/2015."

In many common law jurisdictions the formalities for enforcing a share pledge are straightforward and typically include registering the pledge in a security registry, allowing the lender upon default of its borrower to directly enforce such security and take possession of the security. This enables banks to immediately step-in, in the case of project finance, or to transfer shares to a third party, without resorting to court. In the UAE, self-help is not permitted. Enforcing a possessory security interest, including share pledges is cumbersome and entails court involvement. Failure to observe Article 172 of the Commercial Transactions Law renders the sale null and void, as per Article 176. Article 176 elaborates further and states following the maturity of the debt, borrowers may wholly or partially relinquish the ownership of a pledged asset to the lender and by way of set-off repay the outstanding loan.

In practice, and in an attempt to bypass this formality laid down by the Commercial Transaction Law, it is not uncommon that lenders obtain irrevocable powers of attorney issued by the borrower enabling the lender to transfer the shares in the event of default to complement a share pledge. However, the efficacy of these powers of attorney is problematic as it is deemed to circumvent Article 172 and may therefore violate Article 176. In addition, the fact the concept of 'irrevocable power of attorney' is not widely used and recognised in the UAE, but also rejected by a number of public notaries diminishes its usefulness as a tool. There is a view that the Civil Code being the cornerstone of law, in its Article 1473 actually provides that a pledgee can dispose of pledged property if he is acting as an agent for sale. Interestingly, the Dubai Court of Cassation indirectly confirms the Court of Appeal's decision invalidating the sale of pledged shares conducted by virtue of a power of attorney as it has not validated the sale or implicitly made any statement to that effect. From another perspective, however, the Court of Cassation empowered the lender to effectively exercise its right to use all means of evidence afforded by the UAE Law of Evidence in commercial matters, (i.e. requesting a court investigation in order to ascertain the facts to prove the borrower has indeed authorised the sale of the pledged shares) and emphasised that the statement made by the Court of Appeal on the basis of breach of Article 172 without an ascertation of the facts may be regarded as unfounded until a full investigation is conducted into the lender's claims the borrower had indeed allowed them to sell the pledged shares. As the court entrusted with the application of law, the Dubai Court Cassation does not look into the merits of the case but instead solely ensures the lower court of appeal has addressed all demands advanced by the parties and that it has correctly applied all the relevant laws and regulations. In this case, the Dubai Court of Cassation has fully and efficiently exercised its role. An analogy is worth drawing on this point with regard to the recently enacted Commercial Companies Law, Federal Law No. 2/2015 under which the controversial creation of pledge of shares of a limited liability company has been expressly permitted but regrettably Article 81 of Federal Law No. 2/2015 states that upon commencement of enforecement procedures a creditor and a debtor 'shareholder' may agree on the terms and conditions of the sale of the pledged shares, otherwise the sale is conducted through public auction administrated by the court. Although, the wording is not entirely clear, it suggests any agreement between the debtor and creditor must take place post maturity of the debt and after the start of the 'enforcement procedures'. This case and the position in the new Companies Law highlight a bygone age when borrower and lender were seen as having unequal bargaining powers so the legislator sought to offer protection. However, it is time the legislator streamlines the enforcement regime for movable assets in line with international practice.

Ghada El Ehwany
Attorney
Baker & McKenzie Habib Al Mulla

Selling the Sun

Financial markets have an increasing appetite for renewable energy sector investments. Arman Galledari and Nima Fath of Jones Day explain how this is transforming the Middle East and Africa's energy mix, as solar technology becomes more cost-effective.

The Middle East is a dynamic market for the energy industry. However, it has contrasting challenges which range from dependency on fuel imports for power generation in Jordan, to the very different issues faced by global hydrocarbon powerhouses, such as Qatar and Saudi Arabia. It is a region of energy diversity – and in some cases, disparity. However, there is at least one thing which unites its various economies, and that is a mutual recognition of the opportunity renewable energy presents to their long term economic and social development.

FINANCING RENEWABLES

This enormous energy transition is gathering pace, and its positive trajectory is being underpinned by two primary factors:

- the critical need for energy security to support growing populations and expanding economies; and
- the falling cost of clean energy generation.

As we have seen with the recent DEWA/ACWA power deal, securing project financing at favourable rates for utility scale renewables projects in the region is becoming more straightforward. For a number of years, the commitment shown by development banks, such as the World Bank, to supply cheap capital for clean energy projects in developing nations, including those across Africa has instilled a new sense of confidence in the minds of global financiers.

Africa is in dire need of renewable energy as its nations look to power themselves out of poverty and into sustainable economic development through clean, off-grid electricity. The International Renewable Energy Agency's Africa Clean Energy Corridor initiative calls for the accelerated deployment of renewable power across the continent, recognising that half of all electricity in Eastern and Southern Africa could come from clean, indigenous, cost-effective renewables by 2030.

The challenge in the Middle East has been slightly different. Financing renewables is more a question of long term commercial viability and return on investment, than confidence in the political and regulatory system. And, while technology costs have been high, it has been a challenge for sponsors or governments to offer the kind of power purchase agreements that make clean energy cost competitive. However, the energy market, like all global industries, is interconnected and gathering pace. Clean technology deployment in Africa, Europe and the Far East has driven down technology costs and allowed renewables in some Middle East countries to reach grid parity to fossil fuel generated electricity. The UAE is one such country. In 2015, a report released by IRENA and the Masdar Institute of Science and Technology revealed that solar and wind are now the cheapest sources of new energy supply in the country, and clean energy realisation could result in energy system savings of almost $2bn annually by 2030.

Recent renewable energy projects, such as the new DEWA/ACWA project, also show this, as that deal in particular is offering the lowest cost power from renewables anywhere in the world. A consortium led by Saudi Arabia's ACWA and Spain's TSK was selected based on alternative proposal for 200MW with LCOE of 5.84869 USD cents/kWh. Clean energy at this cost has only been made possible by cheap and secure long term financing.

THE CHANGING FINANCING LANDSCAPE

The new financing landscape, together with a renewed global effort to tackle climate change following the COP21 Paris Agreement is also fuelling ambition. The UAE has upped its target by almost 500 per cent, which would see the share of renewable energy in its energy mix increase to 24 per cent by 2021. By its own admission, part of this increase was made possible by falling costs of solar energy. Although, domestic roof top solar energy generation, an area where the UAE has begun paving the way through various regulatory framework adjustments, may also play an important part in this.

However, this ambitious trend is not only evident in the UAE. Oil rich Saudi Arabia has also promised to export several GWs of electric power instead of fossil fuels, with large-scale solar and wind projects in the pipeline, and is similarly seeking to redefine its energy leadership.

Further afield, Egypt's re-emergence and redevelopment will be underpinned by a renewables programme. In fact, they are currently preparing a law that would allow for state-owned land to be made available for renewable energy projects in exchange for 2% of the energy produced. Their Feed-In Tariff Program also aims to generate up to 2.3 GW through solar power and 2 GW in wind energy.

This progress demonstrates the new confidence shown by private financiers in clean energy's viability across the Middle East. Even in a low oil price environment there is sufficient trust in the cost competitive nature of clean energy, and in its long term cost benefits, to make it a smart investment and a prudent risk. According to the Oxford Institute for Energy Studies, renewable energy, especially solar power, (given the GCC's unique advantage) is set to become a cost-competitive alternative to conventional fossil fuels if the full opportunity cost of

domestically consumed petroleum resources is fully priced into the regional energy system.

That said, recent oil price volatility has to a small extent negatively affected the world's appetite for renewable energy investment. However, given that the short to medium term oil trend is for increased oil demand, this may create the capital to fund the renewables programme. According to the Organization of Petroleum Exporting Countries (OPEC), global daily demand for oil will rise from around 91 million barrels a day in 2014 to 111 million barrels a day by 2040. So the quest for alternate energy is a transition, and the argument for fossil fuels funding this transition may prove to be a valid one.

ROLE OF KEY REGULATION

The key to successfully financing clean energy projects with utilities of scale in today's landscape is establishing the right regulatory frameworks to incentivise investment and breed confidence in financiers that their capital investment is a smart long term decision.

Understanding the elements of a deal that could keep financiers up at night is an important part of this process and there are several aspects of any deal which fall into this category. They range from a country's credit rating and track record for fulfilling payment obligations to currency fluctuations, particularly as equipment and construction costs have historically always been in Dollars.

Success for sponsors is about building a strong enough case for investment that demonstrates viability. The development aid discussion is still a valid one but it is no longer enough to support the rapid scale-up of renewables needed across the Middle East and Africa to make this transition possible. It is a testament to public and private sector players that through the evolution of the renewable energy markets, the role of innovation in driving costs down; and the pathway provided by multilateral banks to engender confidence among private capitalists, we can now demonstrate renewable energy is not only the answer to a myriad of social and environmental challenges in various countries across the world, but also as an investment that pays.

Experience tells us that for international electrical utility companies, independent power producers, electric transmission companies, developers and owners of wind, solar and other renewable energy sources, construction, engineering and environmental firms, the discussion is moving from 'what financiers can do for us', to 'what we can do for capital investors' – and that is a healthy situation for a core industry like energy.

In developing economies, there is a need for a degree of risk assurance and subsequent political risk insurance for funding. Previous involvement of international organisations, like the World Bank can give a degree of relief to lenders or sponsors. However, before banks and lenders come on board, other structural parameters such as concessions offered by the host country, bankability, power purchase agreements, and operation and management processes, must be developed.

THE FUTURE IS BRIGHT

The significance of renewable energy progress in the MENA region and around the world is considerable and is making itself felt in the UAE. As the market accelerates and matures, it will continue to pave the way as dynamic activity attracts smaller players, who in turn help drive innovation and push down costs. This process should further strengthen renewable energy's viability and enable it to attract yet more commercial money. At that point, the scale of development will reach unprecedented levels.

Contracts & Currency De-pegging

Recent falls in oil prices have brought speculation about currency de-pegging, Michael Webb of Hadef & Partners LLC looks at the possible impact on power supply contracts.

The dramatic fall in crude prices has led to speculation that some oil-producing countries may be forced to abandon their currencies' fixed exchange rate pegs, which are typically to the US Dollar. The fall in oil revenues has led in some cases to ballooning budget deficits for countries heavily dependent on oil production, causing these countries to deplete their foreign reserves. This, in turn, can create pressure on these countries to devalue their own currency.

The UAE is not, however, thought to be one of the countries under the greatest pressure to abandon its Dollar peg, for a number of reasons, including:

- The Dirham/Dollar peg has remained in place during previous periods of low oil prices.
- The UAE has had considerable success in diversifying its economy away from a reliance on oil revenues, so is less susceptible to a dramatic fall in the oil price.
- The UAE has greater fiscal strength than many other oil-producing countries, and considerable foreign reserves.

Nevertheless, it is worth considering what provisions might typically apply to the parties to a contract if the Dirham/Dollar peg were to be abandoned, revised or replaced.

THE BASICS

For nearly forty years, the UAE Dirham has, had a fixed exchange rate against the US Dollar. If this fixed exchange rate was removed or amended, there could be a material adverse effect on the revenue streams flowing from supply contracts, if, for example, costs are incurred in one currency and revenues are earned in another.

Michael Webb
Partner
Hadef & Partners

THE LEGAL POSITION

Before beginning an analysis of typical contractual provisions, it is necessary to establish how, and by whom, the Dirham/Dollar peg would be removed or amended. In such a case, the starting point is the UAE Constitution, which governs legislative, executive and jurisdictional matters between the UAE at a Federal or Union level and the individual Emirates which make up the Union.

Article 120 (6) and (13) of the Constitution states that:

'The Union shall have exclusive legislative and executive jurisdiction in the following affairs:
(6) Union finance.
(13) Currency board and coinage.

Article 121 of the Constitution states: *"Without prejudice to the provisions of the preceding Article, the Union shall have exclusive legislative jurisdiction in the following matters: … banks.'*

In addition, Article 122 of the Constitution gives individual Emirates jurisdiction in all matters which are not assigned to the exclusive jurisdiction of the Union by Articles 120 and 121 of the Constitution.

Further details on this subject are found in Federal Law No. 10/1980, Establishing the UAE Central Bank and making certain provisions on the monetary system and the organisation of banking.

For example, Article 62 of Federal Law No. 10/1980 states, 'The official exchange rate of the Dirham shall be determined by Federal Decree on the proposal of the majority of the Board [of the Bank]…. The said Decree shall be considered to be effective from the date on which it is issued.'

This means any removal or amendment of the Dirham/Dollar peg will be enacted at a Federal level, rather than individual Emirate level, and this could have particular significance.

CONTRACTUAL PROVISIONS

Long term supply contracts, such as those common in the power and water industry, typically contain provisions under which relief can be sought by a party in the event of unforeseen circumstances, such as 'Force Majeure' or 'Government Action or Inaction'.

A contract may list a number of circumstances as constituting 'Events of Government Action or Inaction'. Such lists may be exclusive, or may be qualified by a phrase like, 'includes but is not limited to'. One of the common circumstances constituting an Event of Government Action or Inaction is a change in law.

However, a typical provision will expressly state that some of the circumstances constituting Events of Government Action or Inaction must result from the action or inaction of a 'governmental instrumentality' of a Government of one of the Emirates,

rather than a governmental instrumentality of the Federal UAE Government.

As a result, it would be a matter of contractual construction whether a change in law amounts to an Event of Government Action or Inaction if enacted at Federal rather than the Emirate level.

As removal or amendment of the Dirham/Dollar peg would require a UAE Federal Decree, issued upon a recommendation of the Board of the UAE Central Bank, subject to the wording of individual contractual provisions, such circumstances may amount to a change of law, and therefore an Event of Government Action or Inaction.

Parties seeking relief as a result of an Event of Government Action or Inaction will usually need to establish that, as a result, they have incurred increased cost.

Cost may typically be defined in the relevant contract as follows, 'Cost' means, with respect to any Event of Government Action or Inaction, any cost or expense resulting from, or otherwise attributable to, such Event of Government Action or Inaction, that is incurred or suffered by [the party] and not otherwise covered by the receipt of insurance proceeds (which costs or expenses may include without limitation (i) capital costs, (ii) financing costs, (iii) costs of operation and maintenance and (iv) costs of taxes imposed on or payable by [the party], or (v) reduction in the revenue received by [the party]).'

In this example, if a removal of the Dirham/Dollar peg resulted in a reduction in the revenue received by a party, that party would have a right to seek relief by invoking any price adjustment procedure set out in the relevant contract. Such a procedure would typically include:

- giving notice identifying the Event of Government Action or Inaction and the net amount of cost involved;
- the parties meeting to discuss the matter and trying to agree on a pricing adjustment in order to secure the same net economic return to the claimant party as there would have been if such costs had not been incurred;
- in default of agreement between the parties, the matter would be referred to a third party expert for determination;
- a de *minimis* rule, whereby a claim can only be asserted by a party when its aggregate claim exceeds a certain financial threshold.

Under a typical sophisticated long-term supply contract, the removal or amendment of the Dirham/Dollar peg could amount to an Event of Government Action or Inaction.

So any party which incurs increased costs or receives a reduction in revenue as a result could also be entitled to claim an adjustment of the payments made to it under the contract, in order to maintain its net economic return. However, this would always be subject to the procedures set out in the contract, including any de *minimis* rules.

Although the UAE is not thought to be one of the countries under the greatest pressure to abandon its Dollar peg, and has made significant progress in diversifying the economic structure of the country away from a reliance on petrochemical wealth, there is merit in companies involved in energy supply reviewing their contractual positions, so that they are aware of the issues and have suitable strategies in place.

Renewable Commitment: Does the Paris Agreement Change the World?

As many wonder about the Paris Agreement's less prescriptive approach to climate change, Françoise Labrousse and Nima Fath of Jones Day look at what it means to the UAE and other countries.

In 1992 the United Nations Framework Convention on Climate Change (UNFCCC), or the Convention was signed in Rio, with the aim of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous (human) interference with the climate system. It sets out the basis for tackling climate change at an intergovernmental level and provides a framework for the development of more specific commitments and agreements in line with its overriding objective. Each year since ratification, UNFCCC's signatories have convened at the 'Conference of the Parties' (COP) to improve the architecture for achieving this objective. The most recent COP was held in Paris in 2015 and concluded with the Paris Agreement.

THE PARIS AGREEMENT'S AIM

The Paris Agreement, the first global agreement addressing climate change in an adaptive and hopefully enduring way, with buy-in from both developing and developed nations was adopted by 195 countries at the UNFCCC's 21st COP (COP21) in December 2015. Its main, and arguably ambitious objectives are to:

- hold the increase in global average temperature to well below 2°C above pre-industrial levels and make efforts to limit temperature increase to 1.5°C above pre-industrial levels;
- increase ability to adapt to climate change impacts, and foster climate resilience and low greenhouse-gas emissions development, without threatening food production;
- make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development; and
- ensure greenhouse gas amounts emitted by human activity do not exceed levels the Earth can absorb naturally, from some point between 2050 and 2100.

This is a shift in the global approach to addressing climate change and is different from its predecessor, the Kyoto Protocol (which bound its signatories to 'top-down' imposed emission reduction targets), as each country self-determines its greenhouse gas reductions; and it uses emissions reporting as a basis for creating accountability and pressure on developed and developing nations.

SELF DETERMINED TARGETS

Each country has to submit an Intended Nationally Determined Contribution (INDC) or the emissions pledge it intends to achieve based on its analysis of what is feasible. INDCs should be a country's 'highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'. Successive INDCs, must be communicated every five years from 2020, and figures are expected to ratchet upwards. Countries must communicate their INDCs through a submission portal, and they are then published online by the United Nations Framework Convention on Climate Change. However, INDCs are not legally binding and there are no penalties for those who fail to meet their pledged targets. There has been some criticism of this 'soft' approach but a compromise was needed to ensure all major contributors of greenhouse gases were comfortable with the Agreement. This shift away from legally binding commitments to transparent record-keeping and diplomatic considerations recognises that nation-level policies are likely to be the most effective mechanism for implementing emissions-reducing measures on a global scale.

STOCKTAKE EVENTS

'Stocktake' events will occur every five years (with the first in 2023) so the parties can adapt their approach to climate change. At this meeting, parties to the Agreement will assess collective progress toward its long-term goals and if more needs to be done. Attendees at these meetings, are asked to consider 'mitigation, adaptation, and the means of implementation and support.' The dialogue and outcome of the stocktake meetings then helps inform countries as they review their INDC pledges every five years under the ratcheting mechanism. The first stocktake is not until 2023 but the Agreement calls for a 'facilitative dialogue' in 2018 to assess progress toward long-term climate goals.

'*Common but differentiated responsibilities and respective capabilities*' is a key pillar of the UNFCCC, and the Paris Agreement recognises this by distinguishing between developed countries (listed in Annex 1 of the Agreement) and developing

countries (or all others including Brazil, China and India). Developed countries are accountable to a higher degree of responsibility in reaching net zero emissions.

This includes:

- a commitment to providing developing countries with financial support for climate change initiatives. Currently this is set at US $100 billion per year (about 8% of world's military spend) but the amount can be reviewed in 2025;
- recognition by developed countries of the 'loss and damage associated with the adverse effects of climate change'. The Agreement lists ways developed countries could help climate-vulnerable developing countries adversely affected by climate change without apportioning liability or requiring compensation.

Françoise Labrousse
Partner
Jones Day

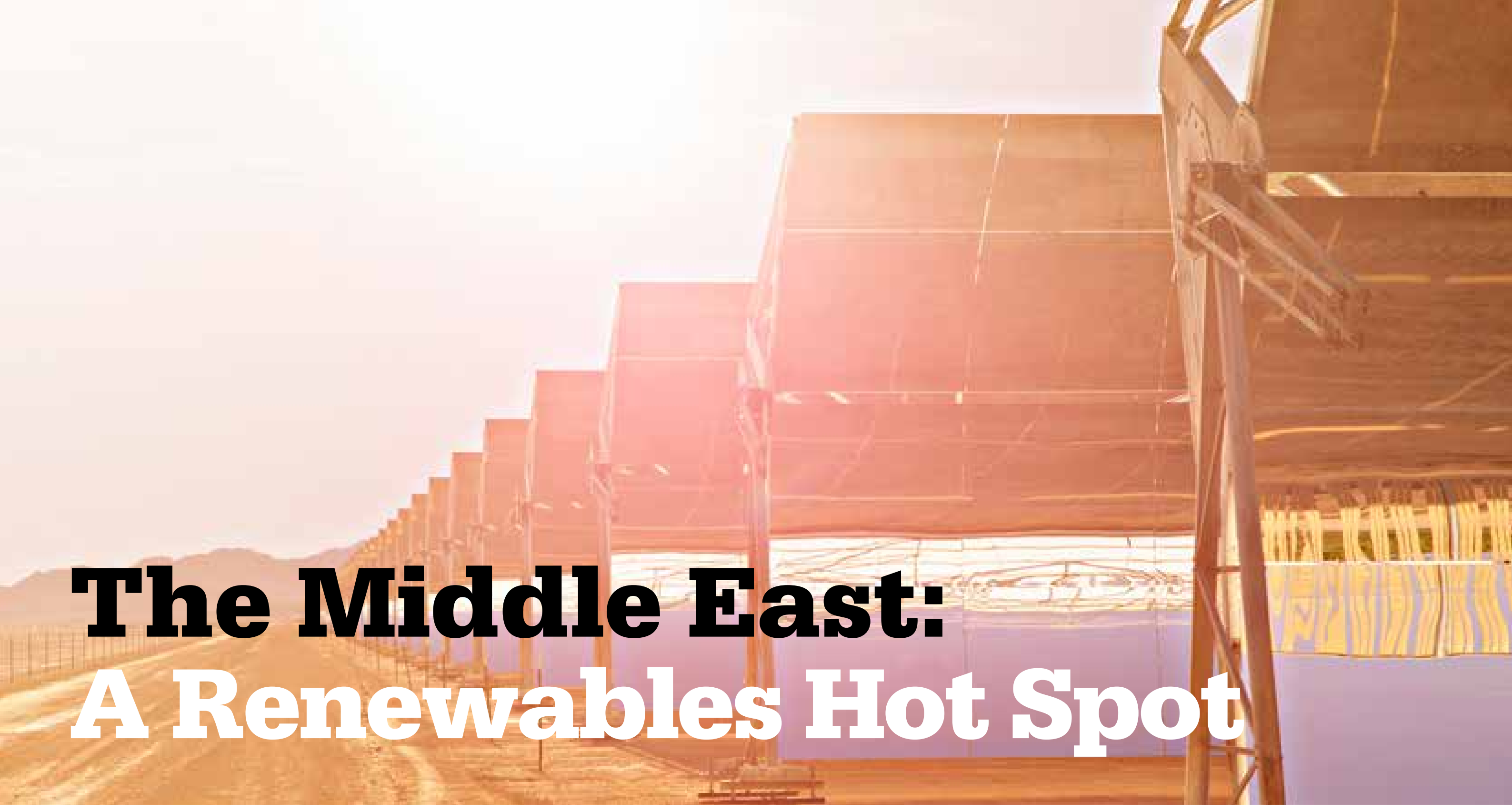
THE UAE CONTRIBUTION

The UAE submitted its INDCs before COP21, setting itself a target of increasing its clean energy contribution to its total energy mix from 0.2% in 2014, to 24% by 2021. Examples of how the UAE is working towards these goals include:

- constructing a 1 GW Mohammed bin Rashid Solar Park in Dubai and delivering clean energy to the national grid through Shams 1, a first-of-its-kind concentrated solar plant in Masdar City;
- introducing energy efficiency standards for light bulbs, water usage, air conditioning, refrigeration and other similar units. For example, through the Emirates Authority for Standardisation and Metrology, inefficient lighting products are being phased out in favour of safe, high quality energy efficient products, with an estimated saving of 340-500MW per year;
- Dubai Electricity and Water Authority's (DEWA) installation of 100 electric vehicle charging points;
- an integrated 'new-energy' industry, via Masdar, the region's largest clean energy supplier;
- developing Al Reyadah, the region's first commercial-scale network for carbon capture, usage and storage, which will capture and compress emissions at a steel manufacturing facility, transport them to oil fields for use in enhanced oil recovery, and ultimately stored them underground;
- making the Green Building Regulations and Specifications mandatory in Dubai from 2014; and
- adopting an integrated approach to sustainability by combining academia, research and development, investment and technology deployment, to spur innovation and investment in clean energy as is seen by the development of Masdar City.

WHAT'S NEXT

For now, parties have only adopted the Paris Agreement. The next step will see it deposited at the UN in New York on 22 April 2016 and opened for signature. It will enter into force and become binding only when at least 55 parties to the UNFCCC, representing at least 55 percent of total global greenhouse gases deposit their instrument of ratification.



The Middle East: A Renewables Hot Spot

Angela Croker and Paul Mansouri of Norton Rose Fulbright look at the developments in three key MENA countries.

In 2014 and 2015, a record number of solar projects were awarded in the Middle East. Renewable energy, particularly solar energy, has always held great promise here, although historically, the region's reliance on its fossil fuel reserves and the high cost of renewable energy generation meant governments did not prioritise such projects. However, as costs reduce this is changing. Supply security and sliding oil prices are also forcing MENA countries to diversify their energy sources.

MOROCCO

Morocco has one of the world's highest average yearly solar irradiation levels, which is up to 30 percent higher than the best European sites. It also has one of the MENA's most ambitious clean energy targets. Forty-two percent of its installed capacity is scheduled to be provided by renewable energy by 2020 and it is well on the way to meeting this target as renewables account for 32 percent of Morrocco's installed total power capacity. Morrocco's Agency for Solar Energy (MASEN) was established as a public-private venture in order to install 2000MW of solar generation capacity by 2020. This programme includes implementation of five solar power projects in the Noor Solar Complex in Ouarzazate, which is expected to be the world's largest solar park. The first phase, the 160MW Noor 1 project, was expected to be operational by the end of 2015, and Noor 2 and 3, are scheduled for 2017.

EGYPT

In 2014, the Egyptian government announced plans to develop up to 4,300MW of renewable generation, including 2,000MW of large scale solar PV projects and 2,000 MW of wind generation. A feed-in-tariff regime was announced in September 2014, inviting developers and consortia to submit proposals for wind and solar projects which would be paid a set tariff for energy produced. One hundred and ten qualified applications were announced in 2015, including 69 large-scale solar facilities and 28 wind facilities. So far, no PPAs have been signed with the Egyptian Electricity Transmission Company under this regime but the first wave of projects should shortly enter into PPAs. Despite these delays, the Egyptian Government remains committed to this programme and Egypt will be one of the MENA's key market opportunities for renewable energy projects.

JORDAN

With no oil or natural gas reserves, Jordan relies on imports for over 95 percent of its energy and currently produces 1% of its energy from renewable sources. Jordan has taken regulatory steps to ensure it can meet its 10% target for renewable energy sources by 2020, enacting a renewable energy law in 2012, the first in the region which allows investors to identify and develop grid-connected electricity production projects through unsolicited or direct proposal submissions.

The national electricity company and regional distribution companies must also purchase energy generated from renewable sources. In 2014, in Government held renewable energy auctions 12 PV projects with a cumulative capacity of 200MW and two wind farm projects were awarded. The results of Jordan's second round of renewable energy auctions were announced in 2015, with substantially lower tariffs than those in the first round, and four 50 MW projects were awarded. The Government wants to install 1000MW of renewable energy capacity by 2020, and the recent awards of solar and wind projects are a clear indication of their plans to meet such targets.

Going Through the Roof

Environmental and legal conditions in Dubai are making roof top solar power more attractive. Sohail Barkatali of Hogan Lovells explains the steps potential solar power producers must take.

"Dubai receives over 10 hours of daily sunlight and has about 350 sunny days per year. Total solar energy is approximately 6.5kWh/m2/day and direct solar radiation is 4-6 kWh/m2/day, which would yield between 2000-2100kWh/m2 annually," Sohail Barkatali of Hogan Lovells explains. "Cost of renewable energy is also reducing, and the world's lowest bid for a 100 MW solar photovoltaic (PV) project development (less than 5USc/kWh) was received by Dubai Electricity and Water Authority (DEWA) for the Mohammed bin Rashid Al Maktoum solar park. Solar power is an attractive, viable power generation option."

DUBAI'S GREEN ENERGY POLICY

"In Dubai, it is the Dubai Supreme Council of Energy, established by Dubai Law No. 19/2009 that is responsible for energy. It is responsible for developing, planning and co-ordinating policy with energy bodies and authorities to deliver adequate energy sources with a balanced approach which protects the economy. Dubai wants to be a world role model for energy security and efficiency while supporting its economic growth through security of supply and efficiency in an environmentally friendly and sustainable manner," notes Barkatali. "Policy for for distributed solar power emanates from Dubai's Integrated Energy Strategy 2030, setting the strategic direction in securing a sustainable supply of energy and enhancing demand-side management for water, power and transportation fuel. Distributed solar is within DEWA's domain and as the vertically integrated electricity and water utility, it has embarked on various strategic projects, including smart grid initiatives."

Sohail Barkatali
Partner
Hogan Lovells

"One of these involves encouraging households and building owners to install solar PV panels for self-consumption and export any surplus to DEWA, which supports the Emirate's Smart Dubai and the UAE Green Economy for Sustainable Development initiative objectives."

ROOF TOP SOLAR LAW

"The ability to generate electricity onsite will be particularly attractive to large commercial units who may pay a higher premium for electricity. However, DEWA can specify the maximum amount of electricity which can be exported back to the grid by each generator. Although, this limit has not been yet been set."

"Those covered must be connected to the distribution system, generate energy from solar power and hold an account for specific premises (which is known as the consumption account) which imports metered power from the distribution system," Barkatali notes. "It does not apply to projects or contracts concluded as part of an IPP project. By law DEWA must provide access to its distribution system to people generating solar energy power. It must review and manage connection applications, conditions and the terms of the connection agreement. DEWA determines the annual connection cap (or the maximum electricity generation capacity that may be connected to the distribution system in any calendar year) and sets the maximum amount of generation related to a consumption account."

"It is not permitted to connect a solar power generator to the distribution system without DEWA's prior consent. Those wishing to connect to the system need to submit an application to DEWA and enter into an agreement with them, which sets out the terms and conditions for operating solar power generation units and their connection to the distribution system (called a Connection Agreement). The law prescribes penalties and remedies for violations and fines range from 3,000 to 150,000 AED and can result in suspension or cancellation of a Connection Agreement," Barkatali explains.

PRACTICAL STEPS

"Step one in this process is to engage a consultant and contractor who is registered with DEWA and receive a technical and financial offer from that consultant. So far 33 consultants and contractors have been trained by and registered with DEWA. To proceed, producers must apply to DEWA for a no-objection certificate (the DDRG Solar NOC). Once this is received, they can submit a design approval application to the authority and a Building Permit application to Dubai Municipality. However, electrical installation work must comply with DEWA's regulations for electrical installations (DEWA Regulations for Electrical Installations 1997 Edition, DEWA Power Supply Guidelines for Major Projects March 2013, DEWA Distribution Substation Guidelines 2014 Edition, DEWA Design Requirements and Guidelines for MV (11kV-22kV) supply, December 2008 and DEWA Standards for Distributed Renewable Resources Generators Connected to the Distribution Network Edition 2015)," says Barkatali.

"Once approved, DEWA notifies the producer of estimated costs and comments on the application. After the connection fee is paid, DEWA conducts the work to make connection feasible. Producers can then start constructing the solar PV plant. Once this is installed and civil and electrical works are complete, producers make an Inspection Application to DEWA with supporting documents, including a Building Completion Certificate from Dubai Municipality, passport copy/copy of trade licence, a Dubai Municipality approved affection Plan/other utilities affection plan and building owner's NOC."

"After site inspection DEWA installs meters, one bi-directional meter measuring power supplied to and energy consumed from the distribution system and one measuring electricity generated by the solar PV facility. The cost of these is included in the connection fee."

"The solar PV facility is then energised and connected to the Distribution System, after commissioning and performance tests. DEWA then issues a final inspection report certifying compliance of the solar PV plant with DEWA rules, and electricity production can start."

"However, producers are responsible for operation and maintenance needs of the plant and for insurance."

"The parties' commercial and regulatory relationship, including rules on inspection are set out in the Connection Agreement."

"Producers must ensure their equipment complies with requirements in DEWA's Standards for Distributed Renewable Resources Generators Connected to the Distribution Network and any other applicable regulations. The maximum active power a producer can feed into the Distribution System at any plot cannot exceed the sum of the maximum power which can be drawn from the Distribution System at that plot at any time. DEWA may also specify other technical limits."

PAYMENT AND ADJUSTMENT

"There is no payment by DEWA under this scheme. They determine the difference between energy imported from and exported to the Distribution System by applying the existing tariff. The tariff for all categories of consumer range from 23 UAE fils/kWh to 38 UAE fils/kWh, depending on consumption. A fuel surcharge may also apply."

"If energy imported by a producer exceeds energy exported to DEWA, the excess is billed to the producer. Where energy exported exceeds that imported, there is no charge and the excess is carried forward to the next billing period. Surpluses can be carried forward without limitation in time or value. However, if the consumption account is closed, any surpluses carried forward are considered to be forfeited. DEWA also has the right to stop imports and exports of energy if an account has been disconnected for non-payment," explains Barkatali.

Getting the Best from Shams Dubai

There are some restrictions users of Shams Dubai need to be aware of. Gurmeet Kaur and Sacha Bacco of Eversheds suggest practical ways to get the best from the scheme.

The Shams Dubai scheme allows private and commercial electricity consumers to install solar generation equipment on their own property and connect it to the DEWA grid. It was established as a result of Dubai Executive Council Resolution No. 46/2014, which covers the connection of generators of electricity from solar energy to the Dubai power distribution system. This applies to all generators with a consumption account in Dubai, including private development zones and free zones but not to DEWA themselves. The Decision allows building owners (or customers) to generate electricity on their premises and use any electricity generated which can be offset against their bills. If surplus energy is generated, it is transported back to the grid and a credit is put against the customer's account with DEWA. There is no time limit on the period during which excess generation credits can be banked, although the customer does need to still be on the premises.

Gurmeet Kaur
Head of Projects
Eversheds

The ability to generate electricity onsite will be particularly attractive to large commercial units who may pay a higher premium for electricity. However, DEWA can specify the maximum amount of electricity which can be exported back to the grid by each generator, although, this limit has not been yet been set. Unlike other jurisdictions, like Jordan, electricity cannot be generated in one location and transported to another location through the distribution or transmission network. Electricity generated under the Shams Dubai scheme must be used on the site it is generated. However, it is possible for electricity generated to be consumed in linked properties which have one consumption account. There can also be more than one consumption account linked to a generator. There are potential ways of ensuring credits are not lost if a DEWA customer moves.

The customer can opt to buy out the PV system and pay the developer appropriate compensation, to novate the contract to the incoming tenant or owner, with a suitable extension of the term to cover any vacant period or to relocate the PV system to the new premises at the customer's cost and continue the arrangement for the remainder of the term. However, if you opt to move equipment, the risk of potential damage to the roof and who will bear the cost of any damage needs to be considered too. Solutions include leaving the mounting structure on the property but removing the rest of the equipment.

This payment approach is different from other jurisdictions. The net metering approach used in Dubai, does not provide a long-term, secure incentive for PV system installers, although there is no additional cost for the government or electricity company. It only works if the cost of PV systems is cheaper than the cost of grid imports. As a long term investment, the modelling has to be based on not only on today's prices but also projected prices until the investment is paid off. Grid import prices are set by the government and it is anticipated they will continue to rise in line with inflation, unless there are external influences. However, at present the legislation is fairly high level and does not contain all the details of how the scheme will work in practice. For example, it does not explicitly deal with the involvement of developers. There appears to be a developing market where developers are financing, installing, operating and maintaining the PV system on behalf of customers for a fixed period in return for compensation from the customer.

Sacha Bacco
Associate
Eversheds

These developers can potentially be reimbursed using a fixed tariff which escalates over time or based on a discount on the prevailing retail price. There are various ways contractual arrangements between developers and customers can be structured. For example, in the UK developers can lease airspace above relevant properties. Although in Dubai, airspace lease is not possible so a form of usufruct agreement or license containing relevant provisions is used. Contractual documents have to deal with various risks including risk of change of law, force majeure, redevelopment, what happens if generating costs increase and suitability of the roof.

Lower for longer

The current global oil price downturn has been quite different from other past downturns. Rupert Harper of Clifford Chance LLP discusses the Middle East legal impacts and trends his firm has seen.

When we first started talking about the crude oil price crash at the end of 2014, it was clear this downturn was different from the crash of 2008, which lasted only a few months before prices recovered. Brent Crude had traded consistently around or above $100/barrel for five years and above $50/barrel for nearly ten but since the start of 2015, it has been between $25-$65 per barrel. Some commentators have suggested there are parallels to the impact of new North Sea supply in the 1980s, where oil traded between $10-$30 for most of the decade. We cannot know how long this will last, but we do know it is having a significant impact on a range of legal issues.

Rupert Harper
Partner
Clifford Chance

INCREASED DISPUTES

As in previous market shifts, there has been an increase in requests for contentious advice from clients, particularly in the construction sector. There are predictable disputes involving non-payment and non-completion of work. Whether legitimate or not, we have seen some developers claiming inadequate performance as a method of deferring payments to manage restricted cash-flows.

We have seen more scrutiny of cost-overruns, variations and time extensions and perhaps longer periods between claim and resolution. Some of this is caused by private developers who are unwilling or unable to tolerate additional cost or revenue deferment and some has been passed-on from government oversight committees and auditors, who are now more conscious about preserving government 'take' by limiting costs. We are also seeing some developers preparing to take harder lines by adding in-house dispute capabilities or partnering with external counsel to access on-call contentious advice.

Poorly drafted contracts are making things more difficult to manage in this environment. Despite the current increased pressure to reduce legal spend, in our recent experience those investing in creating robust contracts which take into account these high-risk areas have generally ended up in a better position. Legal fees for creating a co-ordinated suite of up-to-date, best-practice transaction documents or precedents can be a fraction of the cost of fees on a single dispute or the costs of a dispute loss.

DESCOPING

The current market is being approached very differently by some governments and developers. With some notable exceptions, many in the region have avoided announcing project cancellations but even where projects are proceeding, we are seeing a trend towards discussing project deferment or de-scaling, which can create a number of specific considerations. At initial stages, we are seeing greater emphasis by developers on creating contract flexibility. Invitations to tender need to be structured to allow cancelation or delay, without claims. However, for example, more detailed mechanisms such as limited notices to proceed, extendable notices to proceed and phasing options can be structured to allow more time flexibility, while managing some level of pricing certainty past typical tender validity periods. More attention is also being paid to suspension clauses, with added nuance given to allocation of standby, demobilisation and remobilisation costs in differing circumstances. Specific consideration has also been given to potential de-scoping or de-scaling, as recent case law (such as *MT Hojgaard a/s v E.ON Climate and Renewables* TCC [2013] EWHC 967 and [2014] EWHC Civ 710) has highlighted the pitfalls in removing scope of work from a contract. These include the difficulties of pricing such omissions, which can lead to bitter payment disputes.

TAX RISK

In GCC countries with low-tax or no-tax regimes, deficits in oil funded budgets have created a greater chance that new taxes like VAT could be implemented in the near future. In February, the UAE announced the implementation of 5% VAT from 1 January 2018. Similarly, in various jurisdictions including the UAE and Oman, government subsidies are being scaled back or removed from utilities. The result is increased risk of near term cost volatility, and the question of which party is best placed to bear such risk. This has increased focus on tax provisions, which were once seen as of secondary importance, in regional contracts. Change of law provisions are also being carefully considered as one of the primary mechanisms to allocate the residual risk. Developers often push for change in law relief to be limited to changes which are unforeseeable, but the question is are current trends now taking some such changes out of this category.

WITHDRAWALS

This downturn has hit energy and petroleum (E&P) companies in the Middle East at a time when many

were already facing political and security issues. Producing assets in Libya have been severely affected by conflict and instability there, with force majeure declared in relation to a number of production fields and attacks on key installations and infrastructure. Promising assets in Iraq and Yemen have also been clouded by these concerns, with the trend to hunker down and 'wait it out' severely reduced by the impact of decreased cash reserves, especially for junior E&P companies.

We have also seen companies taking a view on the long-term economic prospects of marginal or exploratory blocks, weighing the terms of the minimum exploration and work commitments and any contractual relief available to them under the terms of their concessions.

We have been advising many entities on the suspension and ultimate withdrawal from some regional blocks and concessions. In some cases governing agreements allow a clear path for this, but in others, creativity and negotiation is needed to get a favourable resolution. We have also worked with several clients seeking successful negotiated outcomes on force majeure, commitment extensions and payment issues. Despite this, a number of entities have discussed entering new, uncertain markets, including Iran, in order to find high-quality, low-cost production. Others are seeing opportunities unique to a low-price context, e.g. fee-per-barrel arrangements have suddenly become more attractive, sadly for host-governments who had originally driven a hard bargain.

M&A ACTIVITY

At the start of the pricing downturn, many predicted low prices would lead to an increase in M&A activity in the oil and gas industry, as under-capitalised companies tried to sell themselves or non-core assets to salvage shareholder value, and well capitalised companies took advantage of this. Several commentators forecasted 2015 would be a record year for oil and gas M&A. We have seen the fruition of market consolidation in the historic trend of mega mergers, such as Shell/BG, Halliburton/Baker Hughes and Schlumberger/Cameron.

However, the predicted wave of activity has not yet occurred, and in general the market in the Middle East has remained relatively quiet, partially in line with the global trend. The Merrill Corporation has noted while various factors are forcing companies in the sector globally to explore all their options, beyond the mega-deals, overall deal value has declined in the sector and deal volume in 2015 was softer than 2014.

Apparently some people are waiting for signs of a market bottom, and others are assessing and reassessing tactics and long-term strategy in a period where the industry's future (or at least the value of certain plays and assets) has been questioned. Government related entities, with strategic mandates to increase reserves and production, have discussed with us their interest in taking advantage of the low price environment but, like others in the industry, are being cautious to date.

They are also not in a position to use scrip as an acquisition currency.

As in any other market, pricing uncertainty and volatility is a key issue which holds back deal-making, as buyers, concerned about further downside risk, do not want to 'catch a falling knife' and sellers are tempted to hold out in the hope of pricing improvement.

E-Merging Trends

Many expected merger activity to change with the fall in oil prices. Jason Royschuk of Pinsent Masons explains the findings of research his firm has carried out on this area.

Recent research carried out by Pinsent Masons and Mergermarkets does suggest there is a general sense in the market, M&A activity will increase this year as the price volatility settles. Our report 'Ahead of the Curve: Challenge and Opportunity in the Global Oilfield Services Industry', found over 80% of oilfield services companies and oilfield services focused private equity firms surveyed expected M&A activity to increase this year, and over 70% expected their own firms to be involved in it. Our research found financial distress was less acute at this stage than may have been anticipated. Most companies in the OFS space at least are already looking more to the opportunity than the challenge.

Jason Royschuk
Senior Associate
Pinsent Masons

Companies with strong balance sheets are in a particularly good position to take advantage of the opportunities, although lower oil prices make diligence even more important as companies' past practices are scrutinised. Issues involving corporate governance of oil and gas companies come to the fore. Employment arrangements and legacy issues also present a greater obstacle to getting transactions done. Joint Operating Arrangements are tested and may need to be future proofed for the lower for longer era. Regardless of where companies are in the M&A cycle, existing Joint Operating Agreements (JOA) require deeper consideration as parties can become increasingly misaligned as their financial positions and ability to adapt to the lower for longer environment varies. For example, sole risk provisions, are more likely to be invoked if parties have different financial capabilities. The JOA should provide flexibility for financially robust companies to proceed on sole risk projects where their partners may not be able to. If JOAs don't have this flexibility, the acquisition process can provide an opportunity to renegotiate the provisions of the JOA. Operators are also facing increased attention around how they discharge their functions from other co-venturers. We are now more likely to see greater restrictions on co-mingling of funds and more prescriptive Authorisation for Expenditure processes in JOAs.

This market presents several unique legal implications when companies decide to acquire or divest assets. A key differentiator in the current market is the financial distress factor, which impacts the type of transactions that arise. Hostile bids, traditionally not prevalent in upstream business, become more likely. The financial climate and the high volatility make transactions more urgent and increase settlement risk. Defensive mergers with shared swaps may also be options, particularly for companies that have suffered a fall in market capital, decreasing their likelihood of being targeted. Legal due diligence needs to change to reflect these issues. If diligence cannot provide comfort, Material Adverse Change (MAC) clauses can mitigate buyer risk where market volatility is high.

However, they also increase the settlement risk and, in the extreme, can turn a transaction into an option. Care is needed to tailor a MAC definition to meet both buyer and seller objectives. Attention also needs to be given to pre-emption provisions in the legacy documentation and how they would play out if a lender foreclosed on a distressed party. That, of course, extends to existing security and indemnity arrangements which must be released, and whether the host government has relinquishment rights when the seller is in financial difficulty. It can be particularly problematic in some jurisdictions which don't distinguish between joint venture partners in case of insolvency, which could have the catastrophic affect that a concession holder could have their title threatened by financial difficulties of a joint venture partner.

Compliance risk rise as oil prices fall for several reasons, including pressure to increase profits while cost pressure increases. However, M&A in new markets can raise a raft of potential compliance issues in addition to necessary legal and compliance diligence, including change of control issues, anti-bribery, corruption and regulatory issues. Basically, companies assume more risk from the acquisition of more licences and permits and alliances with new entities. Compliance teams can be put under pressure to 'get deals done' and management may be tempted not to ask questions if goals can be achieved in an environment of revenue reduction. Compliance risks increase when there is a lower for longer period, which exposes companies to increased penalty and sanction risk.

It also can have a real impact on the marketability of an asset in an M&A process or access to finance for continued operations. If anything, lenders and equity investors are likely only to raise the bar for funding, so potential sellers will only increase obstacles to market if compliance procedures are allowed to atrophy. This is particularly the case for companies operating in jurisdictions where credit-rating agencies, security registers and an efficient mechanism for debt recovery add to the risk.

Peaceful Power

The UAE has created a robust legal framework for the peaceful use of nuclear energy. Hawraa Musa of Alexandria University explains these provisions.

With the potential to be used both for cost effective power generation, and more dangerous, less peaceful purposes, nuclear energy can be a double-edged sword. As a result, it needs careful national and international regulation.

Nuclear energy is energy which is released during a nuclear reaction, when fission and integration of atoms leads to energy release. It is an area where the UAE has taken particular care to ensure it has the correct legislative framework, starting with its ratification of the joint protocol on the application of the Vienna Convention, the Paris Convention of 1988, and the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damages. The UAE has also issued Federal Decree No. 6 /2009 On the peaceful uses of nuclear energy and Federal Decree No. 4/2012 On the civil liability for nuclear damage, and has established the Emirates Nuclear Energy Corporation (ENEC) and the Federal Authority for Nuclear Regulation (FANR) to help encourage growth through a peaceful, safe, and sustainable nuclear energy programme.

Hawraa Musa
Phd Researcher
Alexandria University

CIVIL LIABILITY

Civil liability for nuclear damage is the liability for nuclear damage caused by a nuclear incident. These are incidents or series of incidents stemming from one origin which cause nuclear damage or create serious and imminent threat by causing such damages in respect of all preventive measures. Article 3 of Federal Decree No. 4/2012 defined the individual responsible for nuclear damage by stating, ‘The operator of the nuclear facility is absolutely responsible for damage proved to have happen because of a nuclear accident.’ Article 4 of the same law states: “The operator is solely responsible for any nuclear damage caused by a nuclear incident, according to the provisions of Article 2 of the Vienna Convention of 1997”. Operators are a person licensed by ENEC to operate a nuclear facility and named in the license issued in line with Federal Decree No. 6/2009. Article 57 of Federal Decree No. 6/2009 also adds, ‘the operator will be primarily responsible for all matters pertaining to safety in general, nuclear safety, and protection against radiation.’ While Article 58 confirms, operators bear sole responsibility for any damage caused to individuals or property because of their negligence in operating the nuclear facility or their non-observance of safety and nuclear safety requirements. Operators are defined in Article 1 of that law, as anyone authorised and/or responsible for nuclear, radiation, radioactive waste, or transport safety, when undertaking activities relevant to any nuclear facility or any ionized sources of radiation. This includes individuals in a personal capacity, government authorities, licensed couriers or shippers, hospitals, and self-employed people. This means authorised operators are absolutely responsible for civil liability in terms of damages caused because of nuclear accidents, whether they are authorised or responsible for nuclear, radiation, radioactive waste, or transport safety. They also have that responsibility regardless of whether they are a natural or legal person, a private person or public figure, a national or foreigner, a major operator or another person who the legislator has named as an alternative operator. If there are multiple nuclear facility operators, each one is a guarantor by responsibility if separate responsibility is individually possible, but if it is not possible to reasonably separate damages attributed to each one, all operators become jointly responsible.

However, for operators to be held responsible the pillars of civil responsibility must exist, including casual responsibility, harmful activity and damage. There must be a harmful act creating the operator’s civil liability, and that act must be a nuclear accident, according to Article 2 of the 1997 Vienna Convention.

Damage can either be material damage represented in breach of a injured party’s financial interest, where damage is estimated by an affected person’s loss or lack of earnings, if the damage comes as a natural result of the harmful act, or it can be moral harm represented by trespassing on others and impacting their personal freedom, honour, reputation, social status or financial position. Both damage types require compensation if proven.

With nuclear incidents, Federal Decree No. 4/2012 makes damages possible for death or personal injury, property loss or damage, economic loss or damage, the cost of restoring the damaged environment (unless damage is slight and specific measures have been taken or are being taken), loss of income from an economic benefit where use or enjoyment of the environment has been severly damaged, costs of preventative measures and loss or damage caused by such measures, and any economic loss other than those arising from the destruction of the environment if these are permitted by public law of civil responsibility applied by the competent court.

This Federal Decree also states these losses and damages are those that have arisen or been caused by ionizing radiation emitted by any source of

radiation inside a nuclear plant, from nuclear fuel, radioactive products, or in a nuclear facility. Such losses and damages can also be attributable to nuclear materials coming from or arising from a nuclear facility, or sent to a nuclear facility, if they are caused by the materials' radioactive properties, a combination of radioactive, toxicological, explosive or their other hazardous properties. However, this does not include radioactive isotopes, which have reached the final manufacturing point and can be used for scientific, medical, agricultural, commercial or industrial purposes. The position is the same if damage has occurred or is about to occur.

To be subject to Federal Decree No. 4/2012 damage must relate to a nuclear facility licensed by the competent authorities, as a nuclear accident must occur at or outside the nuclear facility itself, and involve nuclear material coming from the facility, generated inside it or sent to it. So, operators' civil liability for nuclear damage is not based on damage to the nuclear facility itself or any other nuclear facility at the site, but on damage caused to properties in the facility's location.

"Damages can include cash compensation of at least five million SDR and 450 million SDR for every nuclear accident."

THE RESULT

This decree has special provisions for civil liability for physical damage but has not provided any for moral damage.

This does not mean moral damage is excluded from civil liability, if a casual relationship can be proved, general rules in the Civil Transactions Law can be used for it. If an incident has caused nuclear and non-nuclear damages and it is impossible to reasonably separate the two, the non-nuclear damages will be regarded as nuclear damage caused by the nuclear accident. Similarly, if a nuclear incident included in the Vienna Convention involves nuclear radiation which is not covered by the Convention in terms of damage, this does not prevent civil liability being claimed.

To avoid civil liability for nuclear damage operators must prove the damages is due to external reasons, including armed conflict, hostilities, civil war or disobediences. Operators can also be exempt wholly or in part, if they can prove the nuclear damage was caused wholly or partially by the injured person's gross negligence or something they did or didn't do caused it. Operators can also file a civil lawsuit against those who caused, participated in causing, or refrained from doing something which caused the damage. A main operator can also avoid civil liability by assigning a task to another or substitute operator, after that person is recognised or named by the competent authority. However, operators cannot plead they are not responsible by proving the nuclear accident or the actions of another were due to force majeure or other people's actions.

Damages can include cash compensation of at least five million units of special drawing rights (SDR) (or accounting units used by the Internatonal Monetary Fund) and 450 million SDR for every nuclear accident, the costs of restoring the damaged environment as determined by the competent court's measures unless environmental damage is slight, and the costs of measures to prevent or minimise nuclear damage.

Operators must also provide or maintain the guarantees and insurance required by ENEC for their responsibility for nuclear damage.

They need to have insurance or another form of financial security of up to 450 million unit private rights or the amount determined by ENEC to cover their civil responsibility. However, they can get this insurance from any authorised sources inside or outside the country. It is also possible, if they are unable to get the necessary insurance on the insurance market, the state could take up the insurance risk.

Claims For Enforcement

With low oil prices leading to increasing numbers of construction disputes, Malcolm Jezewski of Squire Patton Boggs provides a masterclass in preparing to enforce a claim for payment under a construction contract.

With oil prices still low, the Gulf construction sector is surviving partly thanks to government spending associated with preparations for upcoming events like the World Expo 2020 and the Fifa World Cup 2022. As these have fixed commitments with firm deadlines, preparations and spending should continue. However, it is likely budgets will be stretched and there will be pressure to slow spending, so we may still see an increase in the number of disputes involving delayed payment and non-payment, making it a good time to review some of the key aspects of preparing to enforce a claim for payment arising under a construction contract.

THE FACTS

More than is the case with other types of dispute, determination of construction disputes hinges on assembling, understanding and making effective use of the vast underlying web of facts, circumstances, events and interfaces which make up such projects. Failure to develop and understand the facts fully enough and/or early enough to use them effectively is a key problem in construction claims, so it is important to start collecting and understanding them as soon as possible, and the place to look for the facts is the project documentation.

PROJECT DOCUMENTATION

This can generally be categorised into pre-contract documents; contract documents; commercial or contractual correspondence, and project execution documentation

However, it is important to remember every written record related to a Project is a 'project document', including project personnel's project-related email files, 'personal' notebooks and project diaries. While invariably you end up with documents which are not relevant to dispute issues, it is better to obtain everything first, then exclude what is irrelevant, rather than limiting your collection to particular documents or classes of documents.

Malcolm Jezewski
Associate
Squire Patton Bogg

DOCUMENTED CHRONOLOGY

The most effective way to prepare a claim is to prepare a documented chronology or complete timeline of facts and events backed up by relevant project documents. This should be prepared as early as possible. The narrative of facts supports your claim, so the level of detail and substantiation presented can help you gauge the likelihood of success.

CONTRACTUAL PREREQUISITES

Different contracts have different claim procedures. Necessary contractual prerequisites could include notice, form, timescales, and the amount of substantiation. The legal ramifications of failing to comply with these prerequisites will depend upon the contract and the jurisdiction. For example, under the Fourth Edition of the FIDIC Red Book, before a party is entitled to serve a notice of intention to commence arbitration, it must have first referred the claim to the engineer for determination, and have been dissatisfied with the engineer's decision in whole or in part. As the engineer has 84 days to provide their decision, failing to properly refer the claim to them in the first case can lead to a substantial postponement before the claim can be taken to arbitration. When raising a claim, be prepared to demonstrate all prerequisites have been complied with, or argue why any cases of non-compliance should not affect the claimant's entitlement.

WITNESSES AND EXPERTS

When developing the project chronology, compile a list of the key project personnel. Key players, with first-hand experience of the project can give invaluable insight on the dispute's issues but as project personnel are often engaged on short-term contracts, it is important to identify and interview them early in the process. The technical nature of construction disputes often requires expert witness involvement. These should be appointed and involved as early as possible, as the time it takes for them to develop an understanding and complete their anaysis can lead to significant delays.

Claims should cover what is owed and can be proved, and should be presented in a reasonable, transparent manner. This makes it easier for both parties to reach an early settlement, or for adjudicators to identify the underlying entitlement. Often quantum claims are inflated for bargaining purposes but this can backfire, as it could undermine the credibility of the claim and antagonise the other party.

SOMETHING TO RECOVER

Although usually not a factor in claims against government bodies, in other cases it is important to assess the opposing party's financial solvency and identify any assets' location to ensure that a future award can be turned into a payment. Finally, if there is a risk identifiable assets could be moved out of reach, you should consider if interim measures are needed to freeze the assets in the jurisdiction.

“I am a modest Emirati lawyer who wants to represent all the great things we have in this country.”

Sogol Kaveity and Shamsa Al Marri speak to the young legal entrepreneur Abdulla Al Omran.

For Abdulla Al Omran the day starts, early at five. Then he leaves his home in Sharjah, where he was born and raised to get to his work in Dubai. By 7.30 this young Emirati legal entrepreneur who set up his own law firm just three years ago is working in the Dubai courts. His practice is booming and there are already seven practising lawyers working in his firm, based near the courts in Dubai, two Emiratis and two from overseas.

He likes to get to the Courts early and before his cases begin, he makes sure he does the managerial work his law firm requires.

Around 11 or 12am Abdulla usually heads over to his office in Garoud where he will meet clients, review drafts and pleadings or discuss case strategy with his team on the cases they are currently working on.

His day can end at 3pm but as he notes, it is very different from the time he spent in the public sector. There are no such thing as fixed hours when you are running your own law firm. The days can be long.

"When you have your own law firm it is a 24 hour job. You need to make sure you spoil your clients and make them feel unique. As a result, my phone and email is always on. In fact, I am always on call, even when I am not in the country. The truth is as a lawyer, I can't afford to loose any of my valuable clients."

FAMILY

Although, Abdulla Al Omran spent the early part of his career working in the public sector for Government departments, his long-term ambition was always to set up his own law firm.

His father is a self made man who owns a conglomerate, which owns a number of brands, including, the juice 'Maaza' . He has always been Abdualla's role model.

The business is very much a family affair. In fact, it was Abdulla (the youngest son's) decision to try and support his father in that business which first led him to law.

"I felt we needed a lawyer in the family, although my family said it was my own choice. I was never pushed into law. They were happy for me to study anything."

He adds, "One of the reasons for this was I felt foreign legal consultants were not always clear and transparent when they were working on litigation for my father and his business. I actually ended up doing lawyer-type work for our family business before and while I went to law school."

LEGAL EDUCATION AT SHARJAH UNIVERSITY

As a result, Abdulla decided to study law at Sharjah University. In part it was because it was convenient for home but it was also because of the university's reputation.

"Dr Sheikh Sultan Bin Muhammed Al Qaisimi, the ruler of Sharjah is an academic by profession. He has always cared about the Faculty at Sharjah University. The University also has a good reputation with employers," he explains.

In fact, even now Abdulla still gets support and advice, on his work from fellow advocate friends and professors he met while studying there.

"I found that studying law was a challenge. You see I was fresh from school and didn't really know what university was or how to work with the professors. However, the professors there were great. They were my guide and they motivated me."

At law school Abdulla studied all areas of law but it was civil procedure which interested him most at that time. He added: "Law is all about logic and to understand law you join up the dots using the procedures. If you understand the procedures everything is fine."

WORKING FOR THE GOVERNMENT

Having completed university, he then undertook the necessary training with the Federal Judicial Institute in order to be allowed to practice as a lawyer. Six months of academic study was needed, then there was practical work in the Courts. Thinking back to that time, he explained "The first time I entered a court I was intimidated but after a while you aren't scared of the people in the court anymore. It becomes more normal."

He is now a Federally registered lawyer but is also registered to practice in Dubai, Ras Al Khaimah, Sharjah and Abu Dhabi.

Abdulla then went to work with Dubai Customs. "Working in the Government sector was good. It gave me experience and helped me gain maturity, which was important. I got the opportunity to learn how to deal with people, it helps now with clients. I also learnt discipline, which was important at that time."

While at Dubai Customs, Abdulla was part of the team which set up the Customs Cases Section, something he is particularly proud of.

"We worked out a system. That included what investigations and documents were needed for Customs cases,"

He was also involved in automating these procedures via a database and creating a paperless workflow in this area.

"What was good about that," he adds, "both for lawyers and those accused of smuggling, was that it made everything faster. You no longer have to wait for files to arrrive from the customs inspection centres to the headquarters."

His next role, was also with a Government body. He moved in 2012 to the Dubai Road and Transport Authority (RTA), where he was the Head of the Contracts and Agreements Department. There he was responsible for all contracts, MOUs and agreements which the RTA was party to.

"Most of the contracts at the RTA were construction contracts but there were also agreements with other types of bodies including banks, so that fees could be paid," he explains. Thinking back on the time he adds,"The work gave me good exposure and I was grateful to the RTA for the opportunity they gave me to work with international law firms."

STARTING A LAW FIRM

"My goal was always to be self employed, I wanted to be independent. I'm a modest Emirati lawyer who wants to represent all the great things we have in our country," Abdulla explains.

However, despite this long term goal there were things to first consider. He explains, "The difficulty was deciding when to start. When was the right time to leave the Government sector and set up my own law firm."

He found working for yourself was very different from working for the Government. Not only were there no set hours, he also had to get used to the fact he no longer had a fixed income coming in each month.

"My advice to young lawyers who want to set up their own firm is that you need to make sure first and foremost that you can cover your expenses. You don't have the certainty which comes with a salary."

However, Abdulla's attitude to such challenges is an interesting one. He says, "When you face challenges you have prayer which is constant but actually facing the challenge must be immediate."

Abdulla believes if you are to be successful in setting up a law firm you need a managerial background and this is where the lessons he had learnt from his family business were crucial.

He adds, "You also need to be able to deal with people, with your clients. It is also important to know your rights as a lawyer. The commercial aspect is key. That means you need to think about fees. I would advise young lawyers not to rush in and take a client unless they first have a contract with that client."

In terms of marketing, his firm has grown primarily by word of mouth and connections. He doesn't believe in using social media to promote his firm, although he would be interested in using training as a vehicle to spread awareness.

However, despite the struggles, Abdulla says, "I'm proud to say after two and a half years, my firm is still here. We have seven lawyers now and importantly we have a good reputation too with our clients and we have clients who themselves have a good reputation. I support my clients and they support me."

WORKING WITH CLIENTS

Although, Abdulla's firm focuses on litigation and covers many areas of law, these days it is criminal law which is most important to him. He is happy to take all types of criminal cases and says, "We are in a country with a well implemented legal system. I am part of that system, which means I have to represent people whatever they have done. Even a murderer has a right to representation. It is not emotional it is about procedure."

PRO BONO

Like all UAE advocates who are on the bar list he is part of the UAE pro bono system. "This means," he explains. "if there is a suspect who can't afford representation, the authorities can appoint you, as a lawyer on the list and you must attend, although you get a fee from the Government. If you don't want to attend you have to go in front of a judge and argue why that is."

HIS APPROACH

There is, however, one area where he won't take cases - that is personal affair cases, such as divorce and marriage cases. (Although he does do inheritance cases).

He says, "There are lawyers in this field which I respect but these cases take a lot of time and I don't want to be digging into people's private lives. I don't think my wife would be happy if I took a case like that, regardless of whether the client was male or female."

DIFFERENTIATION

When it comes to differentiating his firm from the others it is all about client care for Abdulla. He says, "I always make sure I follow up with clients and give them updates. I make sure I am quick at getting back to them. I am young and have the ability to do everything that needs to be done."

SUPPORTING OVERSEAS INVESTORS

One of the things his firm has done is to set up a special model to support companies who are setting up in the UAE, which provides information on how they can best ensure their investments, and what their rights and responsibilities will be when they are operating in the country.

He explains, "Really it is common sense. If you have someone from say, Norway or Denmark who wants to extend their business and is looking for opportunities here, what we do first is get an understanding of what their target is. We then review it to see if it is possible to be achieved in Dubai. Often you end up advising them on better or different ways to get the most from their investment. Then we work out a plan. There is a process but the process has to be tailored to the client".

The firm has some international clients but all the clients they have, whereever they are, have an interest in Dubai. The implementation they do is based in Dubai.

At a Glance
Abdulla Al Omran

Abdulla Al Omran (Sharjah 1985) started studying law at Sharjah University in 2002.
He graduated in 2006. He did his advocacy training at the UAE's Institute of Training and Judicial studies from 2007 to 2008. He worked for Dubai Customs' legal affairs department from January 2007 to February 2012.
He joined RTA in 2012 where he was the Head of the Contracts and Agreements Department at age 27. He opened his own law firm Abdulla Al Omran Law in 2013.
Abdullah Al Omran is married and has a daughter.

"When you face challenges...you have prayer which is constant but actually facing the challenge must be immediate."

"Often these international firms come to us because we are Emiratis. They trust us because we are advocates," he adds. "There are few Emirati lawyers but we deal with the world because Dubai is a melting pot."

BIGGEST CHANGES SINCE SETTING UP THE FIRM

Since setting up his firm in 2013, there have been two major changes of law. There have been changes to both the Procedural Law and the Court Fees Law.

He notes, "In terms of court fees some have increased and some have been waived. For example, in the past lawyers had to pay a fee to link to a case. This is now free which makes things simpler, However, on the other hand in the past a lot of court documents were free but you now have to pay in some cases."

He adds, "There have also been changes to expert cases rates and we do sometimes get clients who were used to the old rates who don't believe us when tell them what the fees are. These days the position is that court fees in Dubai are 6% of the value of the claim up to 40,000 AED and 3% of the claim in Abu Dhabi, with no upper limit. That is quite a change."

He has also seen the categories of case which go to a particular court alter, as a result of changes to the case level amounts following Procedural Law changes since his firm started.

"In the past the dividing level for cases to be treated in different ways was 100,000 AED. It is now 500,000. This change was needed to catchup with current commercial realities but it hasn't really impacted our day to day work," he notes.

WHAT IS IT MAKES THE PERFECT LAWYER

When asked about what makes a perfect lawyer, Abdullah says, "A lawyer should be easy to understand and calm. It is important they listen to everything which is being said and they are preparing to search everything. I would also say that you cannot have a fixed mind. You need to be prepared to check things even when you think you are right - as sometimes you are not."

FUTURE PLANS

For Abdulla his ambition is to earn the trust of his clients.

He says, "I would like my firm to be see as the most trusted law firm in the region. I believe I will achieve this by sticking to my principles, being honest and doing my work in a faithful way."

He has plans to expand his firm but merger or joint ventures with international firms are not on the agenda. He explains; "I started in Dubai and stay in Dubai so that is our focus and where any expansion will take place."

He has one final ambition - that is to have more time to spend with his family.

Time for a New (E)RA

In times of change, law firms should be paying closer attention to Newton's third law. Professor Sebastiaan Kodden explains why every external action impacting your business
needs an equal and opposite reaction from the firm's management.

The world is changing fast and that is especially true for the legal profession. More and more often, I notice how much energy and passion is lost within legal knowledge organisations. Talent remains increasingly unnoticed and there are few opportunities for development. Managers often get stuck with good intentions but there is little support for desired changes. This results in frustrations and a lack of (E) or engagement, which is often completely subconscious and unnecessary. So, what is the cause of this and where does the solution lie?

MASTERING NEW ENERGY

Various studies, including my own, show many major legal knowledge organisations still aren't looking at the real problems or adapting their internal organisations to the requirements of modern times. At the same time, these organisations are undergoing major external changes. Legal service firms, in particular are failing to meet the needs of a new generation of employees. And they – that new generation – are precisely the ones who are saying they need more responsible autonomy or (RA), more independence in their work, and they want to be managed differently.

As Newton's third law states, every action has an equal and opposite reaction. 'Action means reaction', so any new force should be paired with an equally large, but opposite energy. Another, but lesser known law, *the Law of Requisite Variety* (Ashby, 1956), states something similar. Every organisation must include just as much internal variety (responsible autonomy) to adequately respond to the amount of external variety (its environmental turbulence) that is experienced in its environment. These two non-judicial laws form the core of many legal organisations' current problems. They are currently experiencing a lot of environmental turbulence, but are still leading in the same way they did 10 years ago.

MASTERING TURBULENCE

The economic environment, the legal profession functions in, is rapidly changing. Every firm can see these changing market conditions. New alternative (digital) legal firms are winning market share. So, it is now particularly essential that law firm directors show modern leadership and guide their firms through these changing circumstances with vision and strategic insight. The most important success factor for any enterprise is without a doubt the entrepreneur themselves, as they have the idea, courage, and perseverance. Their ambition is the driving force behind the company. So, who fulfills that role in a law firm? Usually these are the people who went to law school and perform managerial functions 'on the side', although this is a task which requires not only legal, but also entrepreneurial and managerial skills. So, in a time in which the legal profession is dealing with new requirements and market conditions, extra training and education for managers in the legal profession is vital.

A CULTURE TO OVERCOME DISENGAGEMENT

Various studies (including Bakker, 2009; 2011; 2013; Kodden, 2011) show lawyers in particular are currently experiencing insufficient engagement, flexibility and coordination possibilities. The new generation does not feel they are being managed correctly, which causes a substantial loss of energy. In order to re-establish law firms as excellent organisations and make legal employees energetic and enthusiastic, supervisors in the legal profession need to become familiar with Ashby and Newton's laws as soon as possible. Each change must result in a new change, preferably one with the same force, energy and speed as the external change affecting the organisation internally.

NEW ENERGY

This change will not exhaust a legal professional, but rather give them new energy. The more positive energy you and your colleagues then employ to create innovation within your organisation, more energy there is and in return there is improved competitiveness. In fact, it's like running. The start is difficult, but it soon becomes easier and the energy you feel afterwards is wonderful.


كلايد اندكو
CLYDE&CO
We service your oil and gas needs in MENA
Our comprehensive and practical understanding of the oil & gas sector ensures that we add value from the outset. We have a dedicated global oil & gas team of 70 partners who work across the entire life cycle of oil & gas projects globally.
Our long-term presence and commitment to the MENA region – with 25 years' regional experience, along with 35+ partners and 160+ fee earners based in 5 regional MENA offices – means that we provide clients with knowledgeable market insight and practical advice.
We can support you on:
• projects and M&A
• disputes and international arbitration
• employment
• regulatory and compliance
• trading and derivatives
• transportation
• emerging / frontier markets
Growing our global oil & gas team
with high quality lateral hires when others are shrinking
Retained 70% of our top 20 oil & gas clients
over the past 5 years due to exceptional service delivery
Dedicated oil & gas team of
70 partners across our global network
Further more information, please contact:
Richard Devine
Partner
E: richard.devine@clydeco.com
T: +971 4 384 4000
M: +971 56 506 8288
www.clydeco.com

UAE Business Hub
Luke Tapp

Moving to a new country can be both daunting and challenging. Luke Tapp, who leads Pinsent Masons' Middle East Employment Practice and first came to the UAE in 2012, discusses how it has impacted him and his family from both a personal and professional perspective.

WHEN DID YOU FIRST COME TO WORK IN THE EMIRATES AND WHY?

I moved to Dubai in 2012, having previously, qualified as a solicitor in the UK where I practised employment law for many years. For the last two years, I have led Pinsent Masons' Middle East Employment Practice and as an employment lawyer, the UAE has an interesting and diverse workforce, which creates a large number of HR and employment law issues, you wouldn't find elsewhere. In fact the main reason for moving was I was keen to develop my international experience, and of all the jurisdictions in the world, the UAE specifically, and Middle East more generally was the one which offered everything that I was looking for from a personal and professional perspective.

I was keen to experience life and work in the UAE. So when I was offered the chance to practice employment law in the Emirates, I was delighted to accept.

WHERE ARE YOU FROM, AND WHAT ARE THE BIGGEST DIFFERENCES BETWEEN THERE AND THE UAE?

Orginally, I am from the UK and before moving to Dubai, I was living and working in Cambridge.

On a personal level, the key differences for me are safety, security and quality of life. I have never lived in a country which feels as safe as the UAE does, which is a testament to the authorities and the community. There are also fantastic beaches, the world's best golf courses, an incredible variety restaurants, wonderful weather and access to some of the best family activities and entertainment in the world. My family and I really enjoy our life here.

However, professionally, there are some significant differences between the UK and the UAE. The laws are, of course, entirely different and whereas the UK is a Common Law jurisdiction, the UAE is a Civil Law jurisdiction (outside the DIFC of course). That said, there are some common themes which arise from an employment law perspective across both jurisdictions. Although, there are also some very different issues as well.

DO YOU HAVE A FAMILY? IF SO WHAT DO THEY MOST ENJOY ABOUT LIVING IN THE UAE?

I live here with my wife Aisha and our 10 month old daughter Ayla. As a family we love relaxing in the pool on the weekends, and having breakfast or lunch with our friends. Although, we do not have too much time for dinner now Ayla is with us. We also enjoy spending time at the play centres and the malls and heading to some of the outdoor festivals and events that take place during the Autumn and Winter. We love to travel around the region. We live in the DIFC and I really enjoy taking Ayla out for walks at this time of year in the local area. She loves to see the peacocks and rabbits in Zabeel.

WHAT WAS THE BIGGEST CHANGE?

The biggest change has been Ayla's arrival. She was born in Dubai in May 2015. Before that the biggest change for us was the weather, how we spent our spare time and of course our jobs. However, we do find life in Dubai is a lot easier than in the UK.

WHAT DO YOU LIKE MOST ABOUT LIFE HERE?

In my spare time, I'm a keen golfer. I love playing golf most weeks and I have played almost all the golf courses in Dubai, Abu Dhabi, Sharjah and Ras Al Khaimah. I've even been to the new course in Ajman. The golf courses and facilities in the UAE are entirely different to the ones in the UK. It is almost a different sport.

I also love running and once a week I run around the Zabeel and the Meydan running tracks. I also completed the SCB Dubai marathon in January 2015 in a time of 3 hours and 37 minutes. What's also good about the UAE is that you get to meet new people from a wide variety of backgrounds. Some of my closest friends in Dubai are from Germany, Australia, the Middle East and Scotland. That's a mix of friends I would never have had in Cambridge.

Professionally, I also like the opportunities the UAE market has. Although it is a sophisticated economy, there are still many opportunities for growth and expansion. I have found, for example, that the market in the Emirates is extremely receptive to talent and is a great place to grow a business.

What should employers do to ensure they have a skilled workforce?

There are a number of options available to employers in this region.

- Attract new talent – To do this it is important for companies to ensure the level of remuneration and allowance benefits they offer reflect market practice. There are also other benefits which companies may provide, such as additional bonuses or profit sharing schemes, annual flight tickets and good medical and life insurance schemes. Benefits which can help to attract talent can include the opportunity to gain experience on exciting and innovative projects and 'fast-track' career opportunities.
- Retaining talent – There are two elements to this.
  - Positively encourage employees to remain with the company by having a focus on career development, long term incentive plans and bonus payments which are connected to project completion.
  - Include measures in employment documentation which give the company time to manage the transition of a new employee into a role following the resignation of a key employee. This can be achieved with a long notice period and by providing for the option to place an employee on 'gardening' leave. Companies can also take steps to discourage existing employees from leaving, such as entering into a fixed term contract with them or including restrictive covenants within documentation which limit an employee's post-termination business activities.
- Developing new talent – In the long term, this is likely to be the most effective way forward for employers. There is an increasing focus in the GCC States on nationalisation and developing their nationals into skilled workers within the private sector. For example, 50% of the Saudi population is currently under the age of 25 and 70% of Arabs in the region are under 30. So, there is plenty of potential young talent in the region, but key stakeholders, education providers and nationals must continue to enter into dialogue and work together to ensure GCC nationals have the correct skill sets to take up these opportunities.

WHAT DID YOU FIND MOST DIFFICULT ABOUT MOVING HERE?

It's always difficult to leave family and friends to move to a new country. However, to help with this, we have regular visitors to Dubai and we also return to the UK at least twice a year to catch-up with family and friends. The time difference is small and the flights are relatively short and extremely frequent, so this isn't difficult. It means you feel like you are not too far from friends and family if you ever want to catch up with them. In fact, some of my friends back home say they see us more than they see other friends living next door. The only advice I would give to people coming to the UAE is to embrace the culture and society and take advantage of all of the entertainment and wide range of experiences it has to offer.

HAVE YOU WORKED IN ANY OTHER GCC COUNTRIES? IF SO WHAT ARE THE MAIN DIFFERENCES BETWEEN THEM AND THE UAE?

Our Middle East Employment Practice advises businesses on employment and labour law matters across all six GCC jurisdictions. We have dedicated offices in Dubai and Qatar. Many of the labour laws across these jurisdictions take a similar approach but there are some key differences.

For instance, redundancy is a recognized legal concept across some GCC countries, but not all. There are also separate statutory minimum rights in each jurisdiction, such those on sickness absence, annual leave, working hours and rest breaks

WHEN DID YOU START WORKING FOR PINSENT MASONS?

I joined Pinsent Masons in April 2014, after having spent two years working in the region with a major Middle Eastern law firm.

WHAT HAVE BEEN THE CHANGES AT PINSENT MASONS SINCE YOU STARTED WORKING THERE?

Pinsent Masons in Dubai has grown significantly since I joined. The employment practice has more than doubled in size and financial growth. We are moving to new offices later this year within the Trade Centre District, which just shows the ongoing growth and ambition of our Dubai office. Internationally, the firm is also continuing to grow at a very healthy rate. For example, we have recently entered some new markets, including Melbourne and Dusseldorf.

IS THERE SOMETHING YOUR FIRM HAS DONE TO IMPROVE THE PRACTICE OF LAW IN THE UAE WHICH YOU ARE PARTICULARLY PROUD OF?

All good lawyers will appreciate that thoroughly understanding the law well and applying it practically to the issues clients come across, advances the practice of the law. My practice focuses on employment law issues in the UAE and the GCC region, so we need expertise in, and practical experience of, labour law issues to understand and advise on these issues. Pinsent Masons prides itself on having 'Best in Class' lawyers and practical solutions for clients.

We also regularly deliver training sessions to clients and networking groups. This gives us the opportunity to share best practice and practical advice on how to manage employees in this part of the world.

WHAT DO YOU THINK IS THE BIGGEST GENERAL LEGAL CHALLENGE FOR BUSINESSES HERE?

Aside from the challenging market conditions which many Middle Eastern businesses are currently facing, one increasing challenge is the impact of international legislation on businesses with a presence in more than one jurisdiction. For instance, the recent introduction of the Modern Slavery Act has presented interesting challenges to many businesses as there must now be complete transparency throughout the supply chain on the treatment of workers and personnel. We regularly assist clients with understanding the practical impacts of legislation like this on their business.

TELL US ABOUT YOUR DAY JOB?

Leading Pinsent Masons' Middle East Employment Practice, in a typical week, I meet clients to discuss discreet matters, prepare employment contracts and handbooks, and liaise with advocates on employment disputes.

I also prepare pleadings and evidence, attend meetings with experts and deliver training.

Often we also have to advise on large employment projects including restructures and establishing new business entities. We can also be asked to handle high profile and complex labour disputes.

As Pinsent Masons, is a global law firm, headquartered in the UK, we operate across the world and are asked to advise clients from a range of sectors, including financial services, oil and gas, infrastructure, diversified industries and universities.

WHAT ARE THE BIGGEST CHANGES YOU HAVE SEEN IN THE EMPLOYMENT SECTOR IN THE UAE SINCE COMING HERE?

A common trend in this region is the growing emphasis governments and ministries are placing on their labour laws and employment regulations.

Active and growing infrastructure development programmes in the Middle East are bringing with them welcome changes to employment practices and laws. For example, there have been recent changes in the Qatar, UAE and Saudi Arabian labour laws.

These changes in Qatar, the UAE and Saudi Arabia reflect the growing trend within the GCC, of national authorities wanting to update their labour laws to provide more safeguards for employees. In fact, the developments in the past 12 months are a welcome move in the right direction and in some cases represent significant progress in areas of the law which had previously been untouched for a considerable length of time.

One good example, of this is the fact that on 1 January 2016 three new UAE labour laws came into effect which have provided some additional protection to employees in the areas of employment relationships and work permit sponsorship.

WHAT ARE THE MAIN UAE REGULATORS YOU WORK WITH?

As an employment lawyer, I regularly work with the Ministry of Labour and the various Free Zone Authorities on labour disputes.

I also have a number of cases which are working their way through the Dubai Court process. I regularly advise clients on DIFC employment matters and so, often liaise with the DIFC Courts and the DIFC Authority.

WHAT REGULATIONS DO YOU NEED TO CHECK MOST OFTEN?

The UAE is unique to other jurisdictions across the world as it has a number of Free Zones which operate with their own sets of regulations. So we often have to refer to the Free Zone regulations.

The Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM) even operate as independent jurisdictions with their own courts and distinct laws, which means they operate outside the UAE Labour Law.

Generally, I have to refer to the UAE Labour Law Federal Law No. 8/1980 and the DIFC Employment Law, DIFC No. 4/2005.

I also have to refer to the Labour Laws in the other five GCC jurisdictions on a regular basis.

We also regularly advise clients on the UAE Penal Code, Cyber Crimes Law, and the recent Anti-Hate Law which introduced protection from discrimination across the UAE. Although these laws were not designed specifically for the employment relationship, you may be surprised to discover some employees breach them following acts of misconduct while working for UAE based companies.

YOUR COMPANY PINSENT MASONS CHOSE TO RUN ITS OPERATION FROM DUBAI – WHY?

Pinsent Masons have been established in Dubai for over 10 years and we now have more than 40 lawyers permanently based in the office we have here.

Our firm also has other regional offices including one in Qatar and one in Turkey. We are also planning to establish other offices in the region.

Economies in this region are growing and diversifying, but Dubai is and remains a key hub for business on so many levels.

It has good transport links, developing infrastructure, a pleasant lifestyle and most importantly the government's vision for Dubai in the future is a positive one. All these factors go to making Dubai attractive and accessible to both existing and new businesses.

WHAT ARE THE KEY CHALLENGES FACING YOUR CLIENTS IN THIS REGION AT THE MOMENT?

The Middle East, with its different cultural, social, legal and commercial norms, is a challenging but rewarding environment to work in.

However, one of the key challenges which is having a direct impact on clients at the moment is the falling price of oil. This has adversely impacted the oil and gas sector in particular and as employment law experts, we are having to help clients in that sector with their reorganisations, restructures and in a worst case scenario, redundancy procedures.

FINALLY, WHAT LEGAL ISSUES GIVE YOU THE MOST SLEEPLESS NIGHTS IN DUBAI?

Ayla, my 10 month old daughter gives me more sleepless nights than any legal matter possibly could.

Standard Chartered Bank v Investment Group Private Limited

The DIFC Court of Appeal's decision in this case was decisive in confirming, the broad scope of the DIFC Courts' jurisdiction. Ali Al Aidarous of Al Aidarous Int'l Legal Practice who represented the defendant along with Michael Patchett-Joyce, explains why.

Standard Chartered Bank which operates in the DIFC as a licensed entity and through a branch there and Investment Group Private Limited (IGPL) which conducts its business in Sharjah entered into two loan agreements and a share pledge agreement.

Case Detail

Citation
DIFC Case No. 004/2015

Hearing date
18 November 2015

Court
DIFC Court of Appeal

Under the first loan agreement, disputes were to be referred to the UAE Courts. Under the share pledge agreement IGPL submitted to the non-exclusive jurisdiction of the Dubai Courts and under the later loan agreement the English Courts were to have jurisdiction.

The Bank began action in the DIFC Courts for alleged sums owed under the loan agreements and to enforce the share pledge agreement. IGPL applied for a declaration that the DIFC Courts lacked jurisdiction on this matter and should decline jurisdiction in favour of the Sharjah Courts.

DIFC COURT DECISION

According to our reading of this judgment, which affirmed the DIFC Court's jurisdiction in this case, the broad scope of the DIFC Courts' jurisdiction was based on a wide interpretation of the parties' agreement on jurisdiction on one hand, and Dubai Law No. 12/2004 Concerning the DIFC Courts, as amended by the Judicial Authority Law, Dubai Law No. 16/2011 on the other.

It has two significant implications:

- An agreement on the jurisdiction of the UAE Courts or Dubai Courts is deemed to include the DIFC Courts, unless the parties to the agreent have specifically opted out of DIFC Court jurisdiction.
- In line with Article 5(A)(1)(a) of Dubai Law No. 16/2011, the DIFC Courts have jurisdiction over a claim as long as the claimant has a branch licensed by the DIFC even if the claim does not involve the actual DIFC branch.

This has basically created a 'Broad Scope' for the DIFC Court's jurisdiction.

THE ISSUE

As a DIFC Court of Appeal judgment is final and the DIFC legal system is a precedent-based system, this Broad Scope of the DIFC Courts is binding. So, it is safe to say the DIFC Courts will continue to adopt this Broad Scope concept. However, it would not be prudent to encourage litigants to rely on this to advance a claim before the DIFC Courts simply because a claimant has a licensed entity in the DIFC, even if such an entity is not involved in the particular dispute, or similarly, to abandon a jurisdictional challenge if there is basis for another UAE Court to have jurisdiction over the dispute, in line with the Civil Procedures Code (Federal Law No. 11/19992), whether the Court is a Federal, or a local court of another Emirate, including Dubai.

What is interesting is how the Federal Supreme Court may view such a concept in the event of jurisdictional conflict between the DIFC Court and any other UAE Court, whether it is Federal or local, which is escalated to the Federal Supreme Court.

FEDERAL SUPREME COURT SCRUTINY

In line with Article 99 of the UAE Constitution, the Federal Supreme Court is the highest competent authority for deciding jurisdictional conflicts between Federal courts and local courts on one hand, and local courts of different Emirates on the other, and for ultimately deciding in which Court jurisdiction is vested.

In *Allianz Risk Transfer AG Dubai Branch v Al Ain Ahlia Insurance Company PJSC*, it unequivocally confirmed the DIFC Court's jurisdiction, as a national court, is also subject to the Federal Supreme Court's scrutiny in the event of a jurisdictional conflict between it and another UAE Court. However, Federal Law No. 10/1973 which established the Federal Supreme Court requires in order for a jurisdictional conflict to be brought before it, two courts should have either claimed jurisdiction, or declined it, which did not happen in either the *Allianz* case or this case, so no case was escalated to the Federal Supreme Court and no decision on this has been issued. However, it is possible, this issue could eventually be escalated to the Federal Supreme Court, if there was a case meeting this requirement (including possibly this case).

SUPREME COURT APPROACH

As this issue has not yet been tested, by the Federal Supreme Court it is difficult to predict in certain terms how it would address the 'Broad Scope' of the DIFC Court's jurisdiction. However, based on our reading of the UAE Civil Procedure Code and UAE case law, we believe it would most probably adopt a different approach.

Ali Al Aidarous
Al Aidarous Int'l legal Practice

- Rules of Interpretation: In line with Dubai Law No. 16/2011 the UAE Civil Procedure Code is not applicable to the DIFC Courts, as they should rule on jurisdiction solely based on the DIFC laws, more precisely Dubai Law No. 16/2011, and take guidance from the precedents of other common law jurisdictions, where UAE case law would not influence the DIFC Court. Despite this if a jurisdictional conflict between the DIFC Court and any other UAE Court was escalated to the Federal Supreme Court, we believe that in adjudicating on such a conflict the Supreme Court would, beyond doubt, apply UAE Civil Procedure Code provisions and UAE case law.
- Agreement of the Parties: In this case the DIFC Court of Appeal ruled that the parties had not opted out of the DIFC Court's jurisdiction as the jurisdiction clause in their contractual documents referred to the UAE Courts/Dubai Courts. So, the DIFC Courts should not be excluded unless there is an agreement to the contrary. In our view, this finding may not stand before the Federal Supreme Court. According to well-established principles under UAE law, the exclusive jurisdiction of a special judicial authority, whether it is Federal or local, will be viewed as an exceptional jurisdiction from the general jurisdiction of the UAE Courts. For instance, H.H. the Ruler of Dubai has carved out from the general jurisdiction of the Dubai Courts disputes which relate to lease matters and vested jurisdiction in such disputes to the Lease Dispute Resolution Centre. This was also the case for the Special Tribunals established to adjudicate on disputes involving DP World.

Having said that, any agreement of parties on the UAE Courts or Dubai Courts may not, and should not include the DIFC Courts, as it is a special and exclusive jurisdiction designated for certain disputes under Dubai Law No. 9/2004 Establishing the DIFC and its Courts. Moreover, the DIFC Courts are established in a financial free zone and operate in English, which is not the official language of the country and the language under which all of the UAE Courts operate, whether they are local or Federal. It also applies law which is distinct from that of the rest of the country. The DIFC courts also adopt a different legal system, i.e. common law rather than the civil law system used elsewhere in the UAE.

As a result, on a logical interpretation, an agreement by parties to submit to the jurisdiction of the UAE Courts or Dubai Courts cannot be taken to mean the DIFC Courts as under Article 30 of Federal Law No. 5/1985 (the Civil Code), '*an exception may not be used to draw analogies nor may the interpretation (of an exception) be extended'*.

Therefore, any agreement on the UAE Courts or Dubai Courts should exclude the DIFC Courts unless the parties have expressly agreed otherwise. It is also worth mentioning that an agreement to the contrary may be viewed as null and void based on Article 24 of the UAE Civil Procedure Code if, as based on such an agreement, the DIFC Court strips jurisdiction of another UAE Court, whether it is Federal or local, in a principle that has been well established by both the Federal and Dubai Supreme Court on many occasions.

DIFC ENTITIES

We believe the Federal Supreme Court would likely find that the DIFC Courts do not have jurisdiction over a claim brought by a claimant merely because it has a branch licensed by the DIFC, unless the claim in question directly involves that DIFC branch.

This is a well-established principle of UAE Law. As under Article 33 of the UAE Civil Procedure Code, a claim may be brought before a court in whose precinct the company or association or establishment (a corporate entity) has a branch, in matters relating to the said branch. In addition, under UAE Case Law the provisions of Article 33 have been confirmed by both the UAE Federal Supreme Court in Petition No. 423/25, as well as the Dubai Supreme Court in Petition No. 340/2011 and 349/2011 (Civil). So although, the 'Broad Scope' of DIFC Court jurisdiction has been confirmed by the DIFC Court of Appeal it is still uncertain as to how the Federal Supreme Court would view this concept.

However, while we are awaiting the settlement of this issue by the Federal Supreme Court it may not be prudent to opt for the DIFC Courts as a forum for claims involving the head office of a DIFC licensed entity or any other branch of the same entity outside the DIFC (whether it is in the UAE or abroad), unless the claim directly involves a DIFC licensed entity.

Sales of Bunkers Agreements

UAE Legal Protections

The UAE has nine world class ports, so it's not surprising one of its most common legal issues is the protection of bunkering companies. Zeyad Ahmed Abd El-Aziz Gomaa of Kashwani Law Firm discusses the options available when vessel owners or charterers fail to pay for their fuel.

Maritime shipping and transportation has always been and always will be the most significant factor in international trade. According to the 2014 Review of Maritime Transport prepared by the United Nations Conference on Trade and Development (UNCTAD), 80% of international trade by volume is carried out by sea, with 70% handled by seaports all over the world.

The UAE enjoys a prime geographical location, and since the establishment of the Union its government has been keen to exploit this advantage, with the goal being to secure a bigger role in international trade for the Emirates.

A key part in achieving this has been its extensive investment in building and equipping nine world class ports, which stretch along the country's long coastline. In fact, these projects have been a great success and as a result the UAE is considered to be an international hub for global trade between East and West. For example, Fujairah recently ranked as the world's second biggest fuel hub, after Singapore.

Zeyad Ahmed Abd El-Aziz Gomaa
Legal Consultant
Kaswani Law Firm

SUPPORTING LAWS

In order for the UAE to play such an important role, it has had to equip itself with a set of suitable, modern laws and regulations, which have been developed in such a way as to ensure there is adequate regulation for the ever changing issues which arise from the international transactions taking place within its borders, on a daily basis. One of these laws was the Maritime Trade Law, Federal Law No. 26/1981.

LEGAL PROTECTION

One of the most frequent legal issues that arises in the UAE is the legal protection of bunkering companies against vessels' charterers and/or owners, who do not pay for the delivered bunkers. Typically, a vessel's operator or agents contact one of the bunkering companies operating in the UAE to order a supply of fuel of a specific quantity and specification. Usually, charters or owners are granted a 30-60 days grace period for payment, but sometimes, they do not make these payments in time or, at all. This is when the legal protection question actually arises.

Maritime Law provides extensive protection for creditors whose debts qualify as 'maritime debts'. For this purpose, the UAE legislator adopted a distinctive criterion for determining what constitutes a maritime debt. Under Article 115 of Federal Law No. 26/1981, there are 14 types of debt which qualify as maritime debts. Sub-Article 115-i states that a debt arising from supplying a vessel with necessary products or tools for investing or maintaining that vessel, is deemed to be a maritime debt.

The main protection the UAE legislator has granted this category of creditor under Articles 116 and 117 of Federal Law No. 26/1981, is that they are entitled to arrest the same vessel, they supplied with bunkers. The legal coverage under those articles also extends to including an entitlement to arrest any sister vessel owned by the same debtor.

CHARTERERS

It is worth noting that under these articles, maritime creditors are granted the right to arrest the vessel, whether the debtor was a vessel charterer or its owner. In other words, these creditors can arrest a vessel regardless of who actually caused the maritime debt by ordering the fuel supplies.

Moreover, in cases where a charterer orders fuel supplies for a vessel during a trip in the UAE, and his charterer agreement expires without him paying for the due supplies, the supplier who is considered here as a maritime creditor, is entitled to

arrest that vessel, even if it was being run by the owners at the time of the arrest, or by new charterers. The maritime creditor can also seek to arrest any of the first charterer's own vessels.

LIEN

Maritime debts enjoy further legal protection as a result of the granting to some types of maritime creditors of a lien over the vessel. According to Sub-article 84-e of Federal Law No. 26/1981, debts that emerge from contracts which the captain, whether he was the owner or not, executes, in order to meet the needs of the vessel for resuming its journey, shall enjoy lien privileges. This is important as legally, a creditor who enjoys a lien right, has the privilege of collecting his debt value before other regular creditors. The typical lien's statute of limitation is six months after the fuel supply's delivery. However, this period can be extended for up to three years, if the maritime creditor is a local company that could not arrest the vessel during the original limitation or if the creditor is a foreign company residing in a state that treats UAE companies on a reciprocal basis. A fuel supply debt also ranks higher than a maritime mortgage.

THE LOGIC

The question that arises at this point is why did the UAE legislator favour maritime creditors over a vessel's owner who never ordered the bunkers? In order to answer this, you need to look at the subject from a different angle.

THE LEGISLATOR'S AIM

The UAE legislator's intention was not to favour someone over another. The truth is, the legislator's main aim was to maintain a healthy and safe environment for those who are involved in daily maritime transactions. In order to do this, the legislator had to provide an adequate equation to assure the suppliers that there are special measures they can seek, to retrieve their right. This is in order to encourage these suppliers to enter into such risky transactions. Remember in most cases, fuel supply agreements are made between a local supplier and a foreign charterer or owner, of a vessel that flies a foreign flag. As a result, the legislator created a special status for maritime debts, which include bunkers supplies, in order to make the vessel itself a guarantor for payment of these debts, regardless of the person or entity running the vessel at the time it is arrested. In my opinion, special circumstances need special treatment, and this is exactly what the UAE legislator did. They balanced the naturally unbalanced and risky environment where maritime transactions take place, by securing the creditor's maritime debts through making the vessel itself the collateral in the case of non-payment.

BIT More Protection

BITs and MITs can be useful in protecting cross-border investments but there are changes coming, as Jan Bart Schober, Marieke Vreeburg and Gerard Kreijen of Loyens & Loeff explain.

Until the late 1990s, legal protection of cross-border investments was generally overlooked but since then, protection mechanisms have been steadily gaining attention, particularly from Western oil and gas companies. There are three areas sound analysis of foreign investment protection should consider.

• Host state national laws, possibly including those on national investment agency powers, national investment codes, foreign ownership of assets and transfer of title to property.

• Contractual relationships between foreign investor and the host state.

• Treaties foreign investors can use to protect their assets from negative host state interference, including bilateral investment treaties (BITs) and multilateral investment agreements (MITs).

Ideally, investors will enjoy effective protection of their investments at the national, contractual and international level but in practice, national protection often falls short of what is acceptable, so prudent investors try to compensate for this at the international level.

Jan Bart Schober
Partner, Loyens & Loeff

BITS AND MITS

Investment treaties are agreements between two states on investor and invesment treatment and protection in those states. They are negotiated between states bilaterally (BITs) or multilaterally (MITs) and tie states to rules of international law. If the host state fails to comply with these rules, it is responsible to the investor for a breach of international law, and has a duty to compensate the investor for the loss suffered. BITs and MITs can contribute considerably to project financial stability, in countries with political instability or if the economy is in transition.

Where it comes to protection scope, investors often think about drastic government interference, e.g. license expropriatios or termination but it can also cover taxation. If a host state wants to enforce taxation and tax collection in order to squeeze foreign investors, a breach of a BIT's protective standards may arise.

Gerard Kreijen
Senior Associate, Loyens & Loeff

The UAE has concluded 50 BITs, of which just over 30 are in force. It has also entered into a number of MITs, such as the Agreement on Promotion, Protection, and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, the Unified Agreement for the Investment of Arab Capital in the Arab States, and certain treaties that apply through its GCC membership.

Many UAE BITs have provisions on fair and equitable treatment, unreasonable, arbitrary or discriminatory measures, and expropriation, but certain sectoral carve outs may apply (e.g. in the oil industry), so their protective standards should be determined on a case-by-case basis. Globally, BITs outnumber MITs by far so, we will mainly refer to BITs here. But many concepts which apply to BITs, apply to MITs too. The International Centre for the Settlement of Investment Disputes (ICSID) has hosted most of all known international investment cases, and its statistics show a steadily increasing number of cases. The US tops the league of home states appearing in these investment arbitration cases. However, despite its size, the Netherlands has been one of the main users of the investment treaty system, because those looking for BIT protection often establish themselves in a state that offers the best investment protection. Dutch companies are often used because the Netherlands' BITs are regarded as the 'gold standard' by many.

DUTCH BITS

Dutch BITs are attractive because the threshold for protection is very low. A company only needs to be incorporated in Holland to be entitled to protection. A combination of easy access and the broad scope of protection also make Dutch BITs interesting. Unlike some other models (e.g. the US and Canadian BIT models), the Dutch ones have a strong 'protection only' approach, by providing easy investor qualification by the simple test of incorporation; the full range of protective standards; and immediate, unconditional, unqualified access to investor-state dispute settlement (ISDS). Of course, the level of investor-friendliness of a model investment agreement is often a matter of degree.

Other models such as the 2006 French model BIT and the 2008 German model BIT are also concise and protection-focused, but the French model has a stricter qualification test and both the French and German models require amicable settlement and the observance of a waiting period before investors can resort to ISDS.

The position is somewhat similar with MITs like the 1994 Energy Charter Treaty, which (unlike the Netherlands model BIT) contains a denial

of benefits clause and qualifies the arbitrability of investment disputes related to taxation measures.

The immediate, unconditional, and unqualified access to ISDS that the Dutch model BIT uses is fairly unique, which is why this dispute settlement mechanism is favoured by investors looking for effective remedies.

The risk of unlawful interference by host state governments in investor's foreign assets, is the very rationale for BITs' existence and why prudent investors try to maximize their protection scope.

Dutch BITs often suit that purpose but individual BITs can deviate from their models, so investors should seek advice when assessing a particular BITs' relative quality.

There are no custom-made solutions in this area; you need a balanced approach which takes into account not only protection, but also aspects like tax efficiency and commercial concerns on a case by case basis.

Marieke Vreeburg
Senior Associate
Loyens & Loeff

CHANGING ENVIRONMENT

The global network of BITs changes continuously but there are two developments worth noting. Recently there have been unilateral terminations of BITs by individual host states, including sporadic terminations by Bolivia, Ecuador, and Venezuela of some of their BITs. South Africa has announced it intends to terminate all BITs with EU Member States and Indonesia is to terminate all BITs. However, BITs contain 'grand-fathering' clauses which enable existing investments to be protected for 10 or 15 more years as of the date of their effective termination. Investment projects in for example the energy industry with a longer horizon, could still become unprotected for a part of their operation term and investments made after the termination date will, not benefit from any protection.

The 2009 EU Lisbon Treaty will lead to the gradual phase-out of around 1,200 BITs which EU Member States had concluded with third countries (extra-EU BITs).

Eventually, these extra-EU BITs will be terminated and replaced by EU bilateral trade and investment agreements, which will not only cover a broad range of trade issues, but investment protection and ISDS as well.

These new EU agreements may not match the relatively high protection standards of 'old-style' extra-EU BITs such as those of the Netherlands', as was seen with the recently negotiated Comprehensive Economic Trade Agreement (CETA) between the EU and Canada and the EU-US Transatlantic Trade & Investment Partnership (TTIP) negotiations which fall short of many 'old-school' Dutch BITs, e.g. on 'fair and equitable treatment', expropriation, and immediate, easy access to ISDS in the event of an investment dispute.

Interestingly, in the context of TTIP, the European Commission has put forward proposals for a two-tier court system, which, could mean a fundamental departure from the traditional forms of arbitration based on ISDS.

IMPACT AND POTENTIAL NEXT STEPS

However, treaty negotiations usually take some time and with grand-fathering periods in place, the impact on many existing investments may not actually be seen for years.

That said, investors should still keep a close eye on whether their investments are protected by a BIT that is or will be subject to termination, and consider restructuring these investments if appropriate.

Real Change for Real Estate

Having learnt lessons from other Emirates, including Dubai, Abu Dhabi has issued a law which will have a significant impact on its real estate market. Nicholas Morgan of Berwin Leighton Paisner explains how it will help property investors, including those investing off-plan.

On 1 January 2016, Abu Dhabi Law No. 3/2015, Concerning the regulation of real estate in the Emirate of Abu Dhabi came into force. Abu Dhabi has been able to benefit from the cumulative step-by-step approach which has been taken by the other Emirates, including Dubai.

As a result, its new law is intended to implement a modified and fully articulated real estate system from the outset.

DMA'S ROLE

The Abu Dhabi Department of Municipal Affairs (DMA) will have an important part to play within the new regime and will take on a role which is broadly similar to that of the Dubai Real Estate Regulatory Authority (RERA). As a result, the DMA's success in adapting to this new supervisory role will be key to increasing transparency and enhancing investor confidence in the Emirate's real estate market.

This new law includes three key areas. These are:

- registration;
- escrow accounts; and
- mortgages.

In each of these, the new law aims to raise industry standards and improve working practices, while also striking a balance between the interests of various market stakeholders.

Nicholas Morgan
Associate
Berwin Leighton Paisner

REGISTRATION

Abu Dhabi Law No. 3/2015 establishes an Interim Real Estate Register (IRER), which will be maintained by the DMA. This concept will be familiar to those who are already active in the Dubai property market and is likely to be well received, as it takes significant steps towards protecting the rights of investors and finance parties in off-plan transactions.

For example, the protection provisions in the Dubai legislation, which require developers to hold relevant consents from the competent authority, together with the requisite rights to develop the land before going to market or entering into any sales commitments, are replicated here.

However, investors will be pleased to note under this law developers are only allowed to charge a fixed administration fee for this registration, rather than a percentage fee based on the property purchase price. Investors are also likely to be pleased that a mechanism for transferring rights from the IRER to the existing land register maintained by the Abu Dhabi Municipality after completion of a project, has also been covered in this law.

DEVELOPER BENEFIT

Arguably developers could also benefit from the new legislation in this area, as it should help increase confidence and may possibly stimulate the appetite for off-plan unit investment. There are some developers in the market, who have already been operating similar in-house registers and they are likely to welcome this harmonisation of their rights and responsibilities with those of other developers operating in the Emirate.

That said, the need to register dispositions of off-plan units will impose an administrative burden on developers, who should take note that they will have a six month grace period (subject to extension by the DMA) in which to register any dispositions which occurred before 1 January 2016. Interestingly, the law does allow purchasers to register a disposition, if the developer fails to do this, which could be in order to deal with an issue, which some commentators suggested was not as fully specified in the Dubai legislation.

However, as with many other provisions in this new law, the effectiveness of the new registration regime will largely depend on the DMA's ability to use its new powers to maintain the IRER and take any necessary steps to enforce compliance, if there are problems.

ESCROW ACCOUNTS

Developers, who wish to sell property units off-plan will for the first time be required to obtain permission from the DMA to open and maintain a dedicated escrow account, with an approved account trustee.

This is another aspect of the new law, which should materially improve the rights of those investing in Abu Dhabi's real estate sector.

Again, the escrow account mechanism will be familiar to those who know the Dubai legislation in this area. It is a positive development as it should help ensure all purchase monies and financing proceeds can only be used towards the development and construction of the underlying project.

However, investors should also note that Abu Dhabi Law No. 3/2015 goes a step further by stipulating that account trustees cannot disburse any funds from an escrow account unless and until the developer has completed at least 20% of the construction works.

This means that developers will need to procure funding from sources other than off-plan sales initially, and will probably be perceived positively by investors as it could act as an added incentive for the developer to deliver the project within the agreed timescales.

It could also act as an acid test, and help to ensure that only viable projects are released, as developers will need to convince credit committees to release early funding.

MORTGAGES AND THEIR ENFORCEMENT

The provisions in this new law which relate to the registration, priority and enforcement of mortgages in Abu Dhabi area also positive ones, which should materially improve the position and financing options available to property investors, especially in the case of access to off-plan financing.

In addition, it could also be the case that lenders may benefit from a more certain enforcement route in this area.

For example, the new law has adopted the concept of special mortgages, which are capable of registration, from the Dubai mortgage law. This allows the holder to mortgage a musataha or usufruct interest, or the interest in an off-plan unit.

As in Dubai, this should allow there to be compliance with the requirements under the UAE Civil Code (Federal Law No. 5/1985) for valid mortgages over real estate assets to be registered and for the mortgagor to own the asset and be capable of disposing of it.

EASIER OFF-PLAN FINANCING

This may make it easier for potential purchasers to access off-plan financing as it will remove the need for lenders to be comfortable with a reliance on an unregistered mortgage and a conditional assignment of the borrower's rights under the sale and purchase agreement in the event of a default.

It is encouraging to see that many of the important property market concerns previously raised have now been addressed in this new law and that Abu Dhabi has taken the opportunity to learn from Dubai's experience. As a result, hopefully, provided all the requisite systems are put in place, Abu Dhabi Law No. 3/2015 should provide an enhanced framework for the smooth and efficient operation of the real estate market in the Emirate.

Remarkable!

To Cake or Not to Cake?

Back in 1991, a cake was taken into Court to prove a point. Not an average cake, but a giant 'Jaffa' cake, which was used to help establish that Jaffa Cakes were really cakes and not biscuits."

United Biscuits (UK), manufactures cakes and biscuits, trade under the name McVities in London. They have been manufacturing Jaffa Cakes since 1929. Their product's name cames from Jaffa oranges and the Israeli city of Jaffa. This strange turn of events happened after the UK tax authority, then known as Customs and Excise, ruled that the popular, Jaffa Cake was a biscuit covered with chocolate and as such liable for the standard rate of value added tax. If, however, as McVities wished to claim, the Jaffa Cake was actually a cake covered with chocolate, it would have been zero rated for VAT purposes. McVities argued that the Jaffa Cake was food of a kind used for human consumption and chargeable to tax. As a result in 1991, a case was heard at a VAT tribunal, with the dispute centering on the question of whether Jaffa Cakes rank as cakes or biscuits. Attempting to define what a cake was, the Judge considered a number of areas:

- Name, which was a very minor consideration.
- Ingredients, the ingredients of the sponge part of a Jaffa Cake were virtually the same as those in a traditional sponge cake.
- Texture, with a Jaffa Cake the texture resembled a sponge cake.
- Size, Jaffa Cakes were substantially smaller than the average cake.
- Packaging, Jaffa Cakes were packaged in an 'un-cake-like' way and sold in cylindrical packets.
- Marketing, in supermarkets cakes and biscuits are in separate places, and Jaffa Cakes were sold alongside the biscuits, not with the cakes.
- How they are eaten, biscuits are snacks normally eaten with the fingers, whereas cakes are normally eaten from a plate with a knife and fork.

During the hearing, weight was given to the fact that a Jaffa Cake is moist to start with and when it becomes stale it becomes hard and crisp, just like a cake, whereas biscuits start hard and become soft. So a Jaffa cake was.. a cake after all!

By Definition…

Non adimpleti contractus (latin)

Exception of a non-performed contract

When a person is being sued for non-performance of his contractual obligations, he has an exception defence and right to refuse to perform if the other party has failed to exercise their obligations. This principle has been codified in several European countries. Under Article 1460 of the Italian Civil Code which covers defence based on non-performance, in contracts providing for mutual counter performance, each party can refuse to perform their obligations, if the other does not perform or offer to perform their obligations at the same time, unless 'different time performance' has been established by the parties or appears because of the contract's nature. However, performance cannot be rejected, if considering the circumstances, such rejection is contrary to good faith. Article 1469, then states, : "[E]ach party can withhold the performance due by him, if the patrimonial conditions of the other party have become such as obviously to endanger fulfillment of the counter-performance, unless adequate security is given."

The French civil code does not specifically mention non adimpleti contractus but Section 320 of the German Civil Code, similarly states, "Whoever is bound by a mutual contract may refuse to perform his part until the other party has performed his part, unless the former party is bound to perform his part first."

In the Dutch Civil Code, Article 6:262, Mutual right to withhold performance until the other party performs his due and demandable obligation ('exception non adimpleti contractus') states:

"1. If one of the parties to a mutual agreement does not perform his obligation, although it is due and demandable, then the opposite party is entitled to withhold the performance of his own obligation, that stands opposite to the non-performed obligation of the other party.

2. In the event of a partial or improper performance, the opposite party is only entitled to withhold performance as far as this is justified by the other party's failure in the performance of his obligation."

The concept is also found in Article 82 of the Swiss Code des Obligations effet des obligations, which states, "Celui qui poursuit l'exécution d'un contrat bilatéral doit avoir execute ou offrir d'exécuter sa propre obligation, à moins qu'il ne soit au bénéfice d'un terme d'après les clauses ou la nature du contrat."