

Emirates Law

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**“I believe we
have a good legal
foundation in
terms of attracting
investors.”**

**Dr Jamal Al Sumaiti,
Director General, DJI**

UAE Transport Law

**Side Agreements
Common but Not Legal
Antigoni Filippopoulou &
Sariah Al Hallack**

**Dubai Customs:
Heart of the Hub
Narmin Ahmad Ali Issa**

**Transport Orientated
Development
Ed Hills &
Villiers Terblanche**



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Why Emirates law is at a cross-roads



Justice Dr Jamal Al Sumaiti
Director General, DJI

As a result of its central geographical position on the Arabian Gulf and the Indian Ocean, the UAE has a long and proud tradition of being a transport hub. You only need to walk along the Dubai Creek and watch the dhows loading and unloading goods to see that history in operation. The regulation of that industry also goes back a long way. For example, Dubai Customs who we interview in this issue was established more than a hundred years ago and is the oldest government department in Dubai, although it is actively bringing its operations into the 21st century. They are not the only ones either. When it comes to the transport industry, the UAE is not just looking at the past, it is a sector which has been identified by both the Federal and Dubai Government as being key in its plans for economic diversification. As

well as all the major ports the UAE already has across a number of Emirates, the Government wants to encourage and develop other associated businesses, including ship building, ship owners' associations, the construction of offshore platforms and ship finance. There has also been work in place to expand aircraft and airport capacity and develop rail and tram infrastructure. The success of this can already be seen. For example, in 1990, Dubai International Airport handled just over four million passengers a year but by 2014, that figure had risen to over 70 million. That expansion work is also set to continue, across the transport sector.

We have decided to take transport as our theme for this issue as a result. However, you will find the articles inside do two things. Firstly, as always we hope to provide you with a clear overview of transport legislation, regulation and the current issues being faced by those in this industry in the UAE. In the case of UAE transport law, however, that is not enough. Government ambitions for the sector are such that the legislative framework is going to have to change if these aims are to be met.

As a result there is currently a review of UAE maritime legislation underway to support the future needs of this industry, so our commentators have also provided a critique of where legislative changes would be beneficial. With any expansion of the type envisaged by the UAE and Dubai Governments, it is not just regulation of operations which is important but also financing that expansion. As a result, in this issue we also look at the legal structure of an innovative approach to Islamic finance which was used to help finance the airline Emirates' fleet expansion and to what extent Public Private Partnership models are likely to be used in the key transport infrastructure projects being planned across the UAE. I hope you find this the last issue of 2016 useful and informative. I would like to thank Sogol Kaveity, Shamsa Al Marri, our editorial team and publishing team, and the advisory board for making Emirates Law and Business the success it has been in 2016 and we hope to see you in 2017.

Justice Dr Jamal Al Sumaiti

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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.

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UAE Transport Law



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Key Legislation

Federal Law No. 26/1981

This law known popularly as both the Maritime Code and the Maritime Law covers commercial maritime issues at a national level in the UAE.

Federal Decree No. 85/2007

The UAE introduced the GCC states' Common Customs law by this Decree. It applies to any commodities which cross the customs line when they are being imported or exported.

Federal Law No. 13/2007

This law provided the authority for a national committee to be set up which controls and regulates import and export affairs.

Dubai Decree No. 14/2016

This decree established a new independent maritime arbitration centre known as the Emirates Maritime Arbitration Centre or EMAC.

From Ship to Shore

The transport industry is being targeted for expansion by the UAE Government. Our **expert panel** explains how legislation in this area currently works and the legal changes which will be needed to support this planned growth.

“As is well known the UAE Government is currently looking to diversify the nation's economy so it can become less dependent on oil revenues in the near future. Currently the UAE's non-oil sector stands at 70% of the UAE's GDP but the Government would like to see this figure raise to 80% by 2021 and 100% by 2030,” explains Tarek Saad of Baker & McKenzie Habib Al Mulla.

“What is interesting is that the maritime sector has been identified as one which has great potential in

enabling the country to achieve this.”

“In January 2016, the UAE Government held a Ministerial retreat which was attended by Ministers, Federal and Local Officials, and renowned economists and one of the many outcomes of this retreat was a reaffirmation of the Governmental commitment to diversification,” Saad continues.

“The Government stated they wanted to add new economic sectors, and leverage efficiency and productivity in current sectors. They also wanted to make the younger generation capable of leading a sustainable, balanced national economy.”

“As part of this the Government has recognised the vast potential and economic benefits of the UAE becoming a leading global maritime hub. It has also realised that the maritime industry goes far beyond having major ports and logistics infrastructure in place, and that this industry is actually made up of many other sectors which have not yet had their full potential realised in the UAE. These include ship building, ship owners' associations, ship finance, offshore platforms and many other areas which could have huge impact on the economy,” Ashraf Elswefy of Baker & McKenzie Habib Al Mulla adds.

FEDERAL TRANSPORT AUTHORITY

“In line with the Government's vision, the UAE Federal Transport Authority (FTA), which is the

Federal entity responsible for the maritime sector, has adopted a long term strategic plan which aims to transform the UAE into a global maritime cluster which can cater to and provide unparalleled services for the shipping community.”

“The FTA has recognised that the first step in reaching its goal would be to amend and update Federal Law No. 26/1981 which covers maritime activity (and is known as the Maritime Law or Code). The FTA aims to provide modern and flexible legal legislation which consists of both common and civil law principles which can facilitate and encourage both foreign and domestic investments in the maritime sector in the UAE,” Elswefy says.

“A task force, led by the FTA and law firm Baker & McKenzie Habib Al Mulla, is currently working with other relevant Government Authorities, industry and academic experts and is consulting with all the private agencies operating in the UAE maritime industry in order to articulate the challenges which are facing the maritime industry here, and consider how these issues could be addressed through effective legislative intervention,” Amir Alkhaja of Baker & McKenzie Habib Al Mulla notes.



Tarek Saad
Counsel Baker & McKenzie
Habib Al Mulla

SHIPPING COMMUNITY ROLE

“Members of the UAE's shipping community will play a key role in identifying these issues, as those who are actually involved in the industry on a daily basis are in the best position to identify them. The authorities are keen to ensure the changes to legislation in this area actually make it easier for all participants in the UAE maritime industry to do business. As a result a wide range of players in the maritime industry, including ship owners, ship yards, financiers, freight forwarders, shipping agents, port officials, judges and various local and Federal authorities have been involved in this project. Through various meetings, seminars, questionnaires and workshops which have been arranged by the task force, open and honest discussions have been conducted on the challenges and obstacles which are restricting UAE maritime growth,” Saad adds. “There have also been good suggestions and recommendations on how to better regulate and improve the industry and the



Maritime Law, which have now been conveyed to the maritime authorities.”

PROPOSED AMENDMENTS

“The main proposed amendments to the law are intended to be efficient and creative in tackling areas which the previous laws did not address, such as shipping logistics and ports, ship conversion and repair of various types of vessels, the role of shipping agents, and onshore services which are associated and related to maritime industry operations,” Elswefy explains.

“For example, shipping agents play a crucial role not only in the maritime industry but also in the international transport chain. These agents’ duties are diverse and can include, for example, acting as a port agent, cargo agent, or owner or charterer agent. They can also be responsible for handling the general interests of their customers at ports and harbours worldwide. However, the current Maritime Law, Federal Law No. 26/1981 is silent in defining their role, responsibilities and obligations,” Alkhaja states. “As a result, the UAE courts, in efforts to determine these responsibilities and liabilities, have extended the scope of their judicial interpretation of Article 8 of Federal Law No. 26/1981, which allows a court to apply international conventions, maritime customs and common rules of justice. It is likely, the new Maritime Law will include a new section solely to regulate the rules and responsibilities of shipping agents under UAE law.”

“There are also a number of other activities the current law does not regulate which the new law will aim to address. These include licensing classification societies and authorities, services and maritime consultancy (for vessels and relevant maritime works), marine insurance and P&I clubs, amongst others,” Saad adds.

“The aim is also to update and amend the current legislation on matters like ship registry, limitations of liability, precautionary and execution arrests procedures, and the ratification of international marine conventions. There are a number of articles in the current law which are outdated and will be changed.”

SHIP REGISTRY

“In terms of ship registry under the current laws, only UAE nationals and entities are allowed to register a commercial vessel under the UAE flag. This differs from the position in many other jurisdictions, some of which permit dual registry. The UAE government realises that any increase in foreign investment needed to enable the country to be recognised as a leading maritime hub, may also require them to allow foreign ownership of commercial vessels under the UAE flag in the new law. This decision will have a huge impact on the country’s maritime industry, and global best practices and solutions involving ship registry are also being examined closely to see how they can best be applied locally,” Elswefy notes.



Ashraf Elswefy,
Consultant,
Baker & McKenzie Habib Al Mulla

FINANCIAL CHANGES IN THE NEW LAW

“The new law will provide attractive incentives such as concessions, services and exemptions and many other financial benefits, and encourage national and international capital investment in the maritime field.”

“The proposed amendments will also organise vessels’ working capital and the profits arising from them, as well as loans and ship finance, particularly if the purpose of the loan is to build a vessel, acquire its ownership, repair or operate vessels.”

“The new law will also regulate maritime liens on vessels by banks and financial institutions and set regulations in coordination with the UAE Central Bank and other financial institutions which follow international standards,” Saad adds.

“Essentially, the UAE Government’s main objective is to provide a comprehensive maritime law which matches international laws and stimulates the growth of the macro maritime sector by developing all aspects of the maritime industry.”

“The UAE always strives for innovation and leadership, and these proposed changes to the Maritime Law should help reinforce the nation’s vision and goals, and should make it easier to do business here, which in turn will help cement the country’s place as a global and regional maritime hub,” Alkhaja notes.

COURT POSITION

"One of the other areas where development may be needed is the creation of specialist courts. Although, the UAE has some of the world's largest, most successful ports, and is emerging as a global maritime power house, there is currently no Admiralty Court in the UAE," explains Omar Omar of Al Tamimi & Co. "As other established maritime hubs have dedicated Admiralty judicial arms, the absence of this in the UAE legal framework is conspicuous and a swift introduction is required."

"However, steps have been recently taken with the issue of Dubai Decree No. 14/2016 to establish a new specialist independent maritime arbitration centre in the UAE which will be called the Emirates Maritime Arbitration Centre or EMAC and is expected to start operating in September 2016," Omar notes.

"There is no apparent reason why a unified Admiralty Court has not been established since the maritime law was drawn up in 1981," Adam Gray of Al Tamimi & Co adds.

"Although the UAE maritime law is a Federal law which applies to all the seven Emirates, it is applied by those Emirate's commercial courts, not Admiralty Courts. Each Emirate court also has its own approach to applying Federal Law No. 26/1981."

"The result has been that there has been an outflow of different judgments and varied judicial practices throughout the UAE when applying maritime law. For example, a claimant in one court needs to register cases through the court's online portal and this can take one to three days to process, whereas in other Emirates, a file can be registered in a day. In addition, when it comes to serving arrest orders on vessels each Emirate has its own interpretation of the procedure to be followed," Gray adds.

"Admiralty Courts are a necessary component of a legal system which deals with numerous maritime related matters because of the nature of shipping. Shipping law is unique from all other types of law and specialist, industry specific knowledge of the area is needed," Omar explains.

"Judges need to be appropriately trained in maritime law and understand commercial nuances which distinguish this industry and its law from other industries."

"For example, the English legal system has its own Admiralty Court which has a mandate over technical maritime cases, such as vessel salvage, ship collisions, cargo and vessel mortgages," Omar explains "It is also subject to a distinct procedure as set out in Part 61 of the Civil Procedure Rules, which is maritime specific."



Amir Alkhaja
Associate
Baker & McKenzie Habib Al Mulla



Omar Omar
Partner
Al Tamimi & Co



Adam Gray
Associate
Al Tamimi & Co

"There is perhaps no better example of the impact felt by the lack of an Admiralty Court in a jurisdiction than when dealing with vessel arrests under the maritime code. Vessel arrests are emergency applications, heard *ex parte* and are extremely time sensitive," Gray notes.

"The claimant needs a legal framework which allows them to arrest immediately upon vessel arrival or as soon as they can file the application. A ship owner defendant who has had his vessel arrested, will also be conscious that every moment his vessel is under arrest they are losing earnings and they will want to secure a prompt release through the courts. This means the UAE can seem like an inhospitable place for both the claimant and defendant ship owner, as the courts are not open at weekends and can close as early as 2pm. As a result, vessels

can call over the weekend and leave the UAE jurisdiction before an arrest application can be dealt with by a judge, or a ship owner cannot deposit security for the release of his vessel from Thursday evening until Sunday morning.

An Admiralty Court would be set up to be available to deal with these types of maritime-specific demands," Gray adds.

"There are a few things, which need to be done for this issue to be addressed," explains Omar. "Firstly, the seven Emirates need to start discussions about how a uniform Admiralty Court could be formed which would adopt the best practices and procedures currently being applied across the Emirates. A new Federal admiralty procedure complimenting

the existing maritime code should also be passed. The UAE would also need to train and appoint expert maritime judges to respond to the UAE's booming shipping sector and apply the new law."

GLOBAL DEVELOPMENTS

"One of the biggest recent maritime law developments impacting on the UAE has been the collapse of OW Bunker," says Saad. "OW Bunker was a broker and one of the world's largest traders of bunker oil and its collapse has had a huge impact globally and in the UAE."

"This Danish company had operations in 29 countries and controlled about 7% of worldwide bunker trade until it filed for bankruptcy in November 2014. The effect of its collapse has been felt across the world, including the UAE where there are many parties involved in bunker supply transactions."

"OW Bunker has faced a number of claims for the recovery of payments made for fuel supply, and these disputes have caused global controversy, as parties have been lodging multiple claims in order

to avoid paying twice for the bunkers they had originally ordered," Elswefy adds.

"When OW Bunker went into liquidation, courts across the world had to grapple with many difficult questions," explains Patrick Murphy of Clyde & Co. "These included whether the physical supplier, who had after all supplied the fuel to a vessel, was merely left to rank as an unsecured creditor in the liquidation? Or if they could assert a 'maritime lien'. 'Maritime liens' are recognised in many parts of the world and would entitle the physical supplier of the fuel to proceed directly against the ship owner."

"Other questions being asked around the world included whether the courts would require ship owners to pay the sale proceeds into a bankrupt broker such as OW's estate, when threatened by competing claims from physical suppliers under maritime liens," Murphy added.



Patrick Murphy
Partner
Clyde & Co

UAE BROKER OBLIGATIONS

"In the UAE, the Federal Maritime Commercial Law, Federal Law No. 26/1981 is silent on the broker's obligations and liabilities, and the nature of the transactions it performs in the supply chain contract in the maritime industry," Abdalla Eisa of Baker McKenzie Habib Al Mulla adds.

"In the bunker market, the ship owner often enters into a sale contract with a broker who enters into another agreement with bunker supplier, and so on, without any direct relationship between the ship owner and the ultimate contracting party at the end of the contractual chain who actually supplied and delivered the oil or fuel to the vessel," Saad explains.

"So if the broker becomes bankrupt, it raises the question of who in the contractual chain should the ship owner pay? There is also the question of who has the right of lien, if appropriate, over the vessel? If the ship owner pays its direct contractual party, legally, the party at the end of the contractual chain can still file for payment according to the chain of contracts and to its physical supplier of the products," Elswefy adds.

"Therefore, all the contractual parties have the right to file a claim before the court as this is considered a maritime debt in line with the current maritime code, and to arrest a vessel in line with to Article 115 of Federal Law No. 26/1981 which permits a conservatory arrest against a vessel to secure this maritime debt, by an order from the civil court which has jurisdiction."

UAE LESSONS FOR SHIP OWNERS

"The OW Bunker case has highlighted this particular issue in the UAE, where ship owners are subject to pay for fuel supply without there being clarity on which party they should pay and how they can prevent double payments," Eisa adds. "The courts have joined the ship owners in cases brought by

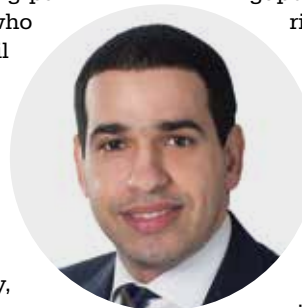
a contractual party in the supply chain in order to more efficiently deal with this issue."

"Although judicial intervention in the UAE has provided legal resolutions to some issues, a commercial approach has ultimately had to prevail. For example, there have been cases where claimants have successfully obtained ship arrests over vessels supplied with bunkers at the request of OW Bunker, but the claimants have refrained from implementing these arrests in order to maintain an ongoing business relationship with the ship owners and have better financial results in the long term."

"In previous cases, the UAE court has ruled in favour of the supplier because the contract between all the parties made it clear the broker, owner or charter would be jointly and severally liable for the fuel payment and the supplier had the right to sue each of them separately. This legal principle is set out in Articles 450 and 452 of Federal Law No. 11/1992. As a result, we

would recommend suppliers include a clause of this type in their contracts and obtain from the owner or charter a warranty that they will be jointly and severally liable with the broker to pay the supplier, in order to avoid not being paid for fuel supplied in a transaction which involves a trader or broker," Saad notes.

"As the UAE Federal Transport Authority is currently looking to amend and update the Maritime Law, there is an opportunity for legislation to fill the gaps which currently exist on ship brokers' rights and obligations," Elswefy adds.



Abdulla Eisa,
Associate
Baker & McKenzie Habib Al Mulla

COMPARATIVE POSITION

"It is interesting to compare the UAE position in the OW case with the position elsewhere," Murphy notes. "While no two contacts are ever the same, the trend seen in the decisions across the world has been to leave the risk of non-payment with either the physical suppliers who dealt with OW or the unfortunate individual shipowners."

"For example, the UK Supreme Court was one of the first to consider a substantive claim under a bunker sale contract in the *Res Cogitans* case."

"At issue was whether the Sale of Goods Act applied to a bunker sale contract between OW and shipowners, where OW had sub-contracted the physical supply to a third party. If it did, OW was required to have title to the bunkers to pass them to ship owners and failure to pass title would have negatively impacted OW's claim, leaving shipowners safe to pay the physical supplier directly," Murphy notes.

"If it did not, the ship owners would have been liable to OW's estate and potentially also to ship owners elsewhere in the world."

"The UK Supreme Court sided with OW, and decided the Sale of Goods Act did not apply," Murphy



adds. "The ship owners had to pay the sale proceeds into OW's estate (or to its secured creditors) which left them exposed to a potential claim by the physical supplier to recover its debt by way of maritime lien. The French courts have not yet had to consider any substantive claims. However, they have, affirmed in arrest applications that physical suppliers cannot arrest vessels for security on the basis they could not succeed against a party (such as a ship owner) who was not the supplier's direct counterparty."

"Meanwhile, the Greek courts have also decided owners are not liable to bunker suppliers, upholding the long established Greek principle that suppliers can only pursue their contractual counterparty," Murphy explains. "Although the Singapore Court has not addressed the substantive issue, it has had to decide if there were genuinely competing adverse claims between a physical and an OW contractual supplier in interpleader proceedings. In this case a ship owner was being pursued for the same sum of money by two creditors and there was an attempt to pay money into the court for the court to determine the issue. The Singapore Court decided there were genuinely no adverse claims, as the physical suppliers could not establish a prima facie right to be paid the price of the bunkers. This meant they preferred OW's claim. In the US, which has seen a proliferation of cases (including owners seeking interpleader relief and physical suppliers commencing arrest proceedings) many cases have been pending for over a year. The courts have determined that the Federal Interpleader Act governs the claims, but there is no firm indication yet on which side the courts will come down on."

"Finally, in South Africa, the Durban High Court has reserved for judgment its decision on whether a Chinese physical supplier or OW Bunker's secured lender is entitled to payment from the shipowners," Murphy adds. "However, the overall pattern

of the decisions around the world in this case has been to leave the ultimate credit risk with the party dealing with OW or on occasions with ship owners who have been forced to pay twice."

DAMAGED GOODS

"Another issue which the shipping industry has to deal with is the damage of goods being transported. Here the well-established international and local UAE practice in the absence of relevant international treaties and agreements was for maritime carriers to include negligence clauses in their contracts, which exempted them from liability for compensating for any damage which occurred to goods during carriage by sea as a result of any fault, or negligence by the carrier's crew or servants," Saad explains. "Although the general principle is that the carrier is liable to compensate a consignee for damage or loss of goods carried at sea, local and international courts have long upheld legal exemptions in certain events, which include fire, unless the fire was caused by the carrier's act or fault, (and the party alleging fault must prove it)."

"Effectively, both international conventions and UAE legislation have traditionally required shippers and consignees to shoulder the burden of proving fires were not attributable to their act or fault," Mohamed Hamdy of Baker McKenzie Habib Al Mulla explains. "Not only do the Hague Rules embodied in the Brussels Convention of 1924 on Bills of Lading reflect this practice, so does Federal Law No. 26/1981, which in fact adopted a major part of the provisions set out in the Brussels Convention."

"Although this legislation exists the UAE courts have rarely applied the law in these cases," Alkhaja adds. "However, the most significant recent exception related to a claim which was brought against a carrier defendant by various cargo underwriters for compensation for damage to cargo as result of a fire on a voyage. On this rare occasion, the UAE Federal Supreme Court and the Dubai Court of Cassation

applied the law and affirmed the outbreak of fire during a voyage constituted a legal presumption in the carrier's favour, exempting them from any liability for loss and/or damage to the goods carried on board."

"The onus is on the party alleging otherwise (the shipper, consignee or other claimant) to prove the fire was caused by the carrier's act or fault. Interestingly, this ruling has also subsequently been upheld by the Abu Dhabi Court of Cassation," Saad adds.

"This case has underlined the importance of both understanding and applying the maritime laws which exist and merging this understanding with commercial practice," Hamdy says.

"With the UAE looking to develop its maritime industry and legal framework, we should see more highly-qualified marine surveyors and experts being attracted here," Alkhaja adds. "So there may be increased collaboration between maritime experts in the UAE and international experts. Such experts are also essential, in identifying the cause of fire in cases like this, and verifying the soundness of procedures adopted by the vessel's master and the crew before and after a fire occurred, and measures taken to prevent its spread. This is because prompt action is often key in being able to determine responsibility and ultimately, liability in these cases."

CUSTOMS LEGISLATION

"The UAE applies the 'Common Customs Law of the GCC States' which is applicable in all the GCC states, and any commodities which cross the customs line, when being imported or exported, are subject to this law," says Omar.

"In the UAE, this law was approved by Federal Decree No. 85/2007. Commodities imported into the UAE are subject to custom dues which are specified in the Customs Tariff which was issued in line with the Common Customs Law. There is no local UAE law on customs. Any laws or regulations issued in the UAE on customs are all subject to the GCC's Common Customs Law."

"According to Federal Law No. 13/2007 a national committee was established under the auspices of the Ministry of Economy to control importation, exportation and re-exportation of commodities in the UAE," James Newdigate of Al Tamimi & Co explains.

"This committee controls the rules regulating import and export affairs and provides the required technical consultation on non-violation of the country's interests and of international conventions to which the UAE is party."

WHAT ARE THE DUTY RATES?

"Generally, most imported commodities are subject to a 5% customs duty. However, products like tobacco and tobacco substitutes are subject to 100% customs duty or duty on the minimum collectable rates basis, whichever is higher, as outlined in a specific table. For example, alcohol is subject to 50% duty of product value," Omar explains.



Mohamed Hamdy
Senior Associate
Baker & McKenzie Habib Al Mulla

"There are also 734 items which are exempt from customs duty under the customs tariff. These include certain animals, vegetables, plants, chemicals, medicines, certain diamonds, silver, and gold, and carriages and accessories for the disabled. Perhaps more surprisingly, helicopters, cruise ships and excursion boats are also exempt."

IMPORTING

"Under Federal Law No. 13/2007, it is illegal to import any strategic commodity which endangers public safety, public health, the environment, natural resources, and national security or for reasons related to UAE foreign policy."

"This takes into account any restrictions currently imposed on those commodities according to applicable legislation in the state," Omar explains. "The UAE authorities are very strict when it comes to cargo they believe jeopardises or threatens national security. The mere discovery of an unnotified handgun

in the possession of a ship's master or crew will lead to the vessel's detention, the master's imprisonment and criminal action against the vessel and its owners." Omar warns. "In addition, if smuggled goods or prohibited cargo are found on board, the vessel will probably be confiscated. There is a list of products where import and export is prohibited," Omar adds.

"In addition to drugs and radiation polluted substances, it includes a detailed range of items, such as printed matter, paintings and drawings which contradict

Islamic teachings or decency, used and inlaid tyres, children's toys in the form of dinosaurs and goods which consist of lead."

PARALLEL IMPORTING

"As long as there is an agent registered in the specified register maintained for this purpose by the UAE Ministry of Economy, parallel importing is prohibited in the UAE. At the registered agent's request the Customs Departments will detain any products imported by any other person and deposit them in the port warehouses until the dispute is settled," Newdigate explains. "This can be a problem for inexperienced traders, agents and forwarders who may allow a cargo to be imported without first checking if it has an agent who is registered in the UAE. As a result of this law, substantial amounts of cargo imported into the UAE perishes while disputes on whether the cargo in question can be imported without the prior approval of the registered commercial agent are settled," Newdigate concludes.



James Newdigate
Associate
Al Tamimi & Co

On the Right Track

With growing numbers of passengers expected on trains and trams in Dubai, the **Roads and Transport Authority** who are responsible for their regulation in Dubai, explain the current legal framework in this area.

The Roads and Transport Authority (RTA) is responsible for regulating the design and planning of surface public passenger transport in Dubai and its free zone areas. Legally, this has been achieved through the establishment of a number of transportation specific regulations, including those for rail systems. These rail regulations provide a framework for exerting legal control and guide the planning and development of all new rail infrastructure. They also help ensure the safe and effective operation of railway systems within the Emirate.

KEY RAIL REGULATIONS

The key legislation regulating the rail sector in Dubai is Dubai Regulation No. 5/2009. It was used to regulate the Dubai Metro, which was the largest infrastructure project ever undertaken in Dubai. Dubai Executive Council Resolution No. 1/2014 has also been enacted enable tramways to be introduced on to Dubai's highways, and augments the legal requirements which were set out in Dubai Regulation No. 5/2009. Both these regulations are over-arching, enabling laws, which are supported by more detailed Administrative Decisions and Orders (i.e. bylaws).

AUTHORITY FUNCTIONS

This regulation had many goals, one of which was to clarify the separation of the functions between the Railway Supervisory Authority (the Technical Rail Authority) and the Safety Regulation Authority. It has also delineated clear legal responsibilities and obligations which are to be discharged by developers or owners, contractors, consultants and operators at various stages of a railway project's lifecycle and safety certification.

RTA ROLE

In its capacity as the body that undertakes the planning and development of railway networks in Dubai, and the supervision of planning and development within the free zones, the RTA must ensure certificates issued by the Safety Regulation Authority or the technical investigation of accidents are free from conflict of interests and are issued independently from owners, operators and contractors or any other related party.

The Railway Supervisory Authority (currently RTA's Rail Agency) is authorised to grant permissions for establishing, developing and maintaining a railway network in Dubai. Without this permission, no entity is allowed to perform or conduct any activity which relates to the development of



railway systems or networks. It is also responsible for qualifying operators, consultants or contractors to carry out any work related to railway infrastructure.

POLICY AND SPECIFICATIONS

The Railway Supervisory Authority is also responsible for providing policy proposals which relate to the planning, development and supervision of the railway network. In addition, it is in charge of providing and guiding the specifications, technical requirements and performance standards for systems, railway networks and infrastructure in Dubai. It also adopts the standards and criteria for qualification and approval of railway contractors, consultants and operators. Finally it is empowered to issue no-objection certificates for construction demolition and excavations in the area surrounding a Railway or Railway infrastructure.

SAFE REGULATION

Meanwhile, the Safety Regulation Authority is the body, which issues Delivery Safety certificates to owners of the railway infrastructure and railway vehicles. It also issues Operational Safety Certificates to Rail Operators and regulates their compliance with these certificate during revenue operation. In addition, it carries out technical investigations into

rail accidents and establishes independent investigation reports.

As part of the minimum safety stipulations, Dubai Regulation No. 5/2009 adopted the idea of insuring the railway with a comprehensive insurance policy. It states as a prerequisite for granting an Operational Safety Certificate, the Railway must be insured with a comprehensive insurance policy and this insurance must be with an insurance company which is licensed to operate in Dubai.

INJURY AND DAMAGE

Another important part of this regulatory framework is Dubai Administrative Decision No. 68/2010 which supports Dubai Regulation No. 5/2009 and provides more details on technical investigations in the case of the accidents which are linked directly to operational activities and result in personal injury or damage to property. As these accidents are normally emergency matters, the legislation requires the Safety Regulation Authority to work as quickly as possible with the least amount of bureaucracy and administration possible to prevent the investigation process being held back.

JUDICIAL OFFICERS

In order to achieve more administrative control on the operation of the railway, Dubai Regulation No. 5/2009 enabled RTA employees and inspectors to be nominated by the Director General, Chairman of the Board of Executive Directors as judicial officers so they can establish any violations of the legislative provisions governing railways in Dubai.

METRO AND TRAM

As far as Dubai Metro and Dubai Tram passengers are concerned, there are a number of specific laws in place and violating them can result in a fine. These fines vary and can be anything from 100 to 3,000 AED depending on the seriousness of the offence.

FINES

Current violations and fines for passengers and members of the public include the following which are listed below.

- Using public transport means, facilities and services without paying the specific fares.
- Using another person's (No.1) card.
- Destroying, damaging or tampering with devices, equipment or seats of public transport means, facilities and services.
- Eating and drinking in prohibited areas, specifically inside the train. (It is permitted to eat and drink in stations and on platforms. However eating and drinking includes drinking water and chewing gum.)
- Causing inconvenience or discomfort to users of public transport means, facilities and services.
- Smoking within public transport means, facilities and services.
- Carrying alcoholic drinks inside public transport means, facilities and services.
- Resting feet on seats.
- Spitting, littering or performing any act that would contaminate public transport means, facilities and services.
- Selling or advertising goods or services within the public transport means, facilities and services.
- Entering into any prohibited area of public transport means, facilities or services.
- Opening or attempting to open the doors of public transport means, while a train or bus is in motion.
- Entering or sitting in places allocated to specific categories, while holding a different ticket. (For example, travelling in a gold class carriage without a gold class ticket or a man travelling in a ladies' carriage.)
- Bringing animals onto public transport means, facilities and services, except guide dogs for the visually challenged.
- Operating or using any security or safety tools or means, including the emergency exits other than in cases of emergency.
- Action taken or attempted by any person that would interfere with the operation of or compromise the safety of a Tram or Infrastructure.
- Crossing a red light at a junction with the Tramway or Crossing a red light at a junction with the Tramway causing an accident which leads to an injury or fatality.

With the increasing demand for public transport, new urban, leisure and commercial developments and the successful Dubai Expo 2020 bid, the numbers of passengers on trains and trams are expected to increase year on year.

This makes it even more important to ensure railway regulation in Dubai addresses all the necessary operations and safety aspects in a scalable framework which follows world class standards.

“RTA employees and inspectors can be nominated by the Director General, Chairman of the Board of Executive Directors as judicial officers.”

Key Precedent



When Is a Flight a Single Flight?

Do EU compensation rules for delayed or cancelled flights still apply if you are flying via a non-EU hub? [Sogol Kaveity](#) looks at the lessons from *Emirates Airlines v Schenkel*, CI73/07.

Dr Schenkel booked an outward and return ticket from Düsseldorf to Manila, via Dubai with Emirates Airlines. His return flight which was scheduled to depart on 12 March 2006 from Manila was cancelled due to technical problems and he eventually departed from there on 14 March 2006, arriving in Düsseldorf on the same day. Emirates Airlines refused to compensate Dr Schenkel for the cancellation of his flight from Manila and so he brought an action against the airlines in the Local Court in Frankfurt am Main, claiming compensation of EUR 600.

LEGAL BASIS

Dr Schenkel was relying on Article 5(1) (c) and 7(1)(c) of Regulation (EC) 261/2004 which established common rules on compensation and assistance for passengers if either they are denied air boarding, their plane is cancelled or there is a long delay. Although, the cancelled flight was between Manila and Dubai, he argued compensation applied to him because the outward and return flights were non-independent parts of a single flight departing from an airport in an EU Member State's territory. Emirates, argued both outward and return flights should be regarded as two separate flights, and as they did not have a license granted by a Member State in accordance with Council Regulation ECC No 2407/92, they were not a 'community carrier' and not obliged to compensate him. The case was heard by a local court in the Frankfurt Am Main which concluded the journey out and back was a single flight and allowed his claim. Emirates appealed to the Higher Regional Court in Frankfurt am Main, before the case ended up in Fourth Chamber of the European Court of Justice.

ARTICLE 3.1.A

The interpretation of Article 3.1.a of Regulation EC No. 261/2004, was considered. The question was whether it should

be interpreted as applying to the case of an outward and return journey where passengers who have originally departed from an airport in a Member State to which the Treaty applies travel back to that airport on a flight which has departed from an airport in a non-member country.

SINGLE BOOKING

The court also asked if the fact the outward and return flights were subject of a single booking affected the provision's interpretation that they should be interpreted as a single flight.

ARTICLES 8.2 AND 17.2

Article 8.2 of the regulation refers to a flight which forms part of a package, which implied that a flight was not the same as a tour or journey, which may consist of several flights. Article 8.1 also expressly referred to a 'return flight', pointing to the existence of an outward flight in the course of the same journey. However, a journey out and back could not be regarded as a single flight, so Article 3.1.a. could not apply at issue in the main proceedings. This interpretation was supported by Article 17.2, in which the Community had envisaged the possibility of extending the regulation's scope to passengers on flights from a non-member states to a member state which were not operated by community carriers.

RESULT

As a result it appeared, the answer was that Article 3.1.a of Regulation No 261/2004 must be interpreted as not applying to the case of an outward and return journey where passengers who had originally departed from an airport in a Member state to which the treaty applied, travelled back to that airport on a flight from an airport in a non-member country. The fact the outward and return flights were subject to a single booking had no effect on the provision's interpretation.

Heart of the Hub

Dubai Customs

Dubai Customs has been operating for over 100 years. **Narmin Ahmad Ali Issa** of **Dubai Customs** explains how their work and role has changed as the Emirate has become a major transport hub.



“Dubai Customs’ main responsibility can be summed up in two ways. Firstly to assess and collect customs duties, and secondly to fight smuggling and customs fraud.

In performing these roles, Dubai Customs also has to ensure the local community is secure and protected from the illegitimate trade in goods which violate the rules.

We also have a duty to ensure the safety and regulatory compliance of the supply chain.

In this respect Dubai Customs has different areas of responsibility, including security, trade facilitation, duty collection and revenue protection.

WHEN WAS DUBAI CUSTOMS ESTABLISHED?

People may be surprised to discover that Dubai Customs was established over 100 years ago and is one of the oldest government entities in Dubai. In fact, it’s called the ‘Mother of all Departments’.

This can give us a feeling of the importance of trade in Dubai’s growth and development. Although, Customs’ core role has been maintained over time, things are being done very differently now than in the past because of the huge flow of trade we have here now and as a result of Dubai’s reputation as transit hub.

For example, Dubai Customs’ flagship Mirsal 2 is an advanced paperless system whereby all goods are declared and cleared online. It is not only a technology solution for declaration but has a very sophisticated business model behind it which helps ensure Dubai Customs’ objectives are achieved.

We also have the award winning Risk Engine, which was developed in-house in line with risk management best practices. In addition, our Intelligence Department collects, links and analyses information in order to identify any risks which should be entered in the Risk Engine system. As a result risky transactions are turned down by the system and routed for inspection. This system helped approve and clear 97% of customs transactions automatically without human intervention in 2015.

Dubai Customs also now has responsibility towards the international community. As a result, we have tailored modern and dynamic methods to help ensure the department is fulfilling both its domestic and international commitments.

HOW DOES FACILITATING LEGITIMATE TRADE WORK?

Facilitating legitimate trade is one of many challenges any Customs administration organisation faces because there has to be a balance between that and combatting all forms of illicit border activities. Both have to be exercised with caution because applying tighter control on fighting illicit trade can risk the facilitation of trade and vice versa.

For that reason Dubai Customs applies modern and advanced controls which include risk management, implementing state-of-the-art IT solutions for screening and clearance, and partnering with the private sector, government entities and other Customs administrations.

We also like to make sure that we are continually training our inspectors so that they can stay as up-to-date as possible.

HOW SHOULD COMPANIES ENSURE CUSTOMS CLEARANCE OF THEIR GOODS IN DUBAI IS AS STRAIGHT FORWARD AS POSSIBLE?

First of all, companies need to be transparent with the Customs authorities and they need to abide by the country’s laws and regulations.

Dubai Customs has been offering ongoing training to Customs brokers and traders on all relevant Customs matters to help them be compliant. This is what helps make their transactions as simple and straightforward as possible. We advise all our clients to attend this training as it helps give them a better idea of their rights and obligations.

HOW DOES DUBAI’S STATUS AS A TRANSIT HUB IMPACT YOUR WORK?

Dubai is known as a transit hub and there is a colossal, ever-growing number of shipments which stop at Dubai’s different sea, air and inland ports either for import to the local market or for re-export elsewhere.

This huge volume of goods has to pass through Dubai Customs and it is a real challenge for us.

However, we are taking this challenge as an opportunity for growth and achievement.

Technology and human development have always been a key aspect of our Customs operations and this has helped to significantly increased our

capacities in terms of speedy cargo clearance and efficient control. All this makes it easier for us to further support the growth of Dubai's foreign trade sector and its role as a transit hub.

WHAT ARE THE KEY CUSTOMS' DUTY RULES COMPANIES SHOULD BE AWARE OF?

In the UAE and the GCC goods are either categorised as high customs duty items like tobacco and alcohol, low Customs duty items which in fact is where most goods tend to fall, or exempted goods.

All goods have a Harmonised Commodity Description and coding system in which the tariff is identified. This same system is also used to identify if a particular goods item is controlled or not.

Customs clients need to be fully aware of these Customs and tariff rules and keep updated with any changes in them if they want to save time and money in their business operations. The Dubai Customs website which is found at <http://www.dubai-customs.gov.ae> has a large number of resources which can help Customs' clients keep informed on all duty-related matters, and other Customs' policies and regulations. Customs' clients with queries can also call our Contact Centre agents who can answer these. Customs duty is levied

only on goods imported into the country and Free Zone goods do not accrue Customs duty.

DO YOU HAVE RELATIONSHIPS WITH OTHER CUSTOMS AUTHORITIES?

Of course, the current global situation where there are growing security threats and an increase in the levels of illicit trade mean that close cooperation and partnership with all local, regional and global stakeholders in the trade facilitation and supply chain is necessary if we are to achieve our Customs' objectives. This type of far-reaching cooperation can definitely be beneficial in terms of enhancing coordinated border management and trade facilitation.

DEALING WITH SECURITY ISSUES

With the rise in global terrorism all our inspectors have to be alert around the clock in order to make sure borders are secure and protected from any infringement. This also means liaising and cooperating with other government entities and Customs administrations because we all have the same mission which is to 'facilitating legitimate trade and fighting illicit trade to support economic development and protect society'.

IMPORTANT CONVENTIONS

There are several international conventions which relate to customs. However, in my opinion the most important convention is the International Convention on the Simplification and Harmonisation of Customs' Procedures, known as the Kyoto Convention. The main purpose of this

convention is to unify customs procedures internationally. The UAE ratified it in 2010.

WILL YOU HAVE A ROLE WITH VAT WHEN THIS COMES INTO FORCE?

At the moment the whole VAT system is still under development. So nothing as of yet is certain. However, in my opinion there will have to be a role for Dubai Customs in this area especially for goods imported into the country.

DUBAI AIRPORT RECENTLY BECAME ONE OF THE BUSIEST AIRPORTS IN THE WORLD. HOW DOES THIS IMPACT YOUR DEPARTMENT?

Dubai Customs has to monitor goods which are imported via the airports and carried by passengers, so we have had to keep up with the flow of passengers at Dubai Airports. We follow several methods to ensure all borders are controlled and monitored.

WHAT ENFORCEMENT AND PENALTY POWERS DO YOU HAVE?

The Common Customs Law differentiates between Customs offences and smuggling. Articles 142 and 143 of the Common Customs Law define what is smuggling and what should be considered as smuggling. Penalties imposed on smuggling vary from jail time and/or a penalty which can be as a minimum twice the value of the customs duty and as a maximum the value of the goods. However, this can be more complicated because the penalty changes based on the type of the goods (e.g whether the goods are dutiable or exempted).

Offences are listed in Chapter 4 of the Common Customs Law and penalty varies depending on the violation. In relation to Dubai Customs' power, as per Article 151 of the Common Customs Law, the customs authority has the power to enter into a settlement with the violator and reduce the fine as listed in the law (Article 151). In addition, the Public Prosecution will not pursue any case against any customs violator unless Dubai Customs' permission has been obtained.

ARE THERE APPEAL POWERS?

Customs cases pursued before the court are heard by the criminal Court. All violators have the right to appeal the court decision in line with the criminal procedure law. The Common Customs law also gave Customs administration the power to look into grievances filed by a violator and have the power to uphold, modify or annul a penalty.

WILL YOUR WORK CHANGE?

Dubai Customs is one of the main supporters of Expo 2020. To guarantee a successful International Expo Dubai 2020, Customs will need to gear up so it can ensure all procedures are carried out smoothly and at the same time without compromising security. So I think the coming years will require us to work more closely with other stakeholders in the public and private sectors.

“Customs cases are heard by the criminal court. All violators have the right to appeal the court decision in line with the criminal procedure law.”

The Cape Town Convention: A Bird's Eye View

The UAE is considered a 'Contracting State' under the Cape Town Convention. **Antony Single** of **Clifford Chance** looks at how this can help lower the cost of doing business for airline businesses.

Aircraft are, by their nature, mobile assets which constantly cross international boundaries. This means that their financiers and lessors need to look beyond simply their state of registration when considering how their rights can be protected.

One of the key conventions covering international interests in mobile equipment is commonly referred to as the Cape Town Convention. There is also a protocol which covers matters specific to aircraft equipment, known as the 'Aircraft Protocol', which together, with the Cape Town Convention, plays an important part in protecting aircraft financiers' and lessors' interests, and as a result helps to lower airline businesses' cost of doing business across the world.

CONTRACTING STATES

The Cape Town Convention effectively came into force on 1 March 2006 for those countries which had ratified or acceded to it, or 'Contracting States'. At the time of writing, 61 countries have notified UNIDROIT that they have adopted the Cape Town Convention. This includes the UAE and seven other countries in the MENA region. However, it is possible a small number of these countries have not yet fully implemented the Convention from a domestic or a practical operational basis.

CONVENTION SYSTEM

The Cape Town Convention provides a system to create, perfect and enforce security rights over relevant assets. Although it provides a uniform set of rules in this respect, parties do have a certain degree of flexibility in terms of how and whether certain rules should apply in their transactions, subject to the Convention's minimum requirements. Similarly, Contracting States can choose to 'opt in' or 'opt out' of certain Cape Town Convention provisions, by way of declarations.

TRANSACTIONAL IMPACT

This means that while the Convention rules need to be broadly understood on whether the Cape Town Convention applies (or may apply) to a transaction, the application and effect of the Convention will vary on a case-by-case basis, depending on the specific declarations made by the relevant contracting state or states and the parties' negotiations and final agreement.

LOCAL LAWS

It should also be remembered that in many areas covered by the Convention, local laws are still relevant and should not be disregarded even if the Convention does apply. In fact, the Convention defers to national laws in various aspects, for example, in procedural issues. In addition, where a State has 'opted out' or varied a Convention rule, domestic law will still apply.

FRAMEWORK

There are three key elements introduced by the Convention. These are:

- the creation of an 'international interest' recognised by all Contracting States;
- a system for perfection and priority of such interests by electronic registration; and
- a standardised set of rights and remedies on a debtor default.



Antony Single
Partner
Clifford Chance

SPHERE OF APPLICATION

The Convention will apply if the following requirements are met:

- there is an 'aircraft object' as defined in the Convention which include airframes, engines and commercial passenger aircraft;
- there is an agreement creating an 'international interest' in an aircraft object, such as a security agreement, a conditional sale agreement (and other title reservation agreements) or a lease agreement. The Aircraft Protocol also extends certain Cape Town Convention rules to contracts of sale in respect of an aircraft object (e.g. registration and priority rules but not default remedies). However, the interest of an outright buyer does not itself constitute an international interest; and
- one of two 'connecting factors' apply, either the debtor is situated in a Contracting State when the agreement is concluded, or the agreement relates to an aircraft object (but not engines) which is registered in a Contracting State.

ASSIGNMENTS OF ASSOCIATED RIGHTS

The Cape Town Convention also applies to assignments of 'associated rights' which transfer the related international interest.

Associated rights are rights to payment or other performance by a debtor under an agreement that are secured by or associated with the aircraft



object. For example, rights to the repayment of a loan secured by a mortgage over the aircraft or rights to lease rentals and performance under a lease of the aircraft are associated rights.

An assignment of associated rights automatically transfers the related international interest and the assignor's priority position and other interests. Parties can agree not to transfer the related international interest under the assignment, in which case the Convention treats such assignment as only an assignment of receivables which means it is excluded from its rules.

REGISTRATION SYSTEM

The International Registry is based in Ireland and operates an electronic notice-filing system. International interests may (and in fact should) be registered as well as various other interests which are set out in the Cape Town Convention, including assignments, sales and certain non-consensual rights which arise by operation of law, such as liens.

The Cape Town Convention does not change the current system of nationality of aircraft nor does it remove the requirement to comply with each country's local registration requirements (although registration of an international interest under the Convention should override any national registrations or interests in any Contracting State, subject to any specific declarations by the state).

Registration establishes priority from the date of filing, preserves effectiveness upon insolvency, and serves as notice.

Broadly speaking, a registered interest will take priority over subsequent registered and any unregistered interests (regardless of actual prior knowledge of the registered creditor).

The system allows advance filing of prospective interests in which case priority runs from the date of the prospective filing and no additional registration is required when the actual interest arises (provided there is no change in the filing details).

The Cape Town Convention also sets out the order of priority of interests, although parties may vary this order by entering into a subordination agreement and registering it.

REMEDIES

The Cape Town Convention lists certain remedies on debtor default, although transaction parties can contract out of these and Contracting States may also make declarations varying them. These remedies include termination, repossession, power of sale or power to lease, power to collect or receive income, de-registration and export. In most cases these remedies require the debtor's consent. The Convention also provides for interim relief measures, including custody of the aircraft object and preservation of its value.

DEFAULT

The Convention defines a default as an event which substantially deprives the creditor of what they are entitled to expect under the relevant agreement, although parties can agree their own default events. There is a requirement to act in a commercially reasonable manner when exercising any Convention remedy.

ECONOMIC BENEFIT FOR AIRLINES

A key role of the Cape Town Convention is to create a set of rules relating to aircraft which make owners', lessors' and financiers' rights clearer. The aim of doing this is that this certainty should create more opportunities and lower funding costs. To some extent it is difficult to objectively quantify this benefit as different leasing companies and banks will have different internal policies on how they see their enhancement of risk analysis as a result of any adoption of the Convention, and such policies are confidential. However, one test for a country is whether it is listed on the OECD's list of countries which have implemented the Convention in a manner which enables them to qualify for a permitted discount under export finance rules. This is known as the 'Cape Town Discount' and the full details of it are set out in Annex 1 of Sector Understanding on Export Credits for Civil Aircraft.

The Cape Town Discount will provide a potential discount on the fees which are associated with an export credit financing transaction. However, it is also often used as an appropriate objective test by other financiers, leasing companies and rating agencies.

Sky's the Limit With Islamic Finance

Following the Lehman Brothers' collapse the aviation sector has been looking for alternative sources of finance. **Gregory Man** and **Tom Burke** of **Norton Rose Fulbright LLP** explain a precedent setting Islamic finance transaction which was used to finance aircraft purchases.

In March 2015, Norton Rose Fulbright acted as international legal adviser to the airline company, Emirates, on the first ever Export Credit Agency (ECA) backed sukuk transaction. The proceeds of this transaction were used for the pre-funded aircraft financing of four Airbus A380-800 aircraft, which were delivered in April, May, June and July 2015 and subsequently leased to and operated by Emirates.

GROUND BREAKING TRANSACTION

This transaction was the largest ever Capital Markets offering in the aviation space to have the benefit of an ECA guarantee. It has been described by many of those involved as the most significant Islamic finance deal in recent years, because of the innovative structure which was implemented and the fact that it was the first time this alternative source of funding had been successfully used to pre-fund the acquisition of aircraft.

However, and possibly more importantly, this transaction has also highlighted the potential benefits for corporates looking to diversify their funding options, and of considering new and innovative financing structures as a means to boost liquidity in a seemingly ever changing economic environment.

BACKGROUND

The Certificates which comprised US\$913 million sukuk due 2025, were issued by Khadrawy Limited, which is a Cayman Islands incorporated special purpose vehicle, and have the benefit of a guarantee by Her Britannic Majesty's Secretary of State acting through the UK Government's Export Credits Guarantee Department (currently operating as UK Export Finance and commonly known as UKEF or ECGD). The Certificates which have a tenor of ten years, were listed on both the regulated market of the London Stock Exchange and NASDAQ Dubai and were issued in line with Regulation S and Rule 144A of the United States Securities Act of 1933.

As part of this transaction Norton Rose Fulbright was able to use its global office network. The team was co-led by partners Mohammed Paracha and Gregory Man in Dubai and partner Sean Corrigan in New York, but had assistance from other team

members in Dubai, New York, Houston, London and Los Angeles.

FINANCIALS

The Certificates were priced on 25 March 2015 at a profit rate of 2.471%. There was then a strong demand from global investors, which attracted orders of over US\$3.2 billion and led to over-subscription of 3.6 times. The transaction attracted interest from a diverse group of conventional and Islamic investors. The Certificates were allocated to over 45 global institutional investors. Approximately 39% of the Certificates were distributed to the Middle East and Asia, 32% to Europe and 29% to the United States. In terms of investor type, around 47% were fund managers, 38% banks and 15% insurance companies and pension funds (which indicates the global investor appetite for innovative Islamic financing methods across a range of sectors.) The transaction involved many of the region and world's leading investment banks, including Citigroup Global Markets Limited, HSBC Bank PLC, JP Morgan Securities PLC and the National Bank of Abu Dhabi PJSC (who were acting as Joint Structuring Agents and Joint Lead Managers), Abu Dhabi Islamic Bank PJSC, Dubai Islamic Bank, Emirates NBD Capital Limited and Standard Chartered Bank (who were Joint Lead Managers) and NCB Capital Company (the Co-Lead Manager).



Gregory Man
Partner
Norton Rose Fulbright LLP

TRANSACTION STRUCTURE

The transaction used an innovative Islamic finance structure which was based on a combination of ijara (leases) and manfa'a (usufruct represented by available tonne kilometres, an airline industry measure of total capacity) to overcome challenging Islamic structuring issues on 'tangibility' during the pre-funding period. It was this innovative structuring which allowed Emirates to combine sukuk financing with pre-funded aircraft financing, which then also benefited from the UKEF guarantee.

RESULTS

As a result of this transaction, Emirates was able to:

- access the debt capital markets for funding, including those in the US, as the sukuk was offered



to sophisticated investors in the US in line with Rule 144A of the United States Securities Act of 1933 (as amended);

- access not only conventional investors but also Islamic sources of liquidity in the Middle East and South East Asia, as both conventional and Islamic investors can invest in Islamic transactions such as sukuk;
- obtain pricing advantages by utilising the UK Government's credit rating;
- pre-fund the acquisition of the aircraft by obtaining the funding for the aircraft before the aircraft were manufactured and delivered;
- pave the way for other airlines to use the same product for Airbus deliveries in the future;
- potentially set a precedent for other ECAs, such as US EXIM, to develop similar products for Boeing deliveries in the future;
- demonstrate how ECA guarantees could be used for the acquisition of other asset classes in a similar way; and
- continue the trend of innovation in the Islamic finance and aircraft finance industries.

THE UKEF ELEMENT

The ECGD Guarantee together with London Stock Exchange listing helped to further build on London's reputation as a key hub for Islamic finance and also underscored the UK Government's Islamic finance ambitions, following on from their own sovereign sukuk issue in 2014. One of the

significant features of the sukuk structure used for this transaction was the UKEF element which saw the UK Government, via UKEF, take a share of the borrower's risk by providing investors with the full faith and credit of the UK Government, as opposed to only the borrower's credit risk, in a Sharia-compliant manner. We understand that this was the first financing where UKEF, as well as Coface and Hermes, had been involved in Islamic finance. In addition, this transaction underlined Dubai's rising profile as a hub for Islamic finance in the Middle East and helped highlight its efforts to become the capital of the global Islamic economy.



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PRECEDENT

The work undertaken by all the stakeholders in this transaction created a precedent which the aviation industry can follow.

This was important as the airline industry has sought out new funding routes, in particular following the Lehman collapse. Importantly, the transaction also demonstrated that there was a significant pool of investor appetite which could be tapped when it came to Islamic finance as demonstrated by the diverse global pool of investors who subscribed for the Certificates.

As a result of this transaction, ECAs can now also look at Islamic finance for other asset classes, such as rolling stock or shipping, which should help open up significant alternative funding potential in the future.

UAE Transport Projects: PPP Potential

So far the long expected boom in UAE public private partnership transport projects has failed to materialise. **Myles Mantle** of **Jones Day** considers what actually is the potential for using these structures on new transport development projects.

There has been an expectation for a long time not only that there will be numerous up and coming transport projects in the UAE but that public private partnerships (PPPs) would be an appropriate method for their delivery. Demand for infrastructure investment, particularly in transport, is extremely high in countries in the region, including the UAE. However, until recently, with some exceptions, this expected boom in transport projects has not in fact materialised. A number of high profile pathfinder projects which initially were tendered on a PPP basis have not been successful and have either been abandoned, procured by more conventional direct procurement methods (as tenders from private participants were deemed too expensive), substantially de-scoped or have been subject to substantial delays (or a combination of all of these situations). As a result, questions have been raised about whether private participation using a PPP model will actually be accepted for UAE transport projects.

CURRENT SIGNALS

PPPs tend to be a more popular tool for funding new infrastructure projects where the host government:

- is running a budget deficit;
- has a stated aim to diversify the economy, and considers achieving this by attracting private sector investment in certain strategic areas;
- wants to maintain a project pipeline in circumstances where government funds are constrained;
- wants to achieve greater efficiency in delivery of important infrastructure, including using competition in public service delivery;
- wants to reduce delays and cost overruns;
- wants to increase quality of product and service;
- wants to increase knowledge transfer between sophisticated international private sector companies and government entities, and get training for public servants in project management and procurement.

Some or all of these conditions apply in the UAE, to a varying degree depending on the Emirate and so it seems inevitable that increasing use of private sector expertise and financing will be a crucial part of certain Emirates' strategy to develop infrastructure projects using a PPP model. This must be especially true if there is buy-in to the idea that

better infrastructure, in particular transport links, promote economic growth and development, and better economic growth and development in turn assists in the diversification of economy.

So given these indications, what transport projects have been announced and what is the framework?

IN DUBAI

Recently, there have been several developments in Dubai, which taken together, seem to indicate there are fantastic opportunities for transport projects there, including under a PPP umbrella. For example, in November 2015 Dubai enacted a new PPP law. In addition, in October 2015 the Roads and Transport Authority (RTA) announced a tender for the US\$2.88 billion route 2020 metro project which is an expansion of the Dubai Metro Red Line from Nakhel Harbour and Towers to the Expo 2020 site. There has also been a recent announcement by Dubai Airports Company of the US\$32 billion expansion of the Al Maktoum Airport at Dubai World Central which will be carried out in two major phases, which should make it the world's biggest airport in terms of passenger capacity by 2050 when it will increase to 220 million passengers per year. This project will involve four new runways, two new terminals, two new satellite

concourses, six train tracks and seven stations connecting those terminals and concourses. The Dubai Airports Company has also announced the US\$7.8 billion Dubai International Airport terminal, concourse and airspace expansion programme which will boost capacity from 60 million to 90 million passengers per year by 2018.

OTHER EMIRATES

In Abu Dhabi the story is more mixed. The US\$9.4 billion Midfield Terminal and upgrade project at the Abu Dhabi International Airport is due to be completed and opened mid 2017. However, it is a direct procurement EPC project rather than a PPP project. Other PPP projects have been announced (notably mixed-use developments, amusement parks and a souk for Abu Dhabi) but there have been no recent announcements about significant transport projects which are to be developed on a PPP type basis. The Government in Sharjah, plans to expand Sharjah International Airport's capacity from 9.5 million passengers per year to 25 million



Myles Mantle
Partner
Jones Day



passengers per year. However, this may be procured using a direct procurement EPC type model too rather than a PPP or even quasi PPP structure.

The Ajman Government also has airport plans, as several years ago it announced it wanted to build a new Ajman International Airport. However, this is also being carried out by direct procurement, for around US\$ 600 million and is expected to be completed by 2018. It will eventually increase capacity to 16 million per year. Given airport projects in Abu Dhabi, and potentially Sharjah and Ajman are being developed on a direct procurement basis, the most interesting projects from a PPP perspective are the Al-Maktoum International Airport development and the Dubai International Airport development projects, which may be carried out under the Dubai PPP law.

AIRPORT PROJECT CHALLENGES

The capacity increases for these airports are impressive, and are based on large projected increases in demand for tourism and commerce in the UAE. However, it is difficult to accurately predict air travel volume 10 or 20 years into the future. You need to factor in potential changes in airlines, airplane size and shape and the rapid advance of technology which can affect airport operations. There can be increased competition from other carriers in the region with competing hub airports, especially if those hub airports are being developed at the same time. Airport developments can also be politically sensitive and may attract a lot of negative media attention which can impact on viability.

These projects can also be sensitive to issues like the country's GDP and fuel price fluctuations, and political issues in countries on particular flight paths, which would otherwise have nothing to do with the host country. If the airport is a design statement or contains new systems (such as the Heathrow Terminal 5 baggage handling system), there can be a risk of potential problems with the design and/or construction if new technology or techniques which have not been used before are included in the construction process.

Airport projects are especially complex because of the multiple stakeholders and revenue sources (such as landing fees, terminal usage fees and

concession fees) and their size and lifetime from planning to completion.

MEETING THE CHALLENGES

To meet these challenges assumptions and forecasts (in particular passenger numbers) need to be rigorously tested and potential challenges considered. There are indications the Dubai Economic Affairs Council (DEAC) is working hard on this. Parties also need to acknowledge that some circumstances are beyond their control and work on the areas they can influence to ensure their business case is as robust as possible. As airport projects are extremely complex and there are so many different stakeholders, investors and owners also need to engage with each stakeholder as far as possible to ensure the business case is flexible and adaptable if circumstances change.

A key element in delivering a successful airport project is proper allocation of risk to the appropriate stakeholder. The owner (and DEAC) would be advised to resist overly aggressive transfer of risk to project investors or developers, as this can result in higher project costs. However, a balance may be required in order to remain flexible given the likelihood circumstances can change. Sometimes investors and developers may also need to retain certain risks which they might not take in other projects and be more actively involved in particular in project management than usual. Once risks are robustly assigned owners and developers should also monitor when they are realised, try to help relevant parties mitigate risks, balancing this against ensuring the project delivery schedule is adhered to. This proper allocation of risk is where potentially a decent PPP framework, like the Dubai PPP law, should assist.

Given the complexity and size of these projects, there will be changes in scope during the development process. So owners, developers and even operators will need some measure of flexibility in their processes. Change order mechanisms need to be included and understood within the contractual framework, and can involve extensive work to get right. It is also important to partner with experienced developers and operators who have faced and resolved similar challenges before,

From Flags to Finance

As the maritime sector is considered an essential pillar for the UAE's economic growth, **Alessandro Tricoli** and **Paul Katsouris** of **Fichte & Co Legal Consultancy** explain the basics of securing a shipping finance transaction.

As a Civil law jurisdiction, UAE maritime law is derived from the UAE's Maritime Code (or specifically Federal Law No. 26/1981) but all maritime financial transactions are governed by the Commercial and Civil Codes. The Federal Transport Authority (FTA), is the Government body which is responsible for regulating and implementing daily shipping procedures, and for operating the national ship registry.

Through bold Government initiatives such as the recently announced Dubai Industrial Strategy (DIS) and the Dubai Maritime Vision 2030, the UAE has clearly set its sights on becoming an international leader in the Maritime Sector. The DIS, in particular, has identified the Maritime Sectors as one of the six essential pillars for the UAE's future industrial growth. However, an important element in achieving this goal will be the ability to attract top level ship financing transactions into the market. Although the UAE is already generally acknowledged as a world leader in Islamic Finance, foreign lenders may find the traditional security package for ship finance transactions difficult to implement in the jurisdiction. This is because there are currently various questions being addressed including the interpretation of the UAE's Commercial and Civil Codes, the technicalities of registering a ship in the country, and mortgaging that ship, which could have an impact.

DUE DILIGENCE

Traditionally the first step for a lender in any ship finance transaction is to determine the borrower's background. This can be more difficult in the UAE as there isn't a public registry of companies, and technically there is no concept of a good standing certificate. As a result a lender has to focus significant resources on their due diligence before proceeding with any transaction, and will also need to receive active support from the prospective borrower.

UAE: A CLOSED AND ADMINISTRATIVE FLAG

The process for registering a vessel with the UAE national registry is outlined in the UAE Maritime Code, Federal Law No. 26/1981 and requires the involvement of several Government bodies including the FTA, the Coast Guard, the Emirates Classification Society (Tasneef), and the Telecommunication Regulatory Authority (TRA). Each of these bodies issues various separate licences, certificates, and

verifications, which once obtained allow the FTA to then issue a Navigation Licence. A Navigation Licence then allows the vessel to freely operate within UAE national waters. There are clear guidelines on which vessels can and cannot be registered under the UAE flag. However, the most important limitation is that the registry is, currently, strictly a national one. This means that a UAE national has to own 51% (or more) of the shares in the vessel in order for that vessel to be eligible for UAE registration. However, a vessel owned by a UAE national is not automatically eligible for a Navigation Licence, unless the owning company's Trade Licence also specifies the type of Marine Activity the company intends to be involved in.

Despite this, vessels under construction, floating docks, offshore rigs, and hovercrafts (amongst other types of vessels) have all been deemed eligible for registration under the UAE flag. However, tankers over 10 years old can only be registered under specific circumstances



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MORTGAGES

The primary vehicle for securing a lender's position is typically the vessel mortgage. However, Federal Law No. 26/1981 has little detail on how a mortgage agreement should be structured. As a result, there is much discretion on drafting a mortgage instrument and it is the drafter's responsibility to ensure the rights of each party are well documented in order to be enforceable. Federal Law No. 26/1981 does specify that a mortgage agreement must be in writing and signed before a notary public, which also means the mortgage has to be in Arabic or in a dual Arabic/English format. However, once a mortgage is finalised and executed, the FTA procedure for registering it is relatively straightforward.

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VESSELS UNDER CONSTRUCTION

One positive point, in which the UAE is far advanced, is that it is one of the few jurisdictions which permits the mortgage of a vessel under construction, with the caveat that the mortgage instrument is accompanied by a declaration from the relevant Maritime Office in the port in which jurisdiction the vessel is being constructed, stating its length and other dimensions, its approximate tonnage, and the address of the yard or place in which it is being built.

OTHER SECURITIES

In terms of other securities, including assignments, guarantees, security over bank accounts and share



pledges, even leaving aside difficulties with due diligence, mortgage and registration, the real problems when it comes to UAE ship finance at present are the difficulties in establishing the usual security package.

The legal treatment of an assignment is still not entirely clear, and similarly in the UAE the creation of a security over an (earning) account is a totally grey area. However, the UAE is addressing these issues. Recent developments in commercial law have helped clarify the status of share pledges, so we hope issues over assignments and security over accounts will also soon be addressed.

FOREIGN JUDGEMENTS AND ARBITRATION AWARDS

It used to be considered unwise for a lender to commence action in a foreign jurisdiction with the aim of enforcing that foreign judgement or award in the UAE. There is presently some debate over which foreign judgements and awards are enforceable in the UAE. Although since the Emirates ratified the New York Convention, foreign arbitration awards have been easier to enforce in the UAE, the position with regard to Court judgements is not as clear. The customary way of determining whether the enforcement of a foreign judgement would be possible, was to evaluate the treaty (if any) between the UAE and the foreign jurisdiction. However, it was unlikely a UAE Court

will accept a foreign judgement where matters involved a UAE national, UAE company, or a business transaction which took place within the UAE due to the national courts' original jurisdiction.

However, a recent alternative has been provided by the DIFC Courts. These Courts have entered into a series of Memoranda of Understanding with foreign courts on how, even in the absence of a specific treaty between the countries, foreign judgements can be recognised and enforced in the UAE through the DIFC Courts. Although this is not yet a well-tested option at the enforcement stage, in a recent judgement it was held that the DIFC Courts could even be used as a conduit jurisdiction for the recognition of foreign judgements, which could then be enforced through certain UAE Courts.



Paul Katsouris
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Fichte & Co Legal Consultancy

NEW MARITIME CODE

Work is currently being undertaken on a new Maritime Code which is expected will clarify current areas of uncertainty, and provide a framework which will help contribute towards the UAE's development into the global maritime hub. It is expected this new Code will help address many of the above grey areas, including the structure of mortgages, and could open up the registry to foreign nationals.

The UAE has already been successful in elevating its status as a major maritime hub, and it seems these changes will allow the sector here to reach the next level internationally.

Setting a Course for Good Governance

These days organisations of all types need to practice good governance but there are reasons why this can be particularly difficult for shipping companies. **Lance Croffoot-Suede** and **Jack Nichols** of **Linklaters** look at the risks they face and steps to take to reduce them.

No organisation is immune from the governance challenges of the global economy. These are issues which require responses across many functions, including operational, legal, compliance and financial functions and can require coordination between different levels of management. Regulators' focus on identifying and seeking accountability for misconduct is more acute than ever. Communities and investors also tend not to be forgiving when misconduct is perceived as having impacted on their interests. Unfortunately, modern technology can also allow any such concerns to be easily widely communicated which means operational risks of this type, unless sensitively managed can quickly escalate and affect the bottom line.

SHIPPING INDUSTRY RISK

The shipping industry is at the forefront of having to face and tackle significant governance challenges. In fact it is an industry which is uniquely exposed to risks as a result of its geographically extensive operations and connections. For example, logistics companies can be highly exposed to corruption risks, through their considerable interactions with government officials in customs and the licensing of imports. They also need to be able to respond to evolving challenges such as climate change, terrorism, piracy and human trafficking.

Tackling these challenges requires an integrated response, as shipping company staff and contractors need to be well equipped to act properly in the vast number and range of legal regimes and cultural expectations their businesses touch. Despite shipping companies' attenuated delivery structures, their management teams also need to take action so they can understand and address these challenges, as they arise in different parts of the world, and support their staff in tackling them.

LONG-STANDING CHALLENGES

Shipping companies have several particular characteristics which increase their exposure to governance challenges.

The shipping industry is truly global and connects all geographic regions and many industries to each other. Shipping activity also tends to be an integral part of many supply chains, and is relied on by businesses to connect to other businesses

and consumers. This means shipping companies need large networks of individuals, working independently at times. These broad networks demand enhanced transparency, so there is clear evidence all these operations are acting in a compliant way, and so they are accountable for their actions.

The shipping industry also has to respond to a complex web of legal requirements imposed by many different jurisdictions. These can include the source and destination of goods being transported, international conventions, and regimes with an extraterritorial impact (such as sanctions and anti-corruption regimes). On top of this, shipping companies need to be aware of the cultural expectations of particular business transactions. These can include gift giving and respect for local customs. Sensitive treatment may be needed to

ensure these points are appropriately addressed. In addition, dealing with ports and borders demands coordination and cooperation with many different government officials. Border posts are often remote and function at all hours with few staff, so oversight can sometimes be weak. Customs officials and police at border controls may be under-resourced and poorly paid. So, shipping companies are heavily reliant on those officials acting properly, and not abusing their discretionary powers. In this context, the risk of corruption is high. It man-



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ifests itself in two ways at borders. The first is 'collusive' corruption where officials receive bribes in order to waive tariffs and taxes. This can be associated with higher usage of a border control or port, which may be considered by rogue businesses as being a preferable port to transfer goods through. The second is 'coercive' corruption. This is where officials demand bribes before they will perform routine processes, and this risk can be associated with reduced usage of a port, as firms may be travelling further and increasing their transport costs, in order to avoid having to pay bribes.

EMERGING ISSUES

As well as these long standing challenges, there are also newer risks for shipping companies which have been caused by changing economic and social circumstances and require responses which cross many functions and strong coordination by management. With commodity prices under pressure, and demand for the transportation of goods



significantly lower than expected, these issues have been challenging shipping companies to adapt in an efficient way.

1. **Heightened regulatory action** - Regulators around the world are becoming more active. The US is no longer the sole principal source of regulatory scrutiny on bribery and corruption. European regulators, and others, are becoming more active in this area and emerging economies are building their capabilities to address these types of breaches. In addition, institutions are beginning to cooperate and coordinate with each other.
2. **Sanctions Changes** - The end of some sanctions in relation to Myanmar, thawing of US-Cuba relations, and the initial relaxation of sanctions for some companies and individuals doing business in Iran are contributing to the potential opening of new markets. As this happens, companies have to balance the benefits of being a 'first mover' and capturing new business, while respecting the restrictions the remaining sanctions maintain and undertaking necessary due diligence when working with new counterparties.
3. **Social impacts** - Social issues such as climate change, conflict and human trafficking and piracy, which can be interlinked are impacting the shipping industry. Climate change and conflict, which are interlinked phenomena, are impacting people's livelihoods and causing them to try to seek new economic opportunities. Some undertake piracy and maritime terrorism, while others try to travel illegally to other countries. Shipping companies need to mitigate against this.

UNDERSTANDING RISK

These challenges cannot simply be addressed by drafting ever more comprehensive and complex paper policies. They are complex ongoing social, economic and political changes and require companies to be adaptable. The necessary flexibility can come from a governance approach which is characterised by principles of good practice, emphasised by senior management and transformed into a compliance culture which permeates the whole business and

is supported at all levels. Companies first need to try to ensure they understand the challenges affecting all aspects of their business. Governance reviews which investigate, identify and try to tackle the organisation's legal, compliance and operational issues can help address these issues and be resolved with the input of multiple business functions. Having identified the nature and impact of these issues, shipping companies should then try to deploy unified governance and compliance frameworks which push back on these challenges. Within such a framework, individuals can be empowered and guided to take action which is appropriate to local risks and requirements. For example, where particular forms of corruption are a greater concern, action within the framework can be enhanced or where they are less they can be reduced. When local cultural requirements expect certain payments, the framework can include guidance for the company's local operations to help them act appropriately, and explain their actions to regulators if necessary.



Jack Nichols
Managing Associate,
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COLLECTIVE ACTION

However, not all these challenges can be addressed alone. Through collective action, shipping companies can also draw on the experience of others, and work together to fight back against issues affecting them all. One example of this is the Maritime Anti-Corruption Network which was formed in 2012 to promote integrity in the maritime shipping sector. This body seeks through its members to share best practices and identify and tackle the causes of corruption which affect the sector. Once challenges being faced are understood, appropriate action can be taken in a holistic and unified way. This allows the company's position on its governance to be communicated clearly by management, and helps create a culture of compliance within the company. It can also help to coordinate effectively with interested third parties, including regulators, investors and communities. Ultimately, it will only be through collective action of all stakeholders that the underlying causes of these challenges can be addressed.

You're Under Arrest?

UAE Law contains provisions which allow for vessel arrests. However, as **Jonathan Brown** of **Hadef & Partners** explains a change in the Dubai Courts has recently reduced the impact of this potentially useful remedy.

The ability to arrest a vessel is an essential form of security for any party interested in cargo, or for lenders who are involved in a claim which could possibly lead to the judicial sale of a vessel, should that become necessary.

Vessel arrests can arise as potential remedies for an assortment of creditors, including ship owners who need to repossess a vessel under a charter party or mortgagees who have terminated a loan facility due to a default.

DUBAI COURT CHANGE

In the UAE, the courts do permit vessel arrests for genuine claims.

However, recently there has been a noticeable change in the documentary information which needs to be produced upon application for such an arrest within the Dubai Court system.

This has led to the frequent refusal of such orders on the grounds of procedural errors which have occurred after the arrest order has been granted. These errors are also tending to invalidate the arrest as a whole, which can cause both losses for the claimants and also inhibit what would otherwise be a valid claim.

KEY LEGISLATION

Federal Law No. 26/1981 Concerning the Commercial Maritime Law, as amended is the primary statute which governs maritime law in the UAE, and among other things it regulates, the arrest of vessels. Vessel arrests in the UAE are accomplished through *ex parte* proceedings, that is to say, without the vessel owners' notification.

ARREST PROCESS

A vessel can only be arrested in order to obtain litigation or arbitration security in respect of a 'maritime debt'. A 'maritime debt' is defined under Article 115(2) of Federal Law No. 26/1981 as meaning a claim in respect of a right arising out of 15 potential heads.

These heads include including collision, GA, crew wages and mortgage. Generally, in order to arrest a vessel, a claimant or their lawyers must file an arrest petition in the UAE Court which has jurisdiction over the port in which the vessel is located.

ARREST PETITION

The arrest petition must include all supporting evidentiary documents and these documents must be

translated into Arabic. The arrest petition will be reviewed by an urgent matters judge who has the discretion to accept or refuse the petition, and also to request further information from the claimant.

There are also a number of generally accepted requirements.

For example, a judge may require the claimant to lodge counter-security in case the vessel is damaged during the period of its arrest. Once completely satisfied, the judge will grant the arrest and issue the order to arrest the vessel.

LETTERS

Almost simultaneously, the UAE Court will then issue two letters. The first letter is sent to the UAE Coast Guard, and the second to the port authority where the vessel is located.

These letters inform the Coast Guard and the port authority of the vessel arrest and that the vessel is not permitted to leave its current location.

The claimant has to file substantive proceedings on the merits of the claim, within eight days of the arrest order. This is known as the Statement of Claim. This latter requirement is also standard.



Jonathan Brown
Partner
Hadef & Partners

FEDERAL LAW NO. 26/1981 REQUIREMENTS

Article 119(1) of Federal Law No. 26/1981 states '[c]opies of the Notice of Arrest shall be delivered to the master of the vessel or his deputy thereon, a second copy to the relevant maritime authority in the port in which the arrest is effected to prevent the vessel from sailing, and a third copy to the Registration Bureau in the said port'.

Article 120 of Federal Law No. 26/1981 goes on to add '1. [t]he Notice of Arrest shall contain a Summons to attend before the relevant civil Court in the area of which the arrest is effected to adjudicate the validity of the debt, of whatever amount. 2. [a] date shall be fixed for the hearing not more than thirty days from the date of the Notice of Arrest. The Court shall promptly enquire into the claim, and the time shall not be further extended'.

PRACTICAL EFFECT

In effect, the Court Bailiff is required to board the arrested vessel and serve the vessel's master or chief engineer with the Notice of Arrest, which must contain a date for the first hearing which is not more than 30 days from the date of the Notice of Arrest.



A copy of the Notice of Arrest must also be served on the port authority where the vessel is located, and another copy sent to the Registration Bureau. It is only after all of the above has been completed by the Court Bailiff that the claimant should file their Statement of Claim or the substantive proceedings which gave rise to the claim, and this should be up to eight days later.

INVALIDATED ARRESTS

Unfortunately, several UAE Court decisions have invalidated arrests and thereby security for the claim because these procedures have not been correctly followed.

The court has clarified that the exceptional procedures provided for in Federal Law No. 26/1981 demonstrate that the legislator insists that vessel arrests are handled in an expedited manner.

Although it is the Court Bailiff who is required to officially serve the Notice of Arrest, it is ultimately the claimant's responsibility to ensure the Notice of Arrest contains all the correct information and is served in the manner prescribed in Federal Law No. 26/1981.

If this does not happen the arrest will be invalidated as a result of the procedural errors.

INFORMATION EXPANSION

In addition to this tendency to invalidate vessel arrests on the basis of this type of procedural irregularity, there has also been a more troubling tendency to expand the nature of the information which needs to be made available to the court upon the application.

In some cases this expansion of the information needed has actually meant it was not practical for the applicant to comply with the request.

Vessel arrests, by their nature are made as a matter of urgency. As a result, in some cases only the basic information about the claim may be available but unfortunately time is of course of the essence.

DUBAI'S ONLINE APPROACH

The system now in operation in Dubai (but not fortunately in the rest of the UAE) is that any such application needs to be registered online before the application is made to the court. This is in spite of the inherently urgent nature of such requests.

In addition, there is also now a requirement that the defendant's trade licence be produced at the same time.

TRADE LICENCE

Given the defendant, who is the owner or operator of the vessel, is normally registered outside the UAE, often it is not possible for a 'trade licence' to be produced. There can also be cases where such a document does not even exist.

There is a system which exists and allows those seeking an arrest to apply to the Chief Justice's office for a waiver of this requirement, but this would also take time, which those seeking an arrest may not have and on occasion, these requests have been refused.

MASTER'S IDENTITY

The Dubai Courts have also required the identity of the master of the vessel be produced as part of the application. Once again, this is not a practical possibility for the applicant in the vast majority of cases.

What is interesting, however, is that none of these documentary requirements coincide with a provision in either Federal Law No. 26/1981 or in UAE Civil Procedure Code (Federal Law No. 11/1992) as amended.

Sadly, the overall effect of this is, in Dubai at least, has been to render the redress available by virtue of Article 115 of Federal Law No. 26/1981 of no value.

However, whether this effect is an unexpected by-product of a mere administrative change or a shift in policy still remains to be seen.

Droning On?

The UAE is keen to encourage the use of drone technology but also to ensure drones are well regulated. Nick Humphrey of Clyde & Co looks at the latest regulatory steps being taken in this area.

One of the most challenging legal issues currently facing aviation regulators in the UAE is how to control the rapid growth, use and availability of unmanned aerial systems (UAS) or drones. Drones present a myriad of safety, security, privacy and data protection issues, and even recently caused the temporary closure of airports in Dubai and Abu Dhabi.

However, at the same time as wanting to regulate and control the use of drones, the UAE has also been a great promoter of innovation in drone technology, in order to stimulate social and economic benefits.

For example, in March 2016, Dubai hosted the first 'World Drone Prix'. A competition called 'Drone for Good' was also initiated by the UAE's Telecommunication Regulatory Authority in order to develop positive applications for drone technology and now offers a total prize pool of 4.67 million AED. In addition, the Dubai Silicon Oasis Authority has implemented the 'Drones for Security Surveillance' initiative which utilises drones equipped with high resolution cameras and high-sensitivity microphones in surveillance of that free zone.

In terms of regulatory steps, the General Civil Aviation Authority (GCAA) has introduced a strategy for the use of drones which 'aims to establish the aviation regulatory environment to reap the societal benefits of this innovative technology and to deal with citizens' concerns through protective action when necessary'.

UAE AIRSPACE USE

The GCAA's first step was to introduce regulations to integrate the use of drones into UAE airspace. In April 2015, Civil Aviation Regulation (CAR) Part VIII Subpart 10 on the 'Operation of Unmanned Aerial Systems within the UAE' (or the Drone Airspace Regulation) was issued categorising drone operations based on whether they were private or commercial/state) and on drone weight (Category 1: 5kg; Category 2: 5kg – 25kg and Category 3: > 25kg). Within each sub-category, the Drone Airspace Regulation establishes limits on the maximum height and type of airspace the drone can operate in, the minimum equipment requirements for a drone operator and other operation restrictions.

Following the recent UAE airport closures which were caused by unauthorised drone use, on 29 June 2016, the GCAA issued Safety Alert 04/2016 which sets out recommendations and guidance on

the contingency measures to be adopted by UAE air traffic controllers when unauthorised manned or unmanned aircraft are reported or observed in 'controlled airspace'. The GCAA recognises airspace infringements by drones and other aircraft can create operational challenges for air traffic controllers, safety and national security threats and significant costs to the aviation industry. Their recommendations include reviewing current contingency plans to ensure they include measures on drone identification, segregation of airspace from a drone and airspace or aerodrome closure or restrictions following the report of an airspace infringement.

LICENSING OPERATIONS

As part of the next phase of its regulatory strategy, the GCAA is introducing new regulations on the certification and licensing of different types of drone operation; flight crew licensing; drone training organisations; and vendors involved in drone import and/or sale. The GCAA also wants to help drive drone use for educational, research and development purposes, and in May 2016 it issued the first operator specific regulations in the form of CAR Part II Chapter 11 on 'UAS for Experimental and Demonstration Purposes'. This establishes the requirements for obtaining GCAA approval to conduct experimental or demonstration flights in defined locations.

Operators have to develop procedures which adequately manage the risks and ensure experimental flights are conducted safely within these procedures. They must also demonstrate

appropriate expertise in UAS design, construction and operation, and have appropriate knowledge of UAE aviation laws and regulations.

The GCAA also issued the proposed CAR Part IV on 'Unmanned Aircraft Systems' (CAR-UAS) in May 2016 which details certification requirements for the operators of drones for commercial and non-commercial (but not recreational use) including use by government authorities. CAR-UAS establishes the processes and standards for applying for and maintaining a UAS operator's certificate (UOC). This is comparable to the requirements commercial aircraft operators face when applying for an air operator's certificate. Information Bulletin No. 7/2016 issued by the GCAA on 17 April 2016, sets out the application fee for maintaining an UOC at 50,000 AED, and states a UOC is valid for one year.

UOC operators will need to establish, implement and maintain a safety management system



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Clyde & Co



which includes appointing key post-holders and maintaining minimum levels of third party liability insurance, although relevant minimums are yet to be specified. A UOC operator's operating crews must be at least 21 years old, have security clearance and be qualified for the particular area and type of operation being undertaken, with reference to the operational limits established by the Drone Airspace Regulation in 2015.

The design of the drone used by a UOC operator must also conform to industry standards acceptable to the GCAA.

A UOC operator also needs to maintain an operations manual which includes contents and processes similar to those adopted by aircraft operators. For example, the manual should include a compliance statement signed by the accountable manager, clear management reporting structures, drone crew members' responsibilities, flight time limitations, processes for maintaining flight logbooks, document retention policies, emergency procedures, recurrence training, occurrence reporting and route planning.

CAR-UAS is currently being finalised following public consultation and is expected to be implemented later in 2016.

THIRD PARTY LIABILITY INSURANCE

Currently operators of registered aircraft into, from and within the UAE need a minimum level of third party liability insurance which is based on the aircraft's maximum take-off weight (MTOW) and is prescribed in the UAE's Aeronautical Information Publication (AIP). The insurance levels adopted in the UAE are in line with those established under EC Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators. In respect of drone operations, both the AIP and EC 785/2004 exclude 'model aircraft with an MTOW of less than 20 kg', possibly to exclude recreational drone use but not commercial drone use, although the drafting is unclear.

The adequacy of the levels of insurance imposed on drone operators and this ostensible exclusion for recreational (model aircraft) users was considered during the UK House of Lords' European Union Committee's (EUC) inquiry on 'Civilian Use

of Drones in the EU' (7th Report of Session 2014-15). The EUC concluded it would be disproportionate to introduce third party liability insurance for leisure users. The EC should however, make amendments to clarify the application of the EU regulations to drone use.

Based on discussions with the GCAA, it is understood these matters are considered in the yet to be finalised CAR-UAS which currently does not prescribe any mandatory third party liability limits and would therefore be subject to the relevant provisions of the AIP.

LOCAL REGULATORY REQUIREMENTS

Obtaining regulatory approval from the GCAA to operate a drone is one of many approvals which may be needed and could vary from Emirate to Emirate. In order to undertake commercial filming and photography using a drone, permits or non-objection certificates must be obtained from relevant authorities within the Emirate where filming is taking place, e.g. from the Abu Dhabi Film Commission in Abu Dhabi and Dubai Film and TV Commission in Dubai. Special permits may also be required depending on the location from the property owner or manager.

Dubai has established its own regulatory framework for drone operations. Dubai Law No. 7/2015 Concerning the Security and Safety of Airspace in the Emirate of Dubai which takes the form of an 'enabling law' by providing the Dubai Civil Aviation Authority (DCAA) with a delegated authority to 'determine conditions' and locations for the drone use.

It does not set drone safety standards. However, on 29 May 2016, the DCAA rolled out a new online portal for the registration of hobbyist, professional (i.e. drone racers), government, temporary and commercial drone operators. It also requires evidence that an operator holds adequate levels of third party liability insurance.

Once the GCAA's drone regime is in full effect, there may be duplicated requirements that drone operators will need to adhere to in the Emirate of operation in order to be fully compliant. This will provide another challenge for regulators as drone technology continues to evolve.



New Approach to Maritime Arbitration

A new independent maritime arbitration centre is to be seated in the DIFC. **Omar Omar** & **Laila El Shantenawi** of **Al Tamimi and Co** consider the details of how it will work in practice.

As a result of its geographical position on the coastline of the Arabian Gulf, the UAE has had a long-standing maritime tradition. From pearl-diving, ocean commerce and the traditional dhow construction which dates back around a thousand years, to more recently the building of the world's largest man-made harbour in the form of Jebel Ali Port, which was officially opened in 1979 there has been a substantial, long standing maritime industry in the UAE. According to their website, Dubai Drydocks, which was opened in 1981 is the largest facility in the Middle East and a report by the Dubai Council for Marine and Maritime Industries has also stated the UAE's maritime industry is worth more than USD 61 billion.

FURTHER ADVANCES

However, the UAE is not sitting on its laurels, steps have also been taken to help advance this key sector. One important one was the approval by HH Sheikh Hamdan Bin Mohammed Al Maktoum, Crown Prince of Dubai of the Dubai Maritime City Authority's proposal to establish the Emirates Maritime Arbitration Centre or EMAC. EMAC is a new independent maritime arbitration centre and was established in accordance with Dubai Decree No. 14/2016. Its goal is to provide a neutral forum for maritime stakeholders and resolve their disputes efficiently. Its work is expected to begin in September 2016. EMAC will be open to all users who choose to resolve their disputes in line with its 'Rules'.

These may include ship owners, cargo owners, charterers, bunker operators, salvage or towage operators, ship brokers, ship agents, ship managers, average adjusters, insurance underwriters, shipyards, vessel class, financial institutions, forwarders, port operators and other stakeholders in the shipping industry.

EMAC has been established as an independent legal entity. Articles 2 and 3 of Dubai Decree No. 14/2016 stipulate its objectives and functions which include promoting maritime arbitration, providing a neutral forum for the efficient resolution of maritime disputes through arbitration by different or alternative dispute resolution mechanisms such as conciliation. It will also be responsible for issuing arbitration and conciliation rules, and organising conferences, workshops, training and seminars.



Laila El Shantenawi
Senior Associate
Al Tamimi & Co

EMAC ARBITRATION RULES

EMAC's draft of Arbitration Rules are expected to be finalised and to come into force in November 2016. They will provide a comprehensive set of procedural rules which will be tailor-made for the maritime industry. They are expected to be in line with the 'party autonomy' principle, and may share similarities with the UNCITRAL Arbitration Rules of 2010. They will also reflect modern trends and best practices in maritime arbitration. It is hoped the Rules will provide for light-touch administrative support by EMAC and combine the effective features of ad-hoc arbitration and institutional arbitration.

They should cover different aspects of arbitral proceedings including providing a model arbitration clause, and setting out rules for commencing arbitration, joinder, multi-party arbitration, appointing arbitrators, submissions by the parties, language and the seat of arbitration, hearings, witnesses, applicable laws, time-limits, award issue, settlement, confidentiality and costs.

UNIQUE POINTS

There will be a number of aspects which are unique to EMAC. Firstly, the DIFC will be the default seat of arbitration so proceedings will be governed by the DIFC Arbitration law (DIFC Law No.1/2008 which is itself based on the UNCITRAL Model Arbitration Law) and supervised by the DIFC Courts. In addition, filing for arbitration will be done electronically in order to save cost and time. According to the draft Rules, an arbitration notice may be filed by courier, post, email or directly via EMAC's website.

The rules also set out proceedings for appointing emergency arbitrators in extenuating circumstances and prior to the formation of the arbitral tribunal.

The decision of an emergency arbitrator will be made no longer than 15 days after their appointment. This will allow for reliefs, orders or awards to be issued promptly before the formation of the arbitral tribunal.

The rules also allow the arbitral tribunal to confirm, vary, discharge or revoke an emergency arbitrator's decision. Finally, arbitrators will have flexibility in deciding on the size of value claims and fast-track arbitrations will be done in the most cost and time efficient way. When it comes to costs the rules require these to be reasonable and there will be a mechanism for reviewing arbitration costs.

DCOA No. 626/2016

Case Detail

Case Name
DCOA No. 626/2016
(Commercial Appeal)

Hearing date
12/07/2016

Court
Dubai Court of Appeal

It looks from a recent Dubai Court of Appeal case that certain ship arrest procedures in the UAE Maritime Code are now being taken more seriously. **Tariq Idais** of **Al Tamimi & Co** explains why.

In 2007, a ship building company entered into a shipbuilding agreement with a ship owning company in which the builders undertook to build a ship for the owners.

In 2010 and 2011, both of the parties entered into amended agreements and it was agreed that the remaining cost of building the ship which was \$75,000,000, would be deferred, with the addition of interest at 6.5% per annum. The interest would be paid within 12 months of the date of the ship's delivery.

The building work was completed and the ship was finally delivered to its new owner on 3 January 2011. On the same day the ship owner granted the builder a First Preferred Ship Mortgage over the ship to the sum of \$75,000,000 (or 100% of the deferred amount plus the agreed interest).

NATURE OF THE CLAIM

On 22 December 2015, the shipbuilder obtained an arrest order over the ship which was at Dubai Drydocks at the time. They based the arrest order request on the First Preferred Ship Mortgage over the ship.

On 28 December 2015 they then brought a substantive claim before the Dubai Court of First Instance against the ship owner seeking \$106,237,341 and legal interest at a 12% rate as of the date the claim was made until full payment.

They claimed the owner had not paid the cost of building the ship and the agreed interest. They also provided the Court with relevant documents including the original and duly attested First Preferred Ship Mortgage.

On 28 December 2015, the court bailiff went to Dubai Drydocks and drafted the notice of the ship's arrest.

The court bailiff fixed a hearing for the validity of the debt's claim on 15 February 2016 and requested the ship's Master to attend the hearing.

THE ARGUMENTS

The ship owner stated that the Court of First Instance did not have jurisdiction to hear the claim, as the parties had agreed in their agreement to refer any dispute relating to or arising out of the agreement to arbitration in London.

They stated as this claim had arisen from the agreement, the Court of First Instance should not have jurisdiction to hear it.

The owner also argued the ship builder had not filed the claim in the form required under the UAE Maritime Law, Articles 119 and 120 of Federal Law No. 26/1981.

They also argued the claim must be dismissed, as the court bailiff had not fixed the hearing of the validity of the debt claim within 30 days as they were required under Article 120 of Federal Law No. 26/1981.

CHANGE OF APPROACH

The Dubai Court of First Instance found the ship builder had not filed the claim in the form prescribed by Articles 119 and 120 of Federal Law No. 26/1981 and the claimant's claim was dismissed.

The Court also rejected the validity of the debt claim. As the substantive claim was dismissed for incorrect form, the ship builder did not prove the validity of the debt claim. The

Dubai Court of Appeal then upheld the Court of First Instance's judgment.

The practice under UAE Law is that once an arrest order is granted over a ship, the substantive claim should be filed with the Court by the claimant within eight days of the arrest order being served on the vessel in line with Article 255 of Federal Law No. 11/1992 or the arrest order is considered void.

The procedures in Articles 119 and 120 of Federal Law No. 26/1981 have not regularly been followed by the UAE Courts in the past.

The Court of First Instance and Court of Appeal decisions do however, suggest a change in approach has happened and the procedures set out in Articles 119 and 120 of Federal Law No. 26/1981 will start to be applied from now on.



Tariq Idais
Associate
Al Tamimi & Co

Transit Orientated Development

If you haven't heard of Transit Orientated Development or TOD, the Middle East's first TOD project is coming to Dubai. Ed Hills and Villiers Terblanche of Latham & Watkins explain the benefits.

In recent years, Dubai and Abu Dhabi have made significant investments in transport infrastructure to address traffic congestion. Dubai in particular has widened highways, constructed new roads and bridges, developed metro and tram networks and introduced water taxi services. The Abu Dhabi government has also developed roads and highways and improved bus services, and is expected to roll out other key components of the Abu Dhabi Transport Master Plan including metro, rail, tram and ferry networks. However, these developments also present an opportunity to implement transit orientated developments (TOD) in and around these investments.

WHAT IS A TOD?

TODs are urban developments which are focused around a transit hub like a railway, bus or metro station or ferry port. Their key feature is that the relevant transit hub is a 'place' which efficiently uses the land in and around the hub for both commercial and residential purposes. From a residential perspective, people choose to live near the hub to take advantage of the convenient transport links and residential amenities within the development. While from a commercial perspective, businesses gain access to both people travelling through the hub and living in and around the development. Successful TOD projects can appeal to urban planners as they invigorate regeneration or development in urban areas and help encourage more people to use public transport, which reduces congestion. The area around Kings' Cross and St Pancras stations in London is a good example of a TOD. Since 2007, this area has been transformed from a run-down inner-city zone to a thriving metropolitan area with shops, hotels, restaurants and residential developments. Relocation of the Eurostar terminus there and excellent transport links connecting the area to the rest of London, the UK and Europe were the catalyst for this development. The key element of a successful TOD is the transit hub with which it is associated. This hub (rail, metro, tram, ferry or other form of transport) must have good and reliable transport links to other business, economic and/or industrial centres in the city or economy. As well as good base transport infrastructure, TODs also need excellent intra-modal connections, especially for pedestrians. People transiting through these hubs are attracted to convenient connections which are short,

direct, continuous and not overcrowded. So planners have to ensure connections are comfortable for the public and developers have to consider the weather. There must be expenditure on walkways and through-flows which are protected from the elements. Thoroughfare design is also important as it can avoid co-mingling pedestrians with traffic, but still accommodate people's desire to take advantage of street level shops and services.

URBAN DENSITY LEVELS

Successful TODs are often also in areas of high urban density which provide a critical mass of users for transit facilities and customers for the shops and businesses. North American literature suggests successful TODs need a floor area ratio (FAR) of at least 1.0, a job/acre ratio of at least 50:1 and residential units of at least 20 units per acre (UPA). The highest density is nearest the transport hub and it tapers off as distance from the hub increases. In growing cities, successful developments tend to be staggered which can allow TODs to evolve within a structured framework over time as they establish a brand and sufficient residents and commercial enterprises to sustain any expansion.

PUBLIC AND PRIVATE SECTOR

In many cases, as the state or local authority often owns the land and infrastructure for a development, planning and operating TODs requires extensive interaction between public and private sector. So deciding early on, the appropriate roles each should take is key to success. Stakeholders should determine who will have responsibility for design of the transit hubs and related landmarks, sightlines and views, the interconnecting infrastructure and securing the continued transport links to the area. TODs can also lend themselves to procurement based on public private partnerships (PPPs). This model offers advantages such as deferment of capital costs, appropriate risk allocation, enhanced efficiency with private sector involvement and rigorous due diligence. However, with this model, the public sector may need to overcome concerns about losing control, the nature of the due diligence and levels of government support.

DESIGN AND PARKING

High quality urban design is another important element in these projects. This extends to the



Ed Hills
Counsel
Latham & Watkins



development as a whole. The public are drawn to well designed areas, with attractive architecture, high quality streets and interesting landscaping. These developments also need to be tailored to pedestrian users and have adequate lighting, signage, security and safety. Parking is particularly important to TODs in the GCC, as cars are the main form of transport in the region's cities and TODs will sit at the crossroads between the car and other forms of transport. Any development should be designed to ensure adequate (but not excessive) parking next to the buildings and if possible in smaller, multiple lots with convenient access to the transport hub and the retail and residential facilities.

COMMERCIAL OPPORTUNITIES

TODs also need an attractive commercial environment so businesses can flourish. Developers should carefully determine the scope and nature of the businesses that operate in the development so they meet residents' and transit passengers' needs. Allowing investors to benefit from the up-sides of these projects often increases efficiency and diversity of choice for end-users. A number of airport projects in the region have granted investors the right to develop the commercial activities on the airport's 'land-side' and benefit from revenues derived from those activities. A similar model could be applied at a TOD.

UAE OPPORTUNITIES

While the UAE has focused on (and has successfully developed industrial and logistics clusters around its primary transport hubs (such as the Jebel Ali port), examples of successful commercial and residential TODs are limited. This is mainly because in Abu Dhabi and, until fairly recently, Dubai the car has been the sole method of travelling between and within the cities. Except for developments around service stations car usage as a sole method of transport does not lend itself to TODs. Dubai's recently developed metro line, tram and water taxi

services have been constructed to connect key parts of the city. However, the stations and hubs on the Dubai transport network which service key developments (like the Dubai Mall or Jumeriah Beach Residences) play an important yet ancillary role in servicing these developments so cannot be considered as TODs. As cities in the UAE and other GCC countries roll out their transport plans, there will be more opportunity for developing TODs. However, the transport networks and infrastructure in Dubai and Abu Dhabi are at different development stages and will require different implementation approaches. In Dubai, there are significant opportunities for TODs to be developed around existing transit facilities.

In December 2013, Dubai's Roads and Transport Authority (RTA) announced the launch of the 19,000 square metre Union Oasis Project. This will be the first TOD project in the Middle East and will be developed on a PPP basis. As with many firsts it has experienced some delays, but the prequalification phase is now complete and bidders are preparing their bids for submission to the RTA. It will help regenerate the Deira area and, if well designed, should kick-start other TOD projects in Dubai. Dubai's new PPP law should also provide a helpful legislative framework for the project's successful implementation. The RTA has also identified several other sites for potential TOD projects, including around the ADCB Station near Karama, Al-Nahda Station and the Salah Al-Din Station.

In Abu Dhabi (and other GCC states with major transport plans), work has not yet started in full on the planned rail, tram and metro networks (although many of recent developments in Abu Dhabi, e.g. the Yas hotel cluster, have been designed to accommodate metro link connections with the airport and Abu Dhabi island).

However, when work gets fully underway, planners would be prudent to consider incorporating TOD projects within the scope of the advanced master plans for these transit projects.



“It was important for me to study maritime law. I felt I had to serve my country. We are a coastal state. The sea is part of our life and the most important way of transporting goods.”

Justice Dr Jamal Al Sumaiti, Director General of the DJI talks to Sogol Kaveity and Shamsa Al Marri about how he became a Judge and the Institute’s educational work with the judiciary and wider community.



Dr Jamal Al Sumaiti was first introduced to the concept of 'law' at his family home in Deira, Dubai. Although, the Al Sumaitis were a simple family – his father worked as an Officer in the Residency Department where visas and work permits were granted and his mother was a housewife – his parents felt it was important to 'lay down the law'. Dr Jamal and his six brothers and three sisters had a series of rules they had to observe at home.

"There were rules about when we had to sleep, eat and come home. One of the most important ones and one I still observe with my own family today was that we all had to eat lunch together every day. So from a young age we learnt that rules were part of

"Learning to delay your actions is a lesson which is important to learn as a judge, even though it is a life lesson you learn from the street."

life and they were there to protect us. Really, the law is the same. It is just a set of rules and we follow the law for the same reasons, my parents made me follow those rules at home."

"Today I have four children and I

have rules of my own they have to follow. We have a rule in the family that the kids have to be a certain age before they can have a mobile phone. Just as I did, I think children realise when they grow up that it is beneficial to have structure and rules in their life."

Dr Jamal also believes it is important for his children to have religion and a solid value system at the heart of their lives. Every day he and his son go to the mosque at 5am. "People without values are nothing," he says. "They are like a compass which steers your life, and they impact how people view the law. For example, you not even think about stealing, if you have values such as respecting others and their property rights."

GRADUATE STUDY

However, Dr Jamal and the other Al Sumaiti children were lucky as the only thing their parents expected of them was that they took responsibility for their studies. "We all studied," says Dr Jamal. "And that came from our parents." Initially, however, Dr Jamal went to study Mathematics and Science at the UAE University, not law. "Not many people in my generation talked about wanting to get a Law Degree. It was all about becoming a doctor, an engineer, a scientist or something more popular. The term 'law' was never discussed which is strange because rules are a kind of law. Life is actually full of law but it just doesn't get called that." In the end it was football which brought Dr Jamal to the law. "While I was studying at the UAE University, I was also playing football for a well-known UAE football club. Football was more important to me than my university studies and I ended up skipping some classes. In the end I decided to change course." It was then Dr Jamal's father suggested he consider studying at the Dubai Police College, as he felt it was important for him to have a Degree. "That was how I ended up studying

law, and one year in I discovered that law was my passion." Criminology and police practice were also part of the study and Dr Jamal qualified as one of the top in his class and came out with a Law Degree, and a Diploma in Police Science. However, life at the Dubai Police College was not easy. "Life at the Police College is like a military life. You wake up at 5am and go to bed at 10pm. In between you have lessons, sport and reading after classes." It was, however, a place where he learnt a lot of good lessons for life and gained experience which made him more mature. "I learnt to respect authority and to be responsible not only for myself but for other people." Students at the Police College became part of a group for four years and if one of their group got into trouble, the whole group would be punished. As is the case in police academies throughout the world, the students learnt that they represented the group, so were responsible to the group and the group was responsible to them.

"It was the way I learnt to be responsible for myself and others. If one of our group, say, was getting in trouble for being late to classes in the morning, it was in the interest of the rest of us to make sure he woke up on time." After four years of eating together, studying together and celebrating together, the group became not only friends but family.

"Even now it's like we are still family and we still look out of each other. I suppose you could say it was another lesson I learnt at the police academy that friends are family. It was there I met one of my best friends too. There was a chemistry between us and I wish him the best success in life. I would be happy for him even if he was picked before me for a position."

Despite all that, Dr Jamal describes his time at the Dubai Police College as a happy time. "If you want your life to be easy, you have to control it. I decided that I controlled my life, not anyone else, and if I wanted to be happy I would be. That was why I enjoyed my time at the Police College. In fact, it's the same control you need to have in Court. I had friends at the Police College who would go all out to enjoy themselves at the weekend but were miserable when they got back. I would tell them this is your life now, not just at college, it will be like this when you work in the police and you need to take control of it."

Discipline was another life lesson, Dr Jamal learnt at the Police College. He had been disciplined before, and was never the type to get into fights when he was young but his experiences at the college taught him more about how to react in difficult situations.

"When I was young, if people swore at me, said bad things or behaved badly I would react. I'd be ready to defend myself. With experience you learn sometimes it's better to ignore others' bad behaviour. So I learnt when to talk and when to keep silent. It's a balancing act which not many people can manage. Not reacting doesn't mean you are weak. The more experience you have, the more quarrels or interviews you have had, the better you are at having that balance. With experience you learn there are other options and that you need to delay your actions. You have to decide whether in this particular case you should fight, go to the police or decide to live in peace. That's the difference between being mature or immature, learning to delay your actions. It's a lesson which is important when you are a judge too, even though it may

be a lesson you learnt from the street. As a judge you have to learn how to control yourself. You may get abuse from the accused in cases but you are a judge you need to be patient and be careful about your language.”

POST GRADUATE STUDY

Having been a top student at the Dubai Police College and after studying English, Dr Jamal went on to take a Masters in International Commercial Law from the University of Nottingham and later a PHD in Maritime Law from the University of Wales. Most of his contemporaries at the Police College wanted to study criminal law, but Dr Jamal wanted to be different, so commercial and maritime law were the obvious next steps. At first Dr Jamal admits he didn't enjoy maritime law but he felt studying it was a duty and he soon grew to love the subject, so much so that he misses it in his current role. “I was one of the first UAE nationals to have a PHD in maritime law,” he explains. “It was important for me to study this area

you and Allah will judge you. For that reason it is not an easy decision to agree to be a judge.” In the end Dr Jamal did accept and after a year of special training, he went to work as a judge in the commercial courts. When asked what he now thinks are the key attributes a judge needs, he explains. “My police experience helped. However, there are two main attributes you need to become a good judge. Personality and knowledge. Not just legal knowledge but also knowledge of the area you are working in. For example, if you are hearing insurance cases, you need to understand the insurance industry.”

“You need both these attributes,” he continues. “It doesn't matter how knowledgeable you are on the law, without the required personality you will not succeed and even with the personality, you will not be a good judge without excellent legal knowledge.”

“Being a judge you are more than a public servant who goes to the office, has customers and works the necessary hours. You need detachment, so when I read case documents I never looked at the names.



of law. I felt I had to serve my country. After all, we are a coastal state. The sea is part of our life and the most important way of transporting goods. I felt the UAE deserved to have as many nationals as possible with this speciality. Sadly, although numbers of UAE maritime law experts have increased we need more young Emiratis to train in maritime law, insurance law, international commercial law and arbitration.”

TIME AS A JUDGE

Dr Jamal also says he never drew up a detailed career plan. After completing his PHD, he returned to the UAE to work as a lecturer in the Dubai Police College. It was then the opportunity came for him to become a judge. If he was doing it all again, he admits he would probably have done things differently. “I would advise other people to follow what I would call the ordinary career path. Become a lawyer first and then a judge.”

In fact, when Dr Jamal was first asked by the Director General of the Dubai Court to take up the role he said no, and it was only after encouragement of a friend and the Director General that he finally accepted. “When you are a judge in a Muslim country, you have a responsibility to apply the Sharia,” he explains. “That means you are representing Allah and that is a big responsibility. Only Allah is above

It was just the plaintiff and the defendant. It didn't matter who they were, my job was to apply the law and to do that you don't just need knowledge of the law, you also need life experience.” When asked about the most challenging case during his time as a judge, Dr Jamal comes back to the issue of detachment. “It was an inheritance case,” he explains. “The deceased had two wives, a number of children and a very small property. The shares of the inheritance had to be determined. The wife who lived in the property asked for a partition to be built so the house could be split in two and she could continue to live there. The other parties wanted the property to be sold and the money split, which would have meant her losing her home. Under the law, the property could not be partitioned if it would reduce its economic value, which would have happened in this case. I found this case very challenging and ended up asking advice from a colleague. He told me I was not in community service, it was simply my job to apply the law and administer blind justice. A case like that has consequences. The woman was likely to be made homeless if I followed the law. However, the lesson I learnt was as a judge you cannot deal emotionally with cases. You are not responsible for the consequences.” When asked if there are differences between the way a civil court judge has to work and

how common law judges work, Dr Jamal explains. "Judges in the common law system tend to interact more with the lawyers, especially in criminal cases. In the civil law system, particularly in commercial cases there are few interactions between the judge and the lawyer. In fact in some cases, there will be no interactions at all. There will just be an exchange of documents because it is about applying the rules." When asked what in his opinion is the best litigation route for overseas investors with a commercial dispute, Dr Jamal says, "I would advise foreign investors to use arbitration. This is not because there is any issue with our courts, as they are some of the best courts in the world. It is because I believe an overseas investor would find this a more familiar environment and easier from a language perspective."

THE WORK OF THE DJI

As had been the case with his work as a judge, Dr Jamal did not seek out his role as Director General of the DJI. It was an opportunity which was offered to him but he is very proud of what he has achieved in a relatively short time he has had it, particularly in the way he has been able to expand the DJI's remit. "My current role is very different from my role as a judge. We are part of Government and my work as Director General is all about having a strategy and vision." The DJI was established in 1996 and Dr Jamal felt it was his mission to put the Institute on the right track. He wanted it to make a name for itself and be seen in a positive light. "When I came here the staff were doing a good job but we struggled in attracting people to come to training and I felt we needed to reach out to them. One of the first things we did was expand our target group." Despite his time as a judge in the commercial courts in Dubai, these days Dr Jamal has a broader focus covering all aspects of law. "At the DJI I'm responsible for ensuring people from all types of backgrounds understand all aspects

of the law," he explains. "Before I came here the Institute's focus was solely the education of judges and prosecutors. I have changed that. These days as well as judges and the prosecutors we are trying to reach out to other groups too including lawyers in practice, academics and anyone who lives in the UAE, even ordinary people in the street. We have one aim that all these groups understand the law. Numbers of people coming to the training we offer has also greatly expanded, as a result of continually enhancing our programme and having a good team. Where appropriate we also work directly with specific groups to provide tailor-made training."


Dr Jamal adds, "Some of the courses we offer are only open to the judiciary. Courses for aspiring judges are only open to Emiratis as we want to encourage the participation of nationals in this area. However, we have other courses which are open to all nationalities." At present the judges in the Dubai courts come from a mix of Arab countries. There are a large number of judges from Egypt but as well as Emirati judges, there are judges from countries as diverse as Syria, Sudan, Morocco and Libya. Dr Jamal strongly believes that everyone needs to update themselves continually including the judiciary. It is one of the reasons the work of the DJI which involves training judges and the wider community is so important. "When I was a judge I wanted to be the best I could be. I had to get more experience. I needed to update myself on new case law and legislation and I had to learn other skills too like body language, emotional intelligence and strategy. As a result we frame our training programme for the legal profession not just on the law but on a whole host of areas, including communications and leadership skills, mediation and subject specific areas, so if you are hearing finance cases you understand finance. We have created a judiciary leadership programme which has been a great success. We have also done training for national mentors which has been welcomed. Technology is part of life too, even for judges. That's what makes learning continual even for the judiciary. To be a good judge you need the right mix of personality and knowledge. Not every judge has this and that is where our training comes in."

At a glance Justice Dr Jamal Al Sumaiti

Dr Jamal Al Sumaiti (Dubai 1970) began his legal education at the Dubai Police College in 1990. He graduated in 1994 with a Law Degree and a Diploma in Police Science. He studied for an LLM in International Commercial Law at the University of Nottingham. From 1998-1999 he was a lecturer at the Dubai Police College. Then from 2000-2004 he studied for a PHD in Maritime Law at the University of Wales, which he achieved in 2004. After another year working at the Dubai Police College, he was asked to become a Judge in the Dubai Courts. A year of training followed and he was appointed a Judge in 2006. He has been the Director General of the DJI since 2007. Dr Jamal is married with four children.

LESSONS FROM OVERSEAS

One of DJI's most innovative initiatives has been the workshops it has hosted with the help of embassies from other countries including France, Holland and the US to help gain an understanding of international best practice in areas of law where the UAE is considering change. The DJI invites experts from a particular country where legislation is already in force to discuss the subject with representatives of the judiciary, the police, government inhouse lawyers and legislators. One of the recent workshops, held with experts from the US was on the area of alternative sentencing. "The US currently operate this system, under which, for example, rather than sending a dangerous driver who has injured someone to prison they are sentenced to spend time working with people with similar injuries in a hospital or clinic. As the UAE is interested in adopting this approach to sentencing, the DJI set up a workshop with the help of the US embassy on this topic so the legal profession

A man with a beard and mustache, wearing a white thobe and a white ghutra with a black agal, stands in the center of a modern, brightly lit hallway. The hallway has a high ceiling with recessed lights and glass railings on the sides. The man is smiling slightly and looking towards the camera.

“We have involved a broad range of contributors from a whole range of firms. The key thing is to bring together the whole legal community, everyone from academics and law students to practitioners, the judiciary, government officials and those working in businesses.”

“Part of making it easier for investors to invest is making it simpler for them to understand the law.”

here could learn lessons from those who have practical experience of this type of sentencing.”

Workshops of this type have also helped the DJI put forward innovative legal concepts which been subsequently taken up by the Government. One example of this was the idea that property seizure could be used as a means of punishment. This approach which is used in the US was discussed at a DJI workshop with the US embassy and the Government is now looking into it. As well as putting ideas forward for the development of the legal system to the Government, the DJI also makes sure its work supports Government initiatives. It has run workshops on electronic laws, published books on technology law and made sure its services are accessible by apps, as part of the support to the Dubai Smart City agenda. The Institute is also playing its part in the

Government initiative to help Dubai become a ‘Happy City’. As Dr Jamal explains, “This initiative is all about making sure government departments give their customers and users a better service, so people go away happy. The way we approached this at the DJI has been by making sure our em-

ployees have a good working environment and are happy in their work. We believe in doing this our staff will feel responsible for giving our customers and users a better service and in turn make them happy.”

IMPORTANCE OF INVESTORS

Although, the DJI’s mission is to ensure there is a broad understanding of the law by those living and working in the UAE, there is one group in particular Dr Jamal is keen to focus on, investors.

“Dubai is not an oil based economy,” he explains. “So in order to assist in the diversification of our economy it is important that we attract investors. To do so we need to make it easier for those who wish to invest in our country. They need to feel their money is secure in Dubai and law plays a part in that. Part of making it easier for investors to invest involves making it simpler for them to understand the laws which apply here and the detailed requirements. I believe we have a good legal foundation, in terms of attracting investors. We have a respected court system, a number of arbitration centres in Dubai and the other Emirates. We also have a number of other routes for alternative dispute resolution including an amicable centre and a mediation committee for labour disputes. This means there are a number of different routes for those who have disputes. In addition, the DIFC Common law Courts have also been making it easier for investors, especially following the extension of their jurisdiction which means they can accept cases from outside the jurisdiction if the parties agree. Dubai is also secure. We have a strong judiciary and a good ADR system. We have modern laws which are up to date, so it is merely a matter of enforcement not having to draft new legislation. What is also important is the way we protect the rights of residents.”

“If you come to the UAE, we will make sure you and your family are secure. However, you will also

have freedom of movement, freedom to trade and other important rights and freedoms. As a result of all this the number of investors coming to Dubai is increasing, so I think we are moving in the right direction in terms of making it easier for foreign investors to invest and feel their investment will be secure but we have to keep making improvements in this area.”

ACCESS TO JUSTICE

“There are over 200 nationalities living in Dubai, speaking a variety of languages,” Dr Jamal continues. “It is important we give them access to justice. We do this in a number of ways. For example, an accused person who doesn’t speak Arabic has the right by law to have an interpreter in the Court to make sure they understand the proceedings. They also have the right to have an interpreter with them during their police interrogation.”

“There are other changes I would like to see to improve the position of ex pats within our legal system,” Dr Jamal adds. “I would like for example, to see more being done to support the families of accused ex pats. For me, being able to access the law in your own language is also important,” he continues.

“Most people who come to the UAE from overseas are not criminals. We need to make it easier for them to understand key legislation in areas such as family law, contract law and immigration. I would like to see an official department being made responsible for ensuring there is a single official version of these key laws available in at least six key languages – say Arabic, English, French, Chinese, Spanish and Hindi. What is good is that having translations of the law is one of the subsidiary objectives of Dubai Vision 2020 so we should see this happening. Even if we just had the laws in English and Arabic we would be able to reach out to about 95% of the population in Dubai which would be good.”

EMIRATES LAW

The decision to launch the Emirates Law magazine came out of Dr Jamal’s wish to make it easier for investors to invest in the UAE by explaining the law to them.

“It is one of the reasons we take the approach we do – of having a theme in each issue and a clear but broad discussion of all the areas which can impact those investing here. We have involved a broad range of contributors from a whole range of firms and sectors too, and just like our education programmes the key thing is to bring together the whole legal community. Everyone from academics and law students to practitioners, the judiciary, government officials and those working in businesses. I’m pleased with the result so far and would like to thank Sogol Kaveity, Shamsa Al Marri and the editorial and publishing team, our board of expert firms who advise us on the contents and our authors and contributors for the work they have done.”



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UAE Business Hub

Villiers Terblanche the Office Managing Partner of Latham & Watkins' Dubai Office specialises in complex infrastructure transactions and represents host governments, investors, lenders and project developers. He talks about his work and in particular his experience of transport projects to Sogol Kaveity.

TELL US ABOUT YOURSELF AND YOUR CAREER?

“Nobody dreams of one day becoming a project finance lawyer. As a kid I was interested in geography, travel and playing tennis. Like Bjorn Borg, but without the headband. I was the youngest of four children in a family of academics. However, one of my sisters talked me out of a life in academia on the basis that I was not likely to clock up many air miles in that profession.”

“As maths wasn’t my thing, law school followed and I started work as an Associate in New York in 1995.”

“The mid-nineties were great years to start a career at a big international law firm. Central Europe, Latin America and many other markets were going through privatisation and massive sectoral reform, not unlike the recent announcements we’ve had in Saudi Arabia.”

“The tech sector was also taking off and mobile telephony was booming. There were also other changes. The fax machine became a dinosaur, e-mail took over our lives and ‘Nirvana’ became best known as the name of a band. So, if you were doing international project finance from New York it meant air miles, meeting new people and constantly looking at the world through a different coloured lens.”

away from hydrocarbon and into social infrastructure.”

WHAT'S YOUR DAY JOB LIKE?

“Latham & Watkins focuses on four areas in the UAE. Firstly, finance including project, bank, and Islamic finance. Secondly, corporate work which encompasses M&A, joint ventures and private equity. Thirdly, capital markets, both debt and equity, and finally technology transactions.”

WHAT'S A TYPICAL DAY LIKE?

“I spend most of my time on green-field projects for airports, seaports, roads, rail, power and water and telecoms projects and other capital intensive assets which are subject to economic regulation or tend to rely on networks to function well. “In the last few years we’ve been fortunate to work in all Middle East jurisdictions except Yemen. The basic Middle East project finance template is largely stable across the region and has been for several decades. The nuances you find around security packages for lenders, local law requirements, political risk matters, insurance requirements, environmental requirements and land-related matters tend to be rather subtle between the GCC countries.”

WHAT'S THE BIGGEST DIFFERENCE BETWEEN THE LAW IN THE UAE AND THE US?

“Our firm has US, UK and local qualified lawyers. The biggest differences however, between the way the law works in the UAE and the US is down to the differences between common law versus civil law.”

“You also see differences in litigation risk and compliance, and differences in the level of complex Industry-specific regulation. And finally, given the UAE’s low tax environment, the impact of tax lawyers is less than in the US.”

WHY DID YOU COME TO THE UAE?

“The professional side of the decision was easy and never in doubt. However, on the personal side, I was a young partner with two small kids and I thought we may not get the chance to live outside the US until after they finished high school. That was eight years ago and it looks like our kids will finish high school here. The UAE has been very, very good to us. My life here involves family, work, friends and

when time permits, I like to ride a bicycle as fast and long as I can on the UAE’s fantastic network of dedicated bike paths.”

HOW DOES YOUR LIFE IN THE UAE AND THE US COMPARE?

“I suppose the main differences here to life in the US is the prominence of central air conditioning, having to work a Sunday to Thursday working week and faster driving.”

“I would say to anyone coming here from the US, invest culturally and be as curious as you can. It’s also important to use common sense and get a good data plan. And if you plan to buy an expensive bicycle talk to me first and don’t expect your land line to be used very often.”

“I enjoy coming to work with a smile and living through the rapid maturing of the legal market here. In my current position I get to work with incredibly talented clients and colleagues. I also like seeing my kids grow up in an environment where they have friends from literally dozens of different nationalities.”

WHAT'S THE MOST INTERESTING TRANSPORT PROJECT YOU HAVE WORKED ON?

“The current project you are working on is always the most interesting one. However, the Salik toll road financing which created a PPP template I think will get used in the future in the same way that the precedent setting deal for airports in the region have been has been of note. For example, the template for Queen Alia airport in Jordan has been used for Madinah International in Saudi Arabia, and is now the template for airports.”

“The UAE power and water project model has also now been exported across the region to Saudi Arabia, Kuwait and other jurisdictions.”

“When you compare transport projects to other types of infrastructure projects market risk or whether there will be sufficient demand for the projects output is usually different in transportation projects than say power or water projects where usually the ‘single buyer’ model of a government-owned entity takes care of this.”

WHICH OF YOUR UAE PROJECT HAS HAD MOST IMPACT?

“In terms of the impact on the life of UAE residents and businesses, I would

“The UAE power and water project model has now been adopted across the region to Saudi Arabia, Kuwait and other jurisdictions.”

HOW LONG HAVE YOU WORKED IN THE UAE?

“I’ve worked in the UAE for a long time. Initially, from 1997 I worked on projects here while I was based abroad but since 2008 I’ve been working on the ground here.”

HAVE YOU SEEN CHANGES?

“Two main changes have taken place in that time in the way business works here. The first is the change in amount of attention paid to detail and downside scenarios since the global financial crisis back in 2008/2009. The second is the way in which the economy has diversified and continues to do so



How To: Work Here If You Are An Infrastructure Company

- Understand the market and appreciate its relative maturity.
- It is a case of diligence, diligence and diligence.
- Realise you will have to play the 'long game'.

list four types of projects I have been involved in. These would be water desalination and power projects, district cooling projects and undersea telecom cable projects. Can you imagine life in the UAE without these things?"

IS IT EASIER OR HARDER TO STRUCTURE PROJECT FINANCE HERE?

"Although the way that project finance works is slightly different, in

the UAE than it is in the US, the basic legal challenges are largely the same. However, the difference in state law in the US (as opposed to Federal law) are arguably bigger than the differences in local law between some GCC countries."

WITH CIVIL AVIATION WOULD ANY AREAS OF UAE LAW SURPRISE OVERSEAS INVESTORS?

"Not really. This is because civil aviation has a well-established international treaty system in place which harmonises many elements of this area of law across the globe."

YOUR FIRM LATHAM & WATKINS HAS IN THE PAST PUT A FOCUS ON PRO BONO WORK IN THE UAE. WHY DID YOUR FIRM FEEL THAT WAS NECESSARY?

"Our firm's commitment to the communities in places we do business in is a deep one."

"In fact, it has been part of Latham & Watkins' ethos since the firm's inception."

"However, in the Middle East region, including the UAE we tend to focus our work in this area primarily on micro-finance."

"We like to assist non-profit making entities and NGOs, and we also provide help with asylum and immigration matters."


YOUR FIRM IS WELL KNOWN FOR ITS WORK IN THE ENERGY INDUSTRY. HAVE YOU NOTICED ANY TRENDS IN THE UAE FOLLOWING THE OIL PRICE REDUCTIONS THIS YEAR?

"It may seem ironic but a low oil price environment traditionally means there is also a greater need for project finance."

"In addition, you find that the discipline and focus which project finance brings to a project will tend to be most appreciated when sources of funding are more limited, as they have been recently since the oil price has fallen."

ARE THERE ANY TRANSPORT INDUSTRY SPECIFIC ISLAMIC FINANCE DEVELOPMENTS HAPPENING?

"These days almost all large transport projects in the region will have an Islamic component. However, the differences you find when you are dealing with transport and other projects in terms of Islamic financing structuring are not really that significant."



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In association with LexisNexis, the DIFC Dispute Resolution Authority's (DRA) Academy of Law has developed the Introduction to DIFC Courts' Procedures and DIFC Laws 2016 Certificates. These have been specifically designed to meet the needs of today's Emirati and expatriate lawyers, legal advisors and consultants, seeking to gain a better understanding of and developing their familiarity with DIFC Courts' procedures and Laws.

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Tackling the Crisis

Figures from analysts show turnover in the legal sector is under pressure, and as **Professor Sebastiaan Kodden**, explains one of the solutions is to get your clients to be more like cats.



For a long time, the legal profession was a growth market and sadly as a result, in many cases there was an accompanying attitude that any economic crisis would by-pass the legal sector. A few calls to various firms have revealed that many law firms still believe they are doing fine. However, figures presented by market analysts have painted a very different picture. In 2015, in a majority of firms turnover was under pressure. 'The most important signals which point to changes in the market have been known since 2010,' says market analyst Gerard Tanja, Partner of Venturis Consulting Group who has been involved in projects with a number of large national and international firms.

The market for business-legal services is changing, now more than ever, and there is increasing pressure on law firm's competitive positions. This is especially true in the small and medium-sized enterprises sector, where small-medium and medium-sized firms mainly work, and it is expected that a lot of business will be lost or will remain outside lawyers' reach.

This is due to a number of different developments. These include the economic crisis, which has made the price of legal services a critical factor, the shrinking of the process monopoly caused by the stretching of district judges' competency boundary, an increasing number of cheaper legal providers, and easy access to legal information via the Internet.

Lawyers are finding it is difficult to distinguish themselves solely on the basis of their legal expertise in a displacement market of this type. Palihawadana & Barnes (2004) studied the loyalty of business clients in the legal world in the UK. Due to increasing competition, they recommended a change of market strategy, from a 'transaction' focus' to a 'focus on client retention and strengthening relationships'. This goes beyond improving client satisfaction, which is the current focus of many law firms.

Change is a must. However, the solution is not the problem. Today's challenge for many law firms lies not in embracing all kinds of new IT-possibilities, which in many cases even undermine the law firms' competitiveness, but in modern legal

leadership and the extent to which clients, but certainly also well-trained employees feel loyal towards the organisation.

In business literature, this form of loyalty is also referred to as the psychological contract. It is an unwritten contract which rests on terms such as appreciation, work autonomy, good coaching and feedback. It is a contract which appears to be much stronger than the written contract containing labour conditions.

More and more young lawyers these days are leaving well known firms and starting their own practice. This leaves their former employers with doubts, as most will have thought they could have retained these lawyers simply by providing generous salaries and bonuses. So what did these young lawyers really want? Was it to change the legal profession? In many cases not at all. Many of these legal professionals in their early thirties are simply looking for more freedom and responsibility in their work and want to be able to advise their clients personally and integrally. Independent entrepreneurship presents them with a perfect solution to the problems they experienced in their former positions. The departure of young, energetic, and expensively trained employees who once committed themselves to the firm's clients with passion and enthusiasm is the real problem for many firms.

Many major legal knowledge organisations don't only blindly rely on the loyalty of their employees, but also on the loyalty of their clients. They don't realise they have enforced the wrong kind of loyalty - that of a dog for its master. A loyal dog will follow its master when he leaves, even if this means moving to the competition. The leaders of legal knowledge organisations would do well to create the right form of client loyalty instead, which is that of a cat to its home. As when a cat's master moves the cat remains loyal to its old, familiar spot. If need be, he'll run right back to it. Leadership and employee behaviour is a much stronger determinant of success and the future of many law firms than salary plans or business models.

As Josh Billings, the American author and teacher says, 'Money can buy a pretty good dog, but it won't buy the wag of his tail'.



When I'm 64?

As more UAE residents reach retirement age, Shiraz Sethi of Stephenson Harwood Middle East LLP and Susan Turner of Lux Actuaries and Consultants, look at position of non-national residents.

According to the World Bank, between 2000 and 2050, the UAE will see over a 22% increase in its share of people over 60. As a result there is clearly a potential diversification opportunity for the UAE economy in providing services for older people. More older residents could lead to growth in many sectors ranging from health care and construction of retirement properties to leisure. Affluent retirees would also help generate jobs for maids, cleaners and gardeners, whose support they may need. However, when it comes to non-national residents, the question is how easy is it from a legislative and financial perspective for them to opt to remain in the UAE? Federal Law No. 7/1999, as amended by Federal Law No. 7/2007 stipulates that the retirement age in the UAE is 60 years old. Prior to January 2011 employees falling under the Ministry of Labour's jurisdiction were required to obtain express approval to continue working once they reached 60. This has been increased to 65. However, there is currently no retirement age in the DIFC.

POSITION FOR EXPATS

Eighty-eight percent of Dubai's population are ex pats. Overseas nationals who wish to reside in the UAE post the official retirement age of 60 (for men and women) must either set up a consultancy company, obtain sponsorship through a family member or dependent or become a resident in the Continuing Care Retirement Community, which is a project consisting of independent retirement homes, assisted living homes and nursing homes for Dubai residents who cannot take care of themselves. Although, the cost of living in the UAE is higher than in some other developed countries, tax free status with no income tax payable can make it an attractive option for those older people with significant savings. Furthermore subject to tax and financial advice, ex pats who are members of a defined contribution pension arrangement may be in the position to transfer UK benefits into what is known as a Qualified Recognised Overseas Pensions Scheme or 'QROPS'. At present there are no such QROPS in Dubai, however QROP arrangements in Gibraltar or Malta may be a solution, after considered advice has been taken. There are however, a

few less positive points which need to be considered. Firstly, unless an ex pat's home country has a reciprocal arrangement with the UAE, they will either have no access to their state pension in their country of origin or that state pension will be frozen. Secondly, pensioners may find medical costs expensive as residence visas will not be renewed unless health insurance is in place under new Dubai Health insurance laws.

UAE PENSION POSITION

According to a survey carried out by the UAE Ministry of Interior in October 2013, two out of three ex pats living in the UAE admitted they were not saving enough for their retirement. At present there is no requirement for employers to provide a compulsory funded pension scheme for ex pats. Unlike some other countries, there are no incentive schemes to encourage employers to provide employer sponsored pension schemes for their ex pat employees. The Dubai Government is known to be considering retirement and savings options for non-nationals and has had encouragement from the World Bank on this. One potential option may be a change in Federal Law to make it a requirement

for companies to invest end of service gratuity benefits into a funded retirement scheme, with possibly a further requirement for part of the cash to be invested in the local stock market or Government bonds. This would also aid the growth of the local money markets.

DIFC CHANGES

One recent initiative which ex pats looking to retire in Dubai will welcome is the establishment of the DIFC Wills and Probate Registry which allows ex pats to register English language wills in line with the laws of their home country and outside of Sharia law. This helps give them the legal certainty and peace of mind that their wishes as stated in their will, will be carried out on their death. This development has made Dubai the first jurisdiction in the Middle East where non-Muslims can make a will under internationally recognised common law principles. It is likely to make it more favourable for ex pats to stay longer in the UAE and make investments here.



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Saudi Renewable Energy South African Lessons

Saudi Arabia has recently set itself some ambitious renewable energy development targets. **Stephen Jurgenson** and **Jason Parker** of **Winston & Strawn**, discuss the lessons from South Africa which could help the Kingdom achieve them.

The Kingdom of Saudi Arabia has recently issued its much publicised Vision 2030 plan alongside the supplementing National Transformation Program 2020. The aim of these two plans is to set far-reaching goals which will help transform Saudi's oil-dependent economy to a diverse and sustainable one, which is also at the crossroads of international trade.

Although the Vision 2030 plan covers a large number of areas and includes a number of targets, one of the most significant ones is that the country will be able to generate an additional 9.5 Gigawatts of new renewable energy capacity by 2030. This is not a mean feat, particularly when you consider that this target includes an additional 3,450 MW of renewable energy capacity being available by 2020.

SIMILARITIES TO SOUTH AFRICA

In order to achieve these results, a comprehensive renewable energy procurement programme which is similar to South Africa's Renewable Energy Independent Power Producer Procurement programme (REIPPP) is being put in place. It is hoped this will not only act as a vehicle for enabling Saudi Arabia to achieve the Vision 2030 plan's renewable energy targets but also for achieving its broader economic development and diversification goals.

RESULTS IN SOUTH AFRICA

Perhaps co-incidentally, Saudi Arabia's renewable goals nearly mirror those which were set by South Africa when it issued its first request for proposal (RFP) under its producer procurement programme, REIPPP.

South Africa's initial RFP was issued in August 2011 and under it the country sought 3,725 MW of renewable energy projects which were to be procured from the private sector over five rounds. At the time, South Africa had no history of large-scale renewable energy installations and a limited renewables industry. Nevertheless, since then it

has procured nearly 4000 MW in the first three bidding rounds alone.

In addition, to date the REIPPP has generated 92 new renewable IPPs across four bidding rounds. This equates to \$12.7 billion (USD) in investment committed to the construction of over 6,200 MW of capacity in onshore wind, solar PV and concentrated solar technologies. South Africa's REIPPP was able to quickly deliver Megawatts to the grid and

has led to a competitive environment which has also seen cost effective tariffs in the country.

COMPETITIVE BIDDING DIFFERENCES

One feature which sets South Africa's procurement programme apart from other international examples of competitive bidding and may make it a suitable model for Saudi Arabia was its inclusion of economic development requirements. The programme required committed projects to meet minimum thresholds on a number of

areas including black South African ownership and management, job creation, inclusion of local content, capacity development, and other socio-economic development commitments. These stringent economic development requirements helped in turn to jump-start the renewables sector, lured foreign investment into the country and helped to bolster the capacity and experience of South African institutions.

POSSIBLE SAUDI MODEL

Saudi Arabia may wish to start by analysing South Africa's REIPP programme if it wishes to consider a comprehensive approach, design and successful implementation. Although, the Kingdom will likely want to adapt and enhance this plan so it meets its own needs. For instance, Saudi Arabia may want to use the means which were used to achieve REIPPP economic development targets, although

the targets themselves would not apply.

Saudi's Vision 2030 is looking for the creation of its own vibrant renewable energy sector and local content targets, but the Kingdom would still need to



Stephen Jurgenson
Partner
Winston & Strawn



Jason Parker
Of Counsel
Winston & Strawn



establish its own set of economic development objectives and measurable criteria.

CURRENT CAPABILITIES

“Unlike South Africa, Saudi Arabia is not starting from a standing start and will have to take its current capabilities into account.”

Unlike South Africa, Saudi Arabia is not, for example, starting from a standing start. So any programme the Kingdom puts in place would have to take into account its current renewable sector capabilities.

One other point which will need to be considered is that Saudi's requirements for local content in terms of renewables equipment and materials may have the effect of increasing tariffs given the Saudi Arabian renewable sector's nascent status.

However, gradual increases in local content across the successive bid phases could in turn encourage growth in local renewable sector capabilities without encumbering early stage bid competitiveness.

SMEs INPUT

In the area of small and medium enterprise development, Saudi Vision 2030 plan has an additional aim of increasing the contribution of this sector to the Kingdom's economy. South Africa had similar goals and actually used the REIPPP to achieve them by limiting foreign ownership in project companies and by requiring minimum shareholdings by South African enterprises.

In South Africa, the Development Bank of Southern Africa (DBSA) and the Industrial Development Corporation (IDC) also assisted in both these aims by providing loans and other forms of financing to South African enterprises which helped to bolster their participation. Therefore, if the Saudi authorities were to institute similar requirements as part of this plan, they will also need to determine whether or not small and medium Saudi enterprises would need financial or other forms of support to participate in the renewables programme. If that is the case, the

Kingdom will then have to explore which entity could serve a function similar to the one DBSA and IDC had in South Africa.

LONG-TERM FUNDING RISKS

Despite, the impressive results of the South African programme there are also lessons which can be learnt from it.

For example, under REIPPP Rand denominated power purchase agreements (PPAs) made it uncompetitive for foreign commercial lenders to provide long-term funding. As a result a majority of the project debt under the programme was provided by local South African commercial banks. It is possible the situation in Saudi Arabia may be different as the Kingdom has a Dollar currency peg and PPA tariffs are typically indexed to the US Dollar. As a result foreign financiers might be expected to have a greater role under a renewables programme in the Kingdom.

As both local and foreign banks have each played a significant role in the Kingdom's successful conventional IPPs both such institutions are familiar and comfortable with financing the energy sector and are more likely to contribute to the success of the Kingdom's renewable programme than would have been the case in South Africa.

FINAL LESSONS

Despite the differences, the South African experience highlights above all that a well-designed, transparent and robust procurement process can help encourage private developer and lender participation. A comprehensive renewables programme is also likely, not just to support Saudi Arabia's primary goal of increasing renewable energy generation but should also enhance the country's institutional capacity, experience and knowledge in the renewable energy sector and help spur on a local renewables industry. However, things pan out and regardless of how closely Saudi Arabia decides to follow the South African approach, this is likely to be an exciting time for Kingdom and its renewable energy industry participants.

Arbitrator Immunity

It may seem strange that as a professional arbitrators may not be liable if they fail to perform their duties. **Essa Ahmad Ali Abdulla** explains why and how this position has been taken in the UAE and elsewhere.

Arbitration from both national and international sources needs to be independent and impartial. Although, most professionals are held liable should they fail to perform their duties according to certain standards of care, this is not the case for professional arbitrators, who are entitled to various immunities from civil suits by the parties. Most common law jurisdictions including the US and England provide arbitrators and arbitral institutions with broad immunity from liability. For example, the US courts have emphasised that arbitrators are granted immunity and their functions are similar to the judges. (It has been well argued that if judges need immunity to protect the integrity of their decisions, then the same immunity is logically needed to protect the arbitrator's decisions.) The US Court of Appeal in the case of *Wasyf, Inc. v First Boston Corp*, held that immunity was important for arbitrators as they play the role of decision makers. The English position on the matter was considered in the Arbitration Act 1996 which exempted arbitrators from any liability purported out of their functions or act and Lord Reid in the case of *Sutcliffe v Thackrah*, stated that judicial immunity is a matter of public policy as it equally applies to arbitrators. As a result arbitrators have specific rights and protections which are founded in applicable national and international laws, or the parties' arbitration agreement.

SIMILARITY TO JUDGES

The common law jurisdiction permits arbitrators to perform a function which is similar that of judges. For example, like judges they invite parties to provide written submissions and to present evidence at a hearing. They also resolve the dispute and render an award which is enforced immediately and subject to very limited judicial review. However, there are differences. For example, arbitrators do not have to follow precedent. They are not required to follow the rules of evidence or procedures courts do. In addition, while judges derive their power from the state arbitrators derive their power from the contract. So, equating arbitral immunity to that of judges is potentially controversial.

THE UAE POSITION

The UAE position to arbitral immunity is somewhat debatable. For example, the Civil Procedure Law entitles parties to dismiss the arbitrator if it

is proved they have deliberately failed to act in accordance with the arbitration agreement. Article 207 of the Civil Procedure Law states that recusing the arbitrator from issuing the award applies for the same reasons as recusing a judge who is unfit to issue the judgment. For instance, if one of the parties was unaware of a relationship between the arbitrator and his opponent and the relationship was itself the cause of recusing a judge in line with the Civil Procedure Law from considering the case, then the party may also have the right to recuse or dismiss the arbitrator accordingly.

The Dubai Courts of Cassation in the Civil case No. 10 of 1995 held that Article 207 of the Civil Procedure Law indicates that the legislature has made the reasons judges are unfit to govern a judgment as being the same reasons that lead an arbitrator to be unfit to govern the award. The competent court should not dismiss the arbitrator unless if it is proven he intentionally neglected the work assigned to him. Therefore, it is not permissible according to Article 207(4) to recuse the arbitrator only for reasons of relationship or marriage, enmity or interest.



Essa Ahmad Ali Abdulla
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APPOINTMENT AND DISMISSAL

In the UAE arbitrators are not subject to the same terms of appointment as judges, they do not swear an oath before appointment and do not enjoy exceptional procedures when being sued. However, an arbitrator is not seen as guilty of denying justice by abstaining from his work. The arbitrator's responsibility of compliance is with the arbitration agreement and there is the penalty of dismissal which ensures the proper functioning of the arbitration. Dismissal is carried out by the judiciary which is the administrative body reviewing the arbitrator's commitment to the arbitration agreement.

In the Dubai Court of Cassation Case No. 250 of 2001 two conditions were set out which needed to apply in order to dismiss an arbitrator. Firstly, prior to requesting the arbitrator's dismissal a statement must be written drawing the arbitrators' attention to his negligent act.

Secondly, the negligent act must be intentionally, not inadvertently done. The court also explained that proving an arbitrator's negligent act after his appointment was not necessary to recuse him as long as all the parties agreed. Therefore, parties themselves have the power of control over their arbitration agreement unlike the position in the



courts where parties cannot by agreement recuse a judge.

EXCEPTIONS

It is also worth noting that Section 29 of the UK's Arbitration Act 1996 made exceptions to the principle of arbitral immunity and clearly allows liability in two conditions. The first is if the arbitrator resigns from the case without showing a good reason for his resignation and secondly if the arbitrator's act or omission is made in bad faith.

However, even in the case of bad faith the question of what constitutes bad faith still arises. The UAE took a similar approach when the Federal Supreme Court in the Civil Case No. 503 of 2000 held that an arbitrator must show a serious reason for resigning from the case or he will be held liable and have to compensate the parties. It is at the Court's discretion to establish serious reasons for an arbitrator's resignation.

ADVANTAGE AND DISADVANTAGE

Historically, an arbitrator's immunity has been found in many institutional rules and has extended to bad faith, negligence, non-disclosure of conflicts, international misconduct and similar malfeasance. The ICC rules in article 40 provide an exclusion for civil liability suits for arbitrators and the ICC institution. This protects arbitrators from the threat of large claims by parties who are dissatisfied with their awards. It also protects the arbitral tribunal from claims by dissatisfied parties about such negligence or the fault of an arbitrator. The Dubai International Arbitration Centre (DIAC)

has used a similar approach and employees, experts and members of the tribunal are excluded from any civil liability which results from any act or omission.

However, the question arises if arbitrators are appointed by the parties in an ad hoc arbitration. Will they be able to enjoy a similar immunity? Arguably not.

With the growing global economy and the increasing number of commercial transactions, immunity has become more important as it encourages practitioners to sit as arbitrators, functioning as justices of peace and ensures they can render the award impartially without jeopardising the stability of either their position or the arbitration procedure.

It would increase confidence among practising arbitrators in the arbitration field because unsuccessful parties in the arbitration will engage in litigation in an effort to justify their position.

They may try to create doubt about the validity of the award or even prejudice the information conveyed during the arbitration course. As a result if there was no immunity, arbitrators may charge higher fees against the risk of being sued by an unsuccessful party to an arbitration award.

On the other hand, the negative effect of granting immunity is that it may drive down the actual purpose of arbitration by permitting the arbitrators to unfairly secure the benefits of immunity.

Therefore, granting broad immunity could also lead arbitrators to neglect their commitments and requirements which are also needed for arbitration to function and could in the end lead to doubt by the parties about the fairness of the arbitrator.

An Aide-Memoire to Enforcement

With the recent first enforcement of a DIFC Decision by a Western jurisdiction, the DIFC's Memoranda of Guidance with other courts are in the spotlight. Nick Carnell of Taylor Wessing takes a look at two main types of these agreements.

Earlier this year, the Supreme Court of New South Wales recognised and for the first time in a Western jurisdiction, enforced a DIFC Decision (in the case of *Legatum Ltd v Salim* (DIFC Case No. 027/2014)). This has helped put the Memoranda of Guidance (MoG) on enforcement entered into by the DIFC Courts with other Common Law Courts into the spotlight.

A DUBAI COURT JUDGMENT

As the DIFC Courts are part of the Dubai judicial system, judgments from them have the same weight as Dubai Court judgments. This means the enforcement of DIFC Court judgments, decisions and orders outside the UAE will be exactly the same as the enforcement of a judgment of any other UAE Court abroad.

In terms of enforcement of UAE Courts' decisions, including those of the DIFC Courts outside the UAE:

- either there is a Treaty in place between the UAE and the target jurisdiction which governs the reciprocal enforcement of judgments and enforcement is then governed by that treaty; or
- there is no Treaty, so enforcement is governed by the laws of the state in which enforcement was sought.

MEMORANDA OF GUIDANCE

The DIFC Courts have signed MoG on enforcement with both common law jurisdictions (such as the Commercial Court of England and Wales, the Supreme Court of New South Wales, the Federal Courts of Australia, the High Court of Kenya, the Supreme Court of Singapore and the United States District Court for the Southern District of New York); and civil law jurisdictions (such as the Supreme Court of the Republic of Kazakhstan and the Supreme Court of Korea).

Although these MoG do not have binding legal effect, they do demonstrate the Courts' cooperation and mutual understanding on the enforcement process for monetary judgments.

TYPE 1 MOGS

The first type of MoG has been signed by the DIFC with the Commercial Court of England and Wales; the Supreme Court of New South Wales; the Federal Court of Australia; the High Court of Kenya and the Supreme Court of Singapore.

In terms of the conditions for enforcement, these MOGs provide that a monetary judgment of the DIFC Courts will be enforceable by the other court if it is final and conclusive and rights of appeal do not prevent a judgment from being considered final. For example, under the MoG signed with the High Court of Kenya, a foreign judgment is conclusive as to any matter which is directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, unless it has not been pronounced by a court of competent jurisdiction, it has not been given on the merits of the case or where it appears on the face of the proceedings to

be founded on an incorrect view of international law or a refusal to recognise the law of Kenya in cases in which such law is applicable; or where the proceedings in which the judgment was obtained are opposed to natural justice; have been obtained by fraud; or where it sustains a claim which is founded on a breach of any law in force in Kenya.

In addition, with these types of MOGs the judgment cannot be penal in nature, e.g. a judgment ordering the payment of taxes, fines or penalties and the DIFC Courts must also have

jurisdiction to determine the dispute subject. In terms of this last requirement, the position will depend on the applicable Conflict of Laws Rules.

The MoG also provides that the DIFC Courts will generally be regarded as having had jurisdiction only where the person against whom the judgment was given was at the time the proceedings were commenced, present in the jurisdiction; was the claimant, or counterclaimant, in the proceedings; submitted to the jurisdiction of that court; or agreed, before the commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court.

In terms of the limited grounds to challenge enforcement with this type of MOG if one of the three requirements listed above has been established to the foreign court's satisfaction the judgment can only be challenged in the enforcing court on the following very limited grounds.

These are that the judgment was obtained by fraud; it was contrary to the relevant English, Australian, Kenyan or Singaporean public policy or the proceedings were conducted in a manner which the enforcing court felt was contrary to the principles of natural justice.



Nick Carnell
Head of Construction
Taylor Wessing



TYPE 2 MOG

This type of MoG has been signed with the United States' District Court for the Southern District of New York (SDNY).

The MoG first sets out the rules for the State or Federal Court to hear a case. These include recognition and enforcement proceedings in the USA and emphasise that the Court must have both subject matter (type of case) and personal (authority over the parties) or asset-based jurisdiction (authority over assets located in the jurisdiction).

In recognition and enforcement proceedings, asset-based jurisdiction exists when assets of the judgment debtor are known to be located in New York.

In addition, a New York court will not find that the foreign court lacked personal jurisdiction if:

- the defendant was served personally;
- the defendant voluntarily appeared in the proceedings;
- prior to the commencement of the proceedings the defendant had agreed to submit to the jurisdiction of the foreign court in relation to the subject matter involved;
- the defendant was incorporated or domiciled or had his principal place of business in the foreign state when the proceedings were instituted;
- the defendant had a business office in the foreign state and proceedings in the foreign court involved a cause of action resulting from business done by the defendant through that office; or
- the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising from such operation.

This MoG also refers to Article 53 of the New York Civil Practice Law and Rules and emphasises that New York Courts generally recognise foreign country money judgments which are final, conclusive and enforceable where rendered, even though an appeal is pending or possible in the future. In terms of grounds to challenge, with this type of MoG the New York Courts will not enforce a judgment which was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law or by a Court which did not have personal jurisdiction over the defendant.

In addition, the New York Courts may deny recognition if:

- the foreign court lacked subject matter jurisdiction;
- the defendant did not receive notice of proceedings in sufficient time to defend;
- the judgment was obtained by fraud;
- the cause of action on which the judgment was based was repugnant to the public policy of this state;
- the judgment conflicted with another final and conclusive judgment;
- the proceedings in the foreign court were contrary to a prior agreed-upon method of settlement; or
- with jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Practitioners should welcome the DIFC Courts' efforts to enhance their international visibility by signing these MoGs which should facilitate the enforcement of DIFC Courts decisions abroad as they broaden the applicability of DIFC Judgments.

Taking the Other Side

Side Agreements may be often used to get round UAE rules on LLC shareowners but conflicting court judgements make this a risky approach as Antigoni Filippopoulou and Sariah Al Hallack of Global Advocacy and Legal Counsel explain.

Much ink has been spilled over the validity and the enforceability of so called 'Side Agreements' which can be used by a foreign party, either an individual or entity, as a vehicle in order to possess 100% beneficial ownership of a limited liability company (LLC) incorporated in the UAE mainland, while at the same time complying with the legal requirement which is that 51% of shares in such a company should be held by an Emirati national. (This requirement is found in Federal Law No. 2/2015 On Commercial Companies (known as the New Companies Law) which replaced Federal Law No. 8/1984 (or the Old Companies Law).

WHAT ARE SIDE AGREEMENTS

A Side Agreement is an agreement signed between an LLC's shareholders, in which the 51% Emirati shareholder transfers all the economic benefit and control over his shares to the foreign 49% shareholder.

This agreement basically reflects the true ownership of the shareholders' shares, which is different from the ownership which appears in the LLC's official Memorandum of Association (the MOA) which has been registered in the UAE Ministry of Economy's Commercial Registrar.

Though this structure appears legitimate, in reality it actually violates the UAE Companies Law.

COURT CONCERN

This approach has long concerned the UAE Courts, and led to numerous debates about the validity and enforceability of these Side Agreements, as there have been inconsistent judgements on this subject. In some cases, the UAE Courts have ruled that if an LLC's shareholders can prove that the payment of their shares or the shares were conflicting with what was provided in the MOA, then the LLC was void and a judgement declaring it void would result in the LLC's dissolution and liquidation as per Article 680 and 682 of Federal Law No. 5/1985 as amended (or the UAE Civil Code) and Article 308 of Federal Law No. 8/1984. In other words, in these cases the UAE Courts considered the Side Agreement as valid and this validity resulted in the LLC being void, which meant the LLC should be dissolved and liquidated.

In addition, the UAE Courts have gone one step further and confirmed that the Side Agreement should apply during the LLC's liquidation process after it has been pronounced void with regard to the settlement of the shareholders' rights between each other.

There have also been similar cases, where the UAE Courts have acknowledged the validity of the Side Agreement, but have based its validity on Article 395 of Federal Law No. 5/1985 which provides that if the contracting parties conceal a true contract with an apparent contract, the true contract is the effective one.

The UAE Courts ruled in these judgements that any person who records in the MOA any particulars which are false or contrary to the provisions of the law would be liable to punishment and if the substantive elements of a company are not satisfied, the LLC shall be void.

The UAE Courts have then clarified that a sham contract was one where two parties agree to execute an apparent but untrue transaction, which conceals the true relationship between them, and the effect is that:

- the apparent transaction is non-existent;
- the effective contract between the contracting parties is the true contract; and
- if the apparent contract hides a contract which is contrary to the law, the latter contract is void.

Therefore, the UAE Courts have concluded that the LLC was void on the grounds that the MOA was the sham contract between the shareholders and the true contract which reflected the true intentions of the shareholders was the Side Agreement.



Antigoni Filippopoulou
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DIFFERENT VIEWS

However, the UAE Courts have decided very differently in some recent judgements by ruling that the MOA of the LLC as registered in the Commercial Registrar is the valid agreement which governs the relationship between the shareholders and not the Side Agreement. As a result the Side Agreement was null and void.

In this case the UAE Courts have depended on Articles 8, 10 and 11 of Federal Law No. 8/1984 which is equivalent to Articles 14 and 15 of Federal Law No. 2/2015) and have held that the MOA and any amendments to it, define the rights, the shareholding, the dividend distribution and the liability for shareholder loss and continue to be valid as long as the shareholders have not agreed to change the provisions and rights in it in the same manner and procedures as the original MOA was executed, notarised and registered in the Commercial Registrar.

Therefore, the UAE Courts have reached the conclusion that the Side Agreement is invalid and its provisions are non-enforceable on the grounds the Side Agreement has not followed the notarisation, registration requirements and formalities for the MOA.



It is apparent from these UAE Court precedents, taking into consideration the fact that a judgement of the UAE Courts does not create a binding precedent as would be the case in common law jurisdictions, that the UAE Courts are deciding on a case by case basis according to the facts of each case and the submitted evidence. This means that no one can predict how the UAE Courts will deal with Side Agreements going forward.

BREACHING THE LAW

It should be noted that although Side Agreements are a common practice in

the UAE in order to circumvent the local ownership requirement for 51% to be held by Emiratis for the establishment of LLCs, these agreements breach not only the New Companies Law, Federal Law

No. 2/2015 but also the provisions of Federal Law No. 17/2004 on fighting commercial cover (which is also known as the 'UAE Anti-Fronting Law'), and prohibits 'Fronting'.

FRONTING

'Fronting' is the practice of enabling a foreigner, whether they are an individual or entity, to undertake any economic or professional activity, which is prohibited for them to do under UAE law, whether that activity is conducted on their own account or in participation with a third party, and where

assistance is rendered to a foreigner to avoid their obligations.

The UAE Anti-Fronting Law, Federal Law No. 17/2004 has considerable penalties where there is a breach of any of its provisions. These include fines, deportation and even imprisonment, not only for the person doing the fronting but also for the person who is fronted.

As a result, the foreign minority shareholders and Emirati majority shareholders of an LLC should be aware of this law when considering entering into a Side Agreement.



Sariah Al Hallack
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IMPLEMENTATION

Although so far the UAE authorities do not appear to have implemented the UAE Anti-Fronting Law, that does not mean this law should be ignored or taken as an indication that the UAE authorities have waived their right to implement it.

Entering into a Side Agreement may be a commonly used practice but there are a number of less risky options for foreign minority share-

holders to consider, including controlling the management of an LLC by being appointed as manager for example. Given the fact the UAE Courts have issued contradicting decisions on the validity of Side Agreements and their enforceability, as well as the serious penalties applicable for breaching the Anti-Fronting Law, Federal Law No. 17/2004, it would be advisable for foreign minority shareholders of an LLC to seek legal advice and consider alternative options rather than entering into Side Agreements.

“Although Side Agreements are common in the UAE, they breach the new companies law and the anti-fronting law.”

Did you know... Theft By Finding

When most people hear the word 'theft' they automatically think of robbers breaking into houses, bankrobbers picking safes, and pickpockets or others who forcibly take property from its rightful owner.

However, in Scotland it is possible to be charged with 'theft' in a far more passive way. In fact, you can be found guilty of 'theft' by having merely picked up something which has been dropped by its owner or left in the street and then putting it in your pocket, under a strange concept called 'theft by finding'.

It is a concept which was recognised in 1991 in the case of *MacMillan & Lowe*.

“Prosecutions for theft by finding are rare as obtaining proof of theftuous intent can be very difficult.”

SHIPS AND CARGO

Appropriating a wrecked ship or its cargo is also treated as 'theft by finding' by the Scottish courts.

FINDING A WALLET IN

THE STREET

Those who find a wallet in the street which has details of the owner's identity inside it, can if they take no steps to find that owner or hand the wallet over to the police also be guilty of this crime, if they cannot give an explanation for their actions.

RELEVANT POINTS

There are a number of relevant points when deciding on such cases.

These include the value of the item, whether it might perish, how easy it is to find the owner, the time elapsed since it was lost, the mental state or education of the finder, and whether there is the presence or absence of 'wickedness'.

OBLIGATIONS ON THE FINDER

Scots Law under the Civil Government (Scotland) Act 1982 even details a list of obligations for those who find things.

For example, they are expected to take reasonable care of the property, and deliver it to either the police, the owner or the occupier of the premises



where it was found. The police also have obligations when this happens.

PROSECUTIONS

Not surprisingly, however, prosecutions for 'theft by finding' are very rare as obtaining proof in such cases of 'theftuous' intent is very difficult, as normally there is no direct evidence.

ABANDONED PROPERTY

Even arguing that the property had been abandoned by its owner does not make the position any simpler. Although, under Scots Law 'ownerless' property cannot be stolen, abandoned property, is treated as falling under Crown ownership. This means it is also capable of being stolen.

Strange as it may seem there are even statutory provisions designed to cover those who might wish to scour local authority refuse dumps in what is known commonly as 'raking the tip'.

BODY SNATCHERS

However, finally on the question of what does and does not constitute a theft in Scotland, despite the fact one of the world's most infamous body snatching cases occurred there, it is not clear if human remains can actually be 'stolen' in that country.

Although as Burke and Hare's lawyers no doubt discovered there is a separate offence of removing a body from a grave which would come into play in such cases.



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As a general rule, evidence which may be adduced is restricted to evidence of matters tending to directly or indirectly prove or disprove the facts of an issue. In criminal cases the prosecution has to prove the alleged offence was committed and the accused was responsible for it. So it may be necessary to show other conduct or surrounding circumstances which are so connected to the act which make them part of the same transaction. In criminal cases, acts are often carried out in secret so direct proof of guilt can be difficult to obtain so indirect or circumstantial evidence, like motive, opportunity or finger prints near the scene from which other facts can be inferred are used. Although, a single piece of circumstantial evidence is normally weak, usually the combination of multiple strands of this type make for a stronger case. This, however, remarkably was not what happened in a case reported in the New York Weekly around 1889, in which the accused was acquitted after his lawyer claimed all the evidence (and there was a lot of evidence) against him was purely circumstantial. The autopsy showed the deceased had been struck by a club. The jury were told a few people had seen the accused standing over the prostrate man with a club in his hand, and that club was bloody. The accused had also been seen to strike or as his lawyer described it, 'gently tap' the man a few times with the club. His lawyer then reminded the jury of the 'injustice' which had been 'done in the sad, regretted unrecoverable past' and that they should be cautious. He mentioned the hundreds of innocent men who would have suffered unjustly if 'at that last moment, some happy circumstance had not thrown doubt on their guilt'. So what had been the true facts of this case according to the accused's lawyer? Well, the lawyer stated it was not murder, it was evident from the evidence there had been a completely different set of circumstances. A sad suicide had taken place. The lawyer stated his client had been in the process of returning to what

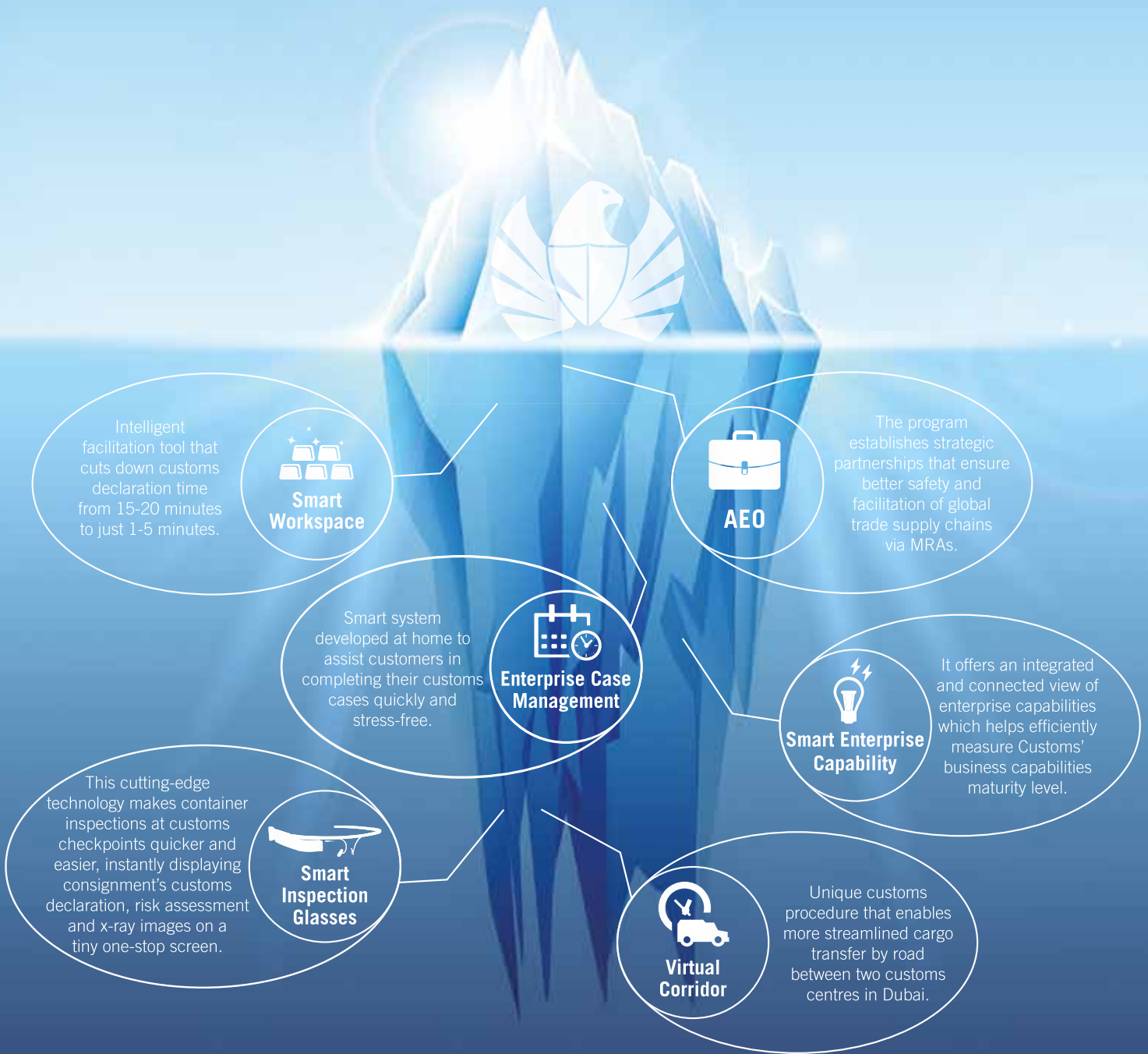
was described as 'his peaceful home' from 'a prayer meeting or something'. Then by chance had happened to come across the unfortunate deceased in the process of committing suicide. He had been doing this by beating himself on the head with a club. The accused, described by his lawyer as being 'benevolent' and 'true to the instincts of humanity' had rushed to help him. He had then jerked the fatal club away from the deceased – which was why he was holding a club covered in blood. In addition, had 'playfully patted' the deceased with the club 'as an injunction that he should not try to commit suicide again'. This clearly explained why the accused had been mistakenly seen by the witnesses continuing to strike the man with the weapon. In this way, the lawyer despite five separate pieces of circumstantial evidence successfully convinced the jury the accused had not committed a murder. It was a case of right place, right time for the deceased who was lucky the accused was passing.

By Definition

Restitutio in integrum **(latin)**

Restoration to the original condition

This approach followed in many common law jurisdictions means in cases of pecuniary loss, including loss of profits and earnings, claimants are entitled to be put in the same position they would have been in, had injury not occurred. According to Halsbury's Laws of England and Halsbury's Laws of India, benefits received may be deducted in the award and both favourable and unfavourable aspects of future loss are reflected in it. Restitutio in intergum also applies in bailment cases, where injured parties are entitled to a sum of money which puts them in a good position, had the loss or damage not occurred. However, damages must not be too remote, i.e. they must flow directly and in the usual course of things, from the loss or damage. In India, according to Halsbury's Laws of India in cases of personal injury consequential on the defendant's tortious act pecuniary loss may cover consequential expenses; cost of care and loss of earnings. However, if awards reflect on loss of earnings and future lifetime costs, the plaintiff's wealth must be offset against the latter award. In Australia, according to Halsbury's Laws of Australia, the requirement of Restitutio in intergum is common in cases of rescinded contracts or on the basis of a vitiating factor. When rescission occurs, plaintiffs always have to restitute the transferred property to the defendant. In case of equity the requirement is substantial restitution.



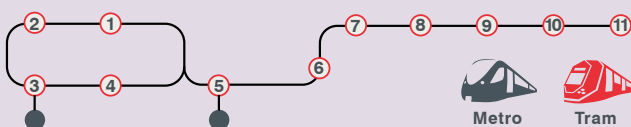
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