

MENA Corporate News

April 2015



Message from the editor

Welcome to the April edition of Clyde & Co's quarterly MENA Corporate News.

In this issue we cover:

- **Stop Press: Impact of the New UAE Companies Law on Foreign Investment**
The UAE Government announced on 1 April 2015 that the new UAE Companies Law will come into effect three months after the date of publication in the Official Gazette. But what impact will the new law have on foreign investors? Click [here](#) for a link to the full article.
- **In Focus: Kingdom of Saudi Arabia**
Investing in or sending employees to KSA? Then be aware of both the crackdown on breaches of the anti-concealment law and the new SAGIA fast track and impact program. Click [here](#) for a link to the full article.
- **In Focus: Franchising in Qatar**
Franchising allows businesses to expand into the rapidly growing Qatar market although, as this article notes, it is not without risks. Click [here](#) for a link to the full article.
- **In Depth: Abu Dhabi Global Market – Update on the draft Legal Framework**
In January the Board of ADGM published drafts of various key regulations. In this article, we examine in detail the draft Company Regulations which are based on the UK Companies Act 2006. Click [here](#) for a link to the full article.

With regards to deal flow, since our last newsletter in December, we have seen continued growth in the number of M&A deals we are working on across the region. Despite concerns in the market at the turn of the year that the dip in oil prices might affect confidence we still see a lot of movement in education, health and infrastructure along with increasing interest in the retail sector. Overall the fundamentals remain positive with a solid deal pipeline supported by strong business performance, particularly in the GCC countries.

We hope that you find MENA Corporate News a useful and informative read. In the coming weeks we expect to issue a number of specific updates on the new UAE Companies Law (once its full impact becomes apparent). In the meantime if you have any feedback or comments please do not hesitate to contact us.

Niall O'Toole
Regional Head of Corporate

Stop Press: Impact of the New UAE Companies Law on Foreign Investment

The issue of the new Commercial Companies Law, Federal Law No. 2 of 2015, was announced by the UAE Government on 1 April 2015 and will come into effect three months after the date of publication in the Official Gazette. The new law introduces changes which will affect some of the structures used by foreign investors to establish businesses in the UAE. This article looks at some of the key changes and where the UAE government has left the previous position unaltered.

Foreign ownership restrictions

The nature and extent of the UAE foreign ownership restrictions has been the subject of political debate for a number of years. This is against a backdrop of increasing economic liberalisation in other GCC countries, at least on the face of the law. For example, in 2010, the Qatari government introduced the possibility of foreign investors owning more than a minority stake in Qatari companies in certain specified business sectors, such as tourism, health and education.

For now, the position in relation to the percentage capital which must be held by a UAE national, or a company wholly owned by UAE nationals, remains unchanged from the previous Commercial Companies Law (Federal Law No. 8 of 1984) (**the 1984 Law**). One or more UAE nationals must hold at least 51% of the share capital of any UAE company under Article 10(1) of the new law (where the company is partly owned by non-GCC nationals).

The new law reserves the power to the UAE Cabinet of Ministers to introduce additional regulations which restrict certain business activities to UAE national ownership only (such as commercial agencies and recruitment agencies which must be owned by Emiratis). There is no express provision which empowers the UAE Cabinet to relax the ownership restrictions. The UAE Minister of Economy has made clear that foreign ownership will, instead, be covered in a new Foreign Investment Law, which may allow wholly foreign owned companies in certain sectors of the economy.

Branch offices: sponsorship requirements

Under the new law, the requirement to appoint an agent who must be a UAE national, or a company which is wholly owned by UAE nationals, remains unchanged. Therefore, foreign companies wishing to do business in the UAE, without incorporating a new corporate entity, will still be required to appoint an agent and produce a notarised agency agreement as part of the branch establishment process.

Although the UAE requirements for local branch sponsors have not been relaxed, it is important to bear in mind that the option of using a branch entity to operate a services based business onshore in the UAE is not generally available in other GCC countries. For example, Kuwait does not allow non-GCC investors to operate through a branch at all and, in Qatar, the use of a branch is limited to companies which have entered into a contract with the Qatar government (or government owned agency or company), and only in order to perform that contract.

LLCs: changes which affect foreign investors

LLCs are the most commonly chosen investment vehicle for foreign investors looking to establish an entity with separate legal personality and with limited liability for its shareholders. Generally, an LLC offers the most flexibility for structuring management and shareholder control (subject to the foreign ownership restrictions).

The following is a list of some of the amendments made by the new law which may affect the structuring of LLCs used for foreign investment:

- **No cap on number of directors:** the 1984 Law set the maximum number of directors which an LLC could have at five. Under the new law, the maximum has been removed. Where there is more than one director, they form a board with such powers and functions as set out in the memorandum of association. The removal of the cap enables more flexibility in structuring the management of the LLC. For example, often foreign investors are interested in having a high number of directors, with a spread of overseas and local representatives with delegated authorities, and different layers of management control.
- **Share pledges:** Under the 1984 Law, there was much debate as to whether it was legally permissible for a shareholder to pledge its shares in an LLC as security. Article 79 of the new law makes clear that it is possible for a shareholder to pledge its shares to another shareholder, or to a third party. The pledge must be registered in the Commercial Register, created in accordance with the LLC's memorandum of association and under a specific document for that purpose. Article 81 goes on to state the method by which the pledge may be enforced against the shares in the case of insolvency of a shareholder. If the creditor is another shareholder in the same LLC, it may agree with the pledgor and the LLC to acquire the shares. If the creditor is a third party, the shares must be offered for sale by way of public auction, although the LLC may elect to buy-back those shares from the bidder on the same terms within 15 days of the auction. In either situation, the remedies for the creditor are not self-help remedies because the agreement of third parties is required in order to obtain the shares, or the cash equivalent, to recover the debt due. This change was widely anticipated following the release of the 2011 Draft of the law and due to a policy change in the Dubai Department of Economic Development in relation to the ability to register a share pledge in the Commercial Register in favour of a UAE financial institution. However, there are a number of areas in relation to the pledge which will need to be clarified in practice under the new law. In particular, the interaction between the pledge provisions and the foreign ownership rules and the way in which a pledge may be perfected as regards other creditors of the shareholder is not clear. For example, the Commercial Register is not open to public inspection and therefore it is difficult for a prospective creditor to be certain as to prior competing interests without the co-operation of the LLC. In addition, the new

law does not require a share certificate to be issued (which could be retained by the creditor). The memorandum of association may require a note of the security to be made in the company registers, however, as some protection for the creditor.

Share pledges are an important topic for foreign investors choosing to incorporate an LLC in the UAE. The foreign investor will often lend the amount of the capital to the UAE national shareholder to enable it to acquire its 51% interest and the foreign investor will require security for that loan. Therefore, confirmation that share pledges are legally enforceable is welcome.

- **Increase in shareholder numbers:** it is now possible for LLCs to have up to 75 shareholders. This is an increase from 50 shareholders in the 1984 Law. In practice, this is unlikely to have a significant effect on most LLCs. It is unusual for an LLC to have a large number of shareholders because all share transfers are subject to pre-emption rights and any change in the memorandum requires all shareholders to attend the public notary to approve the change.
- **Shareholders meetings – notice:** there have been a number of modernising changes made to the way in which LLC shareholder meetings may be conducted. First, the notice period for a shareholder meeting has been reduced from at least 21 days to at least 15 days. It is also possible for the shareholders to consent to shorter notice with unanimous approval. In addition, the method of providing the notice of meeting to shareholders is no longer restricted to registered letter: the memorandum of association may set out any other permissible method of notice, which may presumably include email notice.
- **Delegation by shareholders:** it is now possible for a shareholder to delegate attendance at a shareholder meeting to a third party who is not another shareholder of the LLC. This provides more flexibility for individual shareholders. In the case of a corporate shareholder, different authorised representatives of that shareholder (usually employees) may attend and vote on behalf of the corporate shareholder.
- **Quorum and voting rights:** the quorum and voting requirements of LLC shareholder meetings have been amended. It was previously the case that, in order to pass an ordinary shareholder resolution, shareholders representing at least 50% of the share capital had to vote in favour of the resolution. There was not, however, any separate quorum requirement. In practice, the quorum

for the meeting also had to be shareholders representing more than 50% of the share capital (and potentially more, if there was no certainty that all the shareholders present would vote in favour).

Under the new law, there is now a separate quorum requirement. For a shareholder resolution to be passed, there is a two step process: shareholders holding at least 75% of the share capital must be present at the meeting for the first time the meeting is called, in order for the meeting to be quorate. Resolutions are then passed by the majority of shareholders present at the meeting voting in favour, or such higher number as specified in the memorandum of association. This is a numerical majority of shareholders at the meeting, and not based on percentage capital holdings. It is not clear whether the memorandum of association may provide, instead, for all shareholders (whether present or not) to vote in favour. Any change to this effect will need to be approved by the public notary.

If the requisite quorum is present first time, there is no material effect on the “typical” UAE LLC comprising one foreign shareholder holding 49% of the shares and one UAE national holding 51% of the capital if the meeting goes ahead the first time it is called. For companies incorporated under the 1984 law, the memorandum of association usually requires that all shareholder resolutions to be passed by the votes of shareholders holding at least 75% of the capital (or with unanimous approval). Therefore, the UAE national shareholder is unable to pass a shareholder resolution acting alone and the foreign investor had a blocking right. Under the new law, provided that all the shareholders attend the meeting first time, the foreign investor will have the same blocking rights because the meeting will not be able to proceed without it and, with two shareholders present, both would need to vote in favour.

However, there are certain situations in which the effects of the new law will need to be considered more carefully. In particular, if there are more than two shareholders in a UAE LLC, it will be important to determine which combination of shareholders may hold quorate meetings together, without all being in attendance. In addition, it will be critical for shareholders to have watertight powers of attorney or other delegations of authority in place for others to attend meetings and vote on their behalf. Missing the first shareholder meeting may have a negative

impact: if a quorum is not reached first time, the requisite quorum decreases to holders of 50% of the share capital needing to be present in person and, on the third attempt, no specified quorum is required. This means that the UAE national shareholder would be able to pass shareholder resolutions without the foreign investor being present, if the first meeting does not occur and that any shareholder could single-handedly pass a shareholder on the third time a meeting is convened. The new law does not state that it is possible to provide for a higher quorum under the memorandum of association.

It is important to note that proper notice of the meeting must be given, but the new law still requires shareholder meetings to be attended in person. There is no provision which expressly allows the memorandum to provide for other ways of passing shareholder resolutions. In practice, the memorandum of association may provide for written resolutions, but these require all shareholders to sign to reduce the risk of the validity of the resolution being challenged.

- **Holding companies:** the new law allows for an LLC (and a joint stock company) to be established the sole object of which is to hold subsidiaries incorporated in the UAE or overseas. A Holding Company may undertake ancillary activities to that primary object which are set in an exhaustive list in Article 267: management of its subsidiaries, providing loans, guarantees and finance to its subsidiaries and acquiring moveable assets, real estate and intellectual property assets for the purposes of its holding activities. A Holding Company will not be entitled to trade or undertake any other activities. Such a company will be required to have the words “Holding Company” in its title. Under Article 270, it will be required to produce consolidated group accounts in accordance with internationally accepted accounting and audit practices and standards. This is a welcome addition to the company structuring options which was not available under the 1984 law under which foreign companies frequently had to find an appropriate licence category. The practical requirements related to these Holding Companies, such as the commercial premises requirements, are however yet to be clarified.



What do we need to do to implement the new law?

The new law does not contain any provisions which deal with the implementation of the new law by existing companies, such as “*grandfathering provisions*” under which the old legislation continues to apply to companies established under the previous law. The new law will apply to all UAE companies from date falling three months after its publication in the Official Gazette, as well as all UAE companies to be established in the future.

The law makes some important changes to the way in which a UAE LLC operates from a management and shareholder perspective. In certain cases, LLCs will want to ensure that their current memorandum of association allows them to take advantage of any new flexibility provided for in the law and takes into consideration any more restrictive amendments. We recommend that all companies reconsider their memorandum of association and shareholder arrangements, together with any corporate governance guidance provided to directors, as soon as possible to ensure that they get the best from the new UAE company law regime.

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In Focus: Kingdom of Saudi Arabia

Doing business in KSA? Sending employees to KSA? Not without a licence!

Sending employees to KSA

The Kingdom of Saudi Arabia (**KSA**) is one of the largest economies in the Middle East and a market which has attracted more and more activity in the past six years. Often businesses will seek to explore the market through a partner or a third party with which employees are placed and through which they seek to operate in the Kingdom.

Such operations will more often than not fall foul of KSA legislation designed to prevent a non KSA entity using a KSA entity's trade licence to do business in the Kingdom. Over the past three years, we have seen the KSA authorities clamp down on activities they regard as harmful to the economy and in breach of legislation.

In 2013 a six month immigration amnesty resulted in millions of individuals correcting their status, and thousands being deported for illegal working.

This regulatory clampdown has continued into 2015. In the past few months the Ministry of Commerce and Industry (**MOCI**) has intensified its campaign against illegal business ventures being conducted by expatriates in the name of Saudis (**Concealment**) (referred to in Arabic as "*Tasattur*") as part of efforts to put an end to what it called "*the most dangerous practice*" affecting the business community in the Kingdom.

Article 1 of the Saudi Arabian Anti Concealment Law issued by Royal Decree No. (M/22) dated 4/5/1425H (corresponding to 22/6/2004) (**Anti Concealment Law**) provides that any Saudi who enables a non-Saudi to use the Saudi's licenses and other facilities to invest or engage in commercial activities in KSA without (where available) the necessary authorisations and licenses shall be considered as committing the offence of "*concealment*". Articles 4 and 5 of the Concealment Law provide that a party guilty of "*concealment*" may be punished by:

1. A fine not exceeding SAR 1 million (approximately USD 266,667)
2. Imprisonment for a term not exceeding two (2) years
3. Deportation from the Kingdom
4. Being barred from re-entering the Kingdom

In addition, the foreign party involved in any "*concealment*" may be assessed for tax by the Department of Zakat and Income Tax on the basis of the deemed profits earned in the course of the activities that were "*concealed*".

Various arrangements can fall foul of the Anti-Concealment Law, including the placement of employees into an agent, client or other partner. The key concern is to monitor employees' activities, business cards and their presentation to the market.

Recently, the Council of Ministers has instructed relevant agencies to carry out surprise inspections in the market and report Tasattur businesses to MOCI. As a tool of enforcing the Anti Concealment Law, the Kingdom is planning to monitor the foreign currency transfers of expats, in order to check if such transfers are coming from Tasattur business activities.

New measures impacting foreign investment

In recent months the Saudi Arabian General Investment Authority (**SAGIA**) has introduced a number of changes that will impact foreign investors. These include:

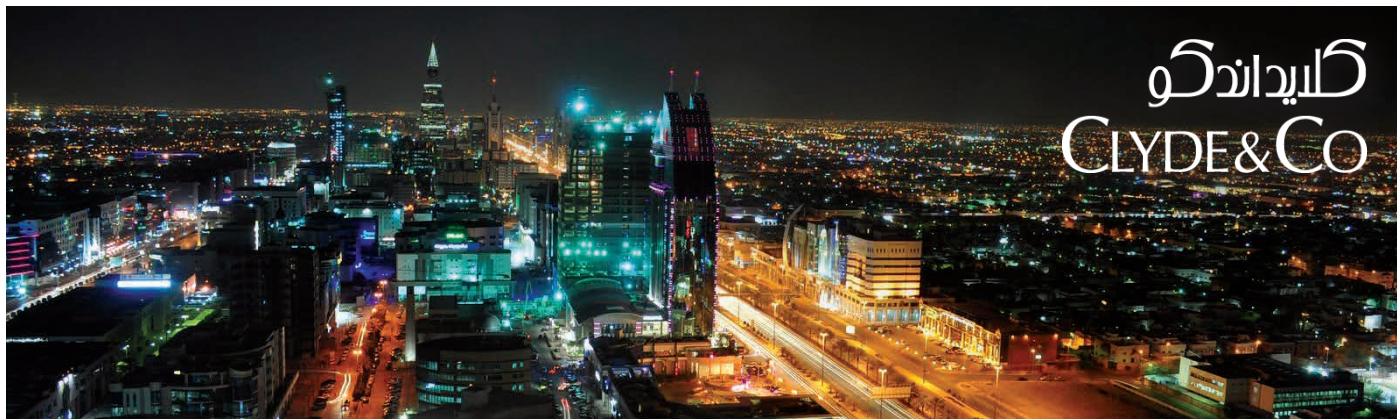
- the announcement in June 2014 of a fast-track license application procedure for certain qualifying applicants (**Fast Track Procedure**);
- the implementation in October 2014 of a new programme to measure the impact of foreign investment in KSA (**Impact Programme**).

Overall this appear to be part of an emerging twin track approach of encouraging foreign investment whilst simultaneously being more choosy about which foreign investors can come into the market (and which can stay).

The Fast Track Procedure

Under the Fast Track Procedure the following type of foreign investors may be eligible to submit an abbreviated licence application:

- Multinational companies
- Publicly listed companies on an international stock exchange
- Foreign companies that manufacture products that are classified and approved by independent agencies and employ certified process technology



- Foreign companies that own certain registered trademarks, patents, or copyrights
- Foreign companies that are establishing a regional office in KSA
- Foreign construction companies that are classified as Class A in their home country
- Foreign companies with assets worth more than USD 13.33 million, that have above 2,000 employees, and that have completed at least one project with a value of at least USD 133.3 million
- Foreign companies contracting with the KSA government or a KSA government-owned entity or entering into a joint venture with a KSA company listed on the KSA Exchange

As a firm we have successfully made a number of Fast Track Procedure applications. In some cases the SAGIA licence was issued in as little of one week – although it should be noted that it still takes time to gather together all the application documents.

The Impact Programme

Under the programme, the impact of licensed entities will be measured according to the following foreign investment objectives:

- Transfer and localization of technological know-how
- Diversification of KSA's economy
- Increasing of exports and decreasing of imports
- Developing KSA human resources
- Reinforcing economic competitiveness in both domestic and international markets
- Balanced development among the different regions of KSA

Entities which demonstrate that they are fulfilling these objectives will be granted special incentives and privileges to help promote and motivate excellence and sustainability. According to the programme, licensed entities will be divided into the following categories:

Strategic	Firms committed to deepening the value chain across targeted sectors, such as transportation, healthcare, education and technology.
Distinctive	Firms employing not less than 10 Saudis (with monthly wages of a minimum SAR 10,000 each and within the “platinum” category); firms with a labor force that exceeds 100 employees and a Saudization rate of over 50%; and the top 10 firms in different sectors based on their capital.
Advanced	Publically listed companies or international consulting firms with no less than 25 employees, in which the Saudization range is within the “platinum” category; contracting companies with more than 300 employees with monthly average wages of not less than SAR 5,000 per employee and in the “green” category.
Limited	Contracting companies with less than 300 employees (with monthly average wages less than SAR 5,000 per employee); and other small operations in various sectors.
Innovative and Promising	Innovative firms which have registered patents.
Non-Classified Contracting Entities	Contracting companies without classification granted a temporary license.

It will take time to see the full impact of this programme in practice. However, the potential advantages and benefits will be granted to licensed foreign investments according to their categorisation. For example, longer SAGIA license periods will be available to entities which are strategic (5 years), distinctive (3 years) and advanced (2 years) together with enhanced service priority in business centres.

SAGIA has also confirmed its intention to develop new formulae to measure the 'added value' provided by licensed entities. These are to be based on quantitative data derived from the balance sheets of such entities together with qualitative data derived from analysis of their operations in practice.

Conclusion

In summary, the Fast Track Procedure and Impact Programme represent a new approach by SAGIA to encourage and measure the foreign investments into the Kingdom. It is too early to assess fully the impact these initiatives will have on foreign investments, however, both existing licensed foreign investors and those considering an investment in the Kingdom will wish to examine and assess the new SAGIA objectives carefully.

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In Focus: Franchising in Qatar

Franchising allows businesses to expand into the rapidly growing Qatar market without the risk and capital investment traditionally associated with establishing a joint venture. Franchising is not, however, a risk-free means of expansion. Below, we consider the opportunities and risks associated with franchising in Qatar and briefly examine the legal framework.

Opportunities

Qatar presents a tremendous opportunity for businesses looking to expand internationally. Qatar has a growing population, a rapidly growing economy, the highest GDP per capita in the world, is set to host the 2022 FIFA World Cup and plans to spend an estimated USD 200 billion on infrastructure projects in the coming few years.

Franchising continues to be the preferred model for businesses looking to expand quickly into Qatar's rapidly developing economy without the risk and significant capital investment associated with entering the market through a joint venture vehicle.

The franchise economy in the Middle East and North Africa (**MENA**) is worth USD 30 billion and is growing by 27% per year. The Gulf Cooperation Council (**GCC**) nations are at the forefront of growing the franchise economy in the MENA region. More than 50% of retail sales in the GCC are generated from international brands and the profitability of franchised outlets is often much higher in the Middle East than in the franchisor's home country.

Particular areas of opportunity exist in the food and beverage (**F&B**) sector. Fast food is estimated to account for 40% of the franchising market in the GCC. F&B franchises are expected to grow by 25% in the coming years. It is anticipated that the health food sector will be a key area of growth within the F&B sector. Franchising opportunities are not, however, limited to F&B outlets. There is a strong appetite for international brands in the retail sector. The education, transportation, tourism and healthcare sectors also present potentially lucrative opportunities to franchisors.

Legal framework

Qatar does not have a specific franchising law. A franchisee will often be considered as an agent under Qatar law and thus franchising agreements will generally fall under the scope of Law No.(8) of 2002 on Organisation of Business of Commercial agents (the **Commercial Agency Law**). The Commercial Agency Law provides significant statutory protection to franchisees and local agents such as the right to an exclusive appointment and the right to receive compensation in the event that agreements with principals terminate or expire. The Commercial Agency Law may displace the terms of a written agreement between the parties. Even if the Commercial Agency Law does not apply, the franchisee may be afforded rights on termination by the Franchiser pursuant to Law No (27) of 2006 (**Commercial Code**).

In addition to the Commercial Agency Law, and the Commercial Code franchisors also need to be mindful of the broader legislative environment in Qatar. Intellectual property, labour and company legislation will impact on the granting and operation of a franchise in Qatar.



Intellectual property

For franchisors, trademarks and trade names are at the forefront of brand protection. In the interests of commercial expediency franchisors often allow a franchisee to register trademarks and trade names before the franchise agreement is signed. This practice comes with high risks even if the franchise relationship is later formalised and documented.

It is difficult to contest or assign the ownership of a trademark under Law No.(9) of 2002 On Trademarks, Trade Names, Geographical Indications and Industrial Models and Designs (the **Trademark Law**). International brand owners often struggle to wrest control of a registered trade name away from a former business partner based on their contractual rights, even if they are able to rely on famous trade mark rights elsewhere in the world.

The enforcement of legal rights can be difficult as there is no concept of binding legal precedent and a limited ability to obtain injunctions. As a result of the above, although franchising in Qatar can be an excellent financial opportunity for both franchisor and franchisee, it is absolutely crucial to ensure that the agreements are reviewed by lawyers familiar with local laws and their implementation.

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In Depth: Abu Dhabi Global Market – Update on the draft Legal Framework

In January this year the Board of Directors (**Board**) of the Abu Dhabi Global Market (**ADGM**) published initial drafts of various key regulations as part of a formal public consultation. Clyde & Co has engaged with ADGM to discuss these regulations and has submitted detailed comments on the regulations to the Board.

The draft regulations and consultation papers are available at

<http://www.adgm.com/setting-up-business/adgm-regulations/>

In this article, we examine the draft companies regulations (the **Regulations**).

General

The Regulations are largely based on the UK Companies Act 2006 (**UK Act**) and replicate many of its provisions. There are, however, several significant departures from the UK Act, which aim to remove various historic peculiarities of the UK Act, better cater to local and regional markets and business objectives and enhance flexibility.

Overall, this approach provides a sensible framework. In particular, the absence of foreign ownership restrictions within ADGM should encourage business in and from ADGM on both a regional and global level. However, the interaction between the ADGM company law regime and the UAE onshore legal regime does need to be carefully analysed. For example, the ADGM does not have authority to create criminal laws and breach of the Regulations will instead result in fines – but what impact will an ADGM regulatory decision or fine have in relation to UAE federal criminal laws which may apply to the same conduct? Similarly, the Regulations include provisions on the ostensible authority of directors based on the UK Act – a concept that does not exist under UAE law. In practice, how will ADGM companies interact with entities onshore and will notaries be willing to notarise powers of attorney from ADGM companies for use in relation to certain onshore activities such as opening bank accounts and setting up LLCs and establishments? These issues will need to be addressed for ADGM to function seamlessly alongside the onshore regime.

Comparison with DIFC

Although similar in many respects to the Dubai International Financial Centre (**DIFC**), the proposed legal system in ADGM differs in several significant respects. In particular, the ADGM plans to adopt English common law directly rather than to take the relevant principles and codify them in the form of specific regulations as the DIFC has done (eg DIFC Law 6 of 2004, Contract Law).

In comparison with the DIFC Companies Law, the Regulations are much lengthier and more detailed. Some specific differences are highlighted below. The UK Act had not been implemented at the time that the DIFC Companies Law was written and the latter instead follows many of the principles set out in the now repealed UK Companies Act 1985. The DIFC therefore retains some concepts and concerns that were abolished or clarified in the UK in 2006. For example:

- The prohibition on ‘financial assistance’ by both public and private companies remains in the DIFC. This was abolished in respect of private companies in the UK and the ADGM has taken the same approach
- Following the English case of *Aveling Barford v Perion* (1989), there had been concerns and conflicting legal opinions in the UK as to whether a company could sell an asset to a fellow group company at a book value which was less than market value if the transferring company did not have distributable reserves equivalent to the difference. Section 845 of the UK Act (mirrored in section 773 of the Regulations) removed the doubts created by that case by clarifying how the amount of a distribution in kind is to be calculated



Restricted Scope Companies

In perhaps the most significant departure from the UK Act, the Regulations introduce a new class of private limited company, the 'restricted scope company' (**RSC**), subject to a reduced level of regulation and enhanced confidentiality. As currently drafted, an RSC must be a subsidiary of a group which publicly files accounts or of a company formed by Emiri decree.

The Board proposes that RSCs will be used predominantly as 'holding companies for professional investors'. It may encourage greater use of ADGM in this context if RSCs are not required to constitute subsidiaries, provided that the shareholders (whether individual or corporate) meet certain minimum net worth criteria and suitable safeguards against money laundering are in place.

The Board is considering whether to extend the RSC regime to include the single family office (**SFO**) concept, a move which could provide useful flexibility in the region.

Although the DIFC has an SFO regime, it does not have a general private holding company concept such as the RSC. The ability to establish such holding companies in ADGM may increase its attractiveness as a place through which to conduct business whether in the UAE or elsewhere.

Cell companies

The Regulations provide for protected cell companies and incorporated cell companies. A cell company is a single legal entity, within which there are a series of pools of assets and liabilities (**cells**). The cells are legally segregated from each other and also from the company itself. Claims by those transacting with a particular cell can be brought only against that cell. In an 'incorporated' cell company each cell has a separate legal identity, which can provide better protection against 'non-cellular' claims.

Cell companies were initially designed for use in the captive insurance industry but are now used more widely, in particular in the investment funds business and also recently as vehicles to structure a series of distinct private equity or real estate transactions. Cell companies are often established in 'offshore' jurisdictions such as Bermuda, Cayman and the BVI.

The UK Act does not contain provisions for cell companies (although the concept is recognised in legislation relating to UK open-ended investment companies). The provisions in the Regulations are based on relevant Jersey law.

The DIFC Companies Regulations contain provisions for protected cell companies but not incorporated cell companies.

These provisions create a convenient framework for structuring investment products. However, as drafted, a cell company cannot also be an RSC. A cell company structure is potentially a useful format for an SFO ie one cell per portfolio company to segregate the potential liabilities arising from a series of family businesses. If the RSC concept is extended to cover SFOs it may therefore be helpful to permit an SFO to establish itself as a cell company subject to the RSC regime.

Share capital

In contrast to shares of UK companies, shares of ADGM companies will have no nominal/par value, thereby rendering the concept of 'share premium' redundant.

The par value of a share bears no relation to its market value and the concept is somewhat archaic. The capital maintenance rules, aimed at creditor protection, have always applied to the total consideration payable on shares issued and not just the nominal price received. There therefore seems little point in retaining the concept.

Nevertheless, the removal of a feature so long embedded in UK company law will undoubtedly have repercussions, both for the drafting of ADGM legislation and also for practitioners when drafting corporate documents. So, for example, preference share dividend rights are often drafted as a fixed rate per cent of the nominal value; any such rights in relation to an ADGM company would need to be framed instead as a fixed amount or as a percentage of the issue price.

Shares in DIFC companies can be denominated in either par or no par value.



Accounts and Audit

AGDM companies must typically prepare their accounts in accordance with international accounting standards. Independent regulatory oversight and guidance, such as that provided by the Financial Reporting Council (**FRC**) in the UK, is a critical element in the reliable implementation of any accounting standards. The Board will in due course decide whether it wishes to establish a similar body in the ADGM. In the interim, it may be helpful if ADGM companies and their advisers are permitted to rely on FRC guidelines and practice statements.

Certain private companies including 'small companies' benefit from exemptions in connection with the accounting and reporting requirements. Notably, RSCs are permitted to adopt the small companies regime regardless of their size and are not required to file accounts with the registrar. They are likewise exempt from audit. The audit exemption may not be appropriate to the extent the RSC regime is extended beyond subsidiaries consolidated into audited group accounts, *eg* to SFOs.

Derivative claims

In the UK, a shareholder holding just a single share has standing to bring a statutory derivative action (*ie* an action on behalf of the company against a director for *eg* breach of duty). Concerns about shareholder activism prompted an amendment to the equivalent provisions of the Regulations, such that only a member holding '5% or more of the share capital of the company' may bring such a claim. This is a reasonable approach, although the drafting needs to be clarified to explain how (*eg* by reference to voting rights?) and at what stage(s) this percentage threshold is calculated.

The DIFC Companies Law does not contain an equivalent provision permitting statutory derivative claims, although an action for 'unfair prejudice' is available to shareholders in similar terms to the provisions of both the UK Act and the Regulations.

Corporate transactions

Although not part of the UK Act, the Regulations include provisions for 'continuance' to allow companies to re-domicile both in and from ADGM. These are based on Jersey law. The DIFC also allows companies to transfer their incorporation both to and from the DIFC.

Provisions from the UK Act on schemes of arrangement, mergers and divisions have been adopted, with the following key differences:

- Schemes of ADGM companies require the approval of 75% of voting rights but not a majority in number of shareholders. The majority in number requirement in the UK enables activist shareholders to split their holdings between affiliates to help block the requisite shareholder resolution
- Mergers will be available to private and not just public companies
- Mergers will not involve the transfer of assets and liabilities or the 'dissolution' of one or more of the merging companies. Instead, a 'universal succession' concept is adopted, under which the 'merged company' is absorbed or consolidated with another company into a successor or surviving company. This is in line with a number of other jurisdictions including Jersey and the BVI

There are no provisions for schemes of arrangement or statutory mergers in the DIFC Companies Law.

The Regulations do not contain the statutory 'squeeze-out' provisions in Part 28 of the UK Act which allow and require a bidder holding 90% or more of the shares to acquire the remaining shares. The DIFC Companies Law contains similar provisions in Part 7 of Chapter 10. It is envisaged that separate Takeover Regulations will be issued by the Board in due course.

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