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FROM THE CHAIR

Important developments for the Arab Regional Forum

**Hassan Arab***Chair, Arab Regional Forum; Al Tamimi & Co, Dubai*h.arab@tamimi.com

It has been a productive year for the Arab Regional Forum. I'm sure that many of you attended the IBA Annual Conference in Buenos Aires which took place in October, during which our forum conducted some very interesting sessions. Perhaps the most important of these was a presentation by Sir Anthony Evans, Honourable Chief Justice of Dubai International Financial Centre (DIFC) Court. I am delighted to have had the pleasure of participating in this session and introducing him to delegates. It was great to see such a good turnout at all the events hosted by the forum resulting in some very positive exposure for us.

In addition to formal sessions, officers of the forum attended meetings with the officers of the Law Firm Management Committee, the Young Lawyers' Committee and the Mediation Committee to discuss the arrangements for future joint sessions. We look forward to the IBA Arbitration Day which will take place in Dubai in February 2009. The event is being organised by the Arbitration Committee with the support of the

Continued overleaf

This newsletter is intended to provide general information regarding recent developments in the Arab region. The views expressed are not necessarily those of the International Bar Association.

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Arab Regional Forum (visit www.ibanet.org/conferences/conf254).

As always, the Arab Regional Forum strives to promote and assist the Gulf region's legal community and to encourage the active participation of Arab lawyers at relevant events and initiatives. The forum will be instrumental in revitalising the IBA's activities in the region and it is our aim to build on the training and development of our lawyers through the organisation of high-quality legal events and seminars.

In June 2009 the forum will be undertaking training

sessions on legal issues and drafting. The sessions will be offered to young/junior lawyers and will be held in Damascus, Syria in association with the Law Firm Management Committee. The Forum will also host a half-day session on legal developments in the Middle East region during the IBA Annual Conference in Madrid in October this year.

I am grateful for your involvement in and contributions to the forum's activities. We rely heavily on your support and participation in achieving our visions and goals.

ARAB REGIONAL FORUM

The Arab Regional Forum was founded by the International Bar Association in October 1994 and is open to all IBA members either practising in the region or with an interest in it. The forum works closely with national bar associations to cover topics of relevance to lawyers in the region; including business law, human rights and other general practice issues. It publishes this newsletter and organises regional conferences.

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Contribute to this newsletter

If you would like to contribute, articles are always welcome.
Please send Word documents (up to 3,000 words) to editor@int-bar.org

SYMPOSIUM ON INTERNATIONAL ARBITRATION

HOSTED BY THE
LCIA ARAB USERS' COUNCIL AND DIFC-LCIA ARBITRATION CENTRE

DIFC Conference Centre and Jumeirah Emirates Towers, Dubai

Tuesday 17 February 2009



Jumeirah Emirates Towers, Dubai

INTRODUCTION

The London Court of International Arbitration (LCIA) is one of the world's premier international arbitration institutions, renowned not only for its arbitration administration services but also for its conferences and symposia. In February 2008, the LCIA entered into an historic association with The Dubai International Financial Centre (DIFC), Dubai, to form the DIFC-LCIA Arbitration Centre, bringing the LCIA to the forefront in the Gulf Region in a joint venture with one of the world's fastest growing financial centres. We are delighted, therefore, to be putting on a symposium in Dubai.

SYMPOSIUM FORMAT

The symposium is designed to be interactive and to provide an opportunity for delegates to share news and views on developments in the field of international commercial arbitration and ADR. The LCIA will contact delegates before the symposium to request topics for discussion. Delegates will be encouraged to participate in a free-flowing discussion of current issues of key interest in the field, under the expert guidance of well-known co-Chairs.

WHO SHOULD ATTEND?

Arbitrators, in-house counsel, practitioners, academics and members of the local and international business community interested in, and affected by, current developments and best practice in the field of international arbitration.

REGISTRATION FEE

The delegate's registration fee is £490 for members of the LCIA Users' Councils or of the IBA and £540 for non-members. For more information about membership please email membership@lcia.org

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To register for this symposium, please download the programme from the LCIA website
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Crucial statutory reassurance for off-plan project buyers: an analytical review of the new Interim Registration Law No 13 of 2008

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The phenomenal boom in the real estate market has caused certain anomalies and difficulties that needed to be addressed by the legislators in order to bring stability to this vital market. The aim is not only to limit the disputes arising among the parties involved, (ie, master developers, sub-developers, brokers and investors/buyers), but also to reinforce significantly the steady growth of the market.

Individual buyers or consumers are the most vulnerable parties in these transactions. This vulnerability was addressed by the newly promulgated law. The main features are statutory reassurances to buyers, introduced in a well-balanced manner and which protect all parties' interests, including those of developers. This dispels apprehensions that currently prevail in the real estate market.

Statutory reassurance

Compulsory interim registration

As a deterrent against, and protection from issues relating to ownership of off-plan properties, it is now a mandatory requirement for all developers to register any sale or disposition involving off-plan projects in the Interim Real Estate Register. Non-registration will render the transactions null and void. This does not mean that the non-registered buyer will not have leverage. Although no *action in rem* can be heard, a seller who fails to register the transaction can still be sued on an *action in personam* basis.

The law has defined the real estate unit as any demarcated part of a real estate, including a demarcated part of off-plan project. Therefore compulsory registration is applicable whether the property is of a single or multiple units, and whether the unit is an apartment, a villa, or a simple plot of land.

No launch without possession

The developer is now under obligation to have actual possession of the land where the project is to be built, and obtain the approval of the Land Department for such development before selling any units on an off-plan basis.

The law applies retrospectively, as the developer is under obligation to register within 60 days, all the transactions that took place prior to the date that the law came into force, namely 31 August 2008.

However, the law is silent on the requirements for such registration. In particular, no warranty is required on the part of the developer stating that the registered transaction is the only transaction entered into. This is mainly to prevent a situation where the developer has sold the units several times, before they are finally registered in the name of the last buyer.

Ease of transaction

Article 6 of the law provides for the freedom of transaction, whether by cash sale, mortgage or any legal transaction on the registered off-plan units sold. It is, however, silent on the requirement for such registration by the subsequent buyer or seller. In particular it does not state whether the application for registration requires the consent of the developer. Prior to this law, granting consent was left to the sole discretion of the developer. In our view, the consent of the developer becomes unnecessary in case of a sale, a step that will give a great deal of flexibility to the buyer and will limit abuse by some developers.

The procedure for mortgaging such units is covered by the newly enacted Law No 14 of 2008.

Before promulgation of this law, most transfer fees were levied by the developers under the heading of 'administrative fees.' The law has prohibited the charging of these transfer fees that used to be levied by the developer at an average rate of two per cent of the unit price, while permitting administrative fees to be approved by the Land Department. However, bylaws are expected to give guidance on the limit of such fees.

Independent final registration

The law imposes an obligation on the part of the developer to register the completed project in the permanent Real Estate Register, once the development is completed and the completion certificate is issued. As a further protection to the consumer, the law permits the Land Department, either at its own initiative or upon the request of the buyer, to apply for the final registration of the unit that has been registered in the Interim Real Estate Register. The Land Department will do so after satisfying itself that the buyer's contractual obligations have been carried out.

Registration of brokerage agreement

Contrary to the hitherto prevailing practice, it is no longer sufficient that a real estate broker be duly licensed to conduct the brokerage activity in respect to the sale of the off-plan project, pursuant to the directive concerning the registry of real estate brokers in the Emirate of Dubai (Law No 85 of 2006). The brokerage agreement between the developer and the broker should itself now be registered with the Land Department.

Restrictions on termination

In our view, one of the crucial reassurances offered to investors by the law is the provision of Article 11, that limits to a great extent the abusive termination of off-plan sales by the developer. As per the law, the developer is under obligation to notify the Land Department on any default on the part of the buyer, triggering a 30-day notice from the Land Department to the buyer. Should the buyer fail to rectify this within the notice period, the developer may terminate the agreement.

However, it is unclear whether such a 30-day statutory notice is in addition to any notice agreed between the developer and the buyer, or if such notice would replace any agreed notice period.

It is also unclear whether the Land Department will have any say if the buyer challenges their alleged default, following receipt of the notice served by the Department. In our view, the Department's role will come to an end when notice has been served. If the Department is convinced on prima facie evidence that there is a default, its issuance of such a notice would be viewed as an administrative decision that will obviously be subject to challenge before the competent court of law.

Another ambiguity that has recently arisen over Article 11 concerns the imposition of a cap for liquidated damages in the event of termination pursuant to a breach by the buyer. The letter of the law sets this cap at 30 per cent of the amount paid by the

buyer. However, the Director General of the Land Department, Mr Sultan Butti Bin Mijrin has been reported as stating that the cap will apply to 30 per cent of the total purchase price and not the amount actually deposited by the buyer.

Further muddying the waters are Mr Bin Mijrin's reported remarks that unlike some other provisions of the law, Article 11 will not have retroactive effect. Therefore, if a contract was entered into before the law came into effect, the parties to the contract will not benefit from Article 11's provisions, even if default and termination occur after the law came into effect.

While the entire by-laws of Law No 13 of 2008 are awaited, the official statements on the by-laws for Article 11 have been causing uncertainty.

No increased area cost

Another reassurance introduced by the law is the prohibition of claims for additional money based on an increase in the built-up area. This, in our view, will force the developer to provide the public with accurate drawings at the time of promoting the project. However, the law allows for adjusting the price if the units turn out to be smaller than the agreed area, unless such adjustment is marginal.

Enhanced monitoring powers

Finally, the law has given the Land Department vast powers to monitor off-plan developments. It may report violations of any laws and regulations on the part of the developer and/or the broker, and refer them to the relevant authorities for investigation whenever necessary.

Conclusion

The new law has closed various loopholes and is expected to enhance the regulation of the market. By-laws or executive directives relating to such law are expected to be issued by the Land Department to provide clarity on the issues mentioned above. These can be consolidated by court precedents to be established, especially with the return of the role of the court of law in deciding disputes relating to real estate development.

The rule of law and a comparative study of civil and common law traditions

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Today we live in a world that is increasingly being referred to as a 'global village'. In many respects this is correct. Globalisation not only encompasses the removal of trade and customs barriers between countries, encouraging freedom of movement and unification of currencies, it also involves the harmonisation of laws. All other aspects of globalisation require a legal framework to permit the flow of goods, services, people and ideas.

Globalisation has led to economic integration and interdependence among nations, promoting the hope for a peaceful and prosperous future for humankind. The universal desire for globalisation has been, unconsciously perhaps, supplemented by the growing uniformity of global commercial laws and regulations. These have come hand-in-hand. The movement has also benefited from the development of the common and civil law traditions over the centuries. These are the two great pillars on which the law rests in most countries.

The wave of colonisation of American, African and Asian countries by major Western powers led to the evolution of common and civil law as parallel strains of legal development. The foreign rulers brought to the colonised lands their own laws and legal traditions, which were applied with suitable amendments to respect the local cultures and religious environment. Both the systems of law have aided globalisation of legal regimes, connecting the world, instead of every country developing a different legal system.

Both common and civil law systems are pathways to the promised land of justice. Justice is the fundamental law of society. Indeed, both these legal systems have as an objective the provision of justice and establishment of a system of law that is certain, fair and accessible.

The rule of law

His Majesty The Ruler, in his speech at the inauguration of the second annual session of the Council of Oman in November 2008, referred to the need for those in government to be held accountable and legal procedures to apply against them 'in

accordance with the principles of justice upon which we have laid down the pillars of rule. In accordance with these pillars, we are required not to allow anyone to be above the law... Therefore, we emphasise that the issue of enforcement of justice is imperative and inevitable...'

The rule of law is the acceptance, whether freely or by imposition, of a body of law by which society and its members regulate itself. From this very statement, you may note one of the important elements of what his Majesty said: 'In the eyes of the law, all men are equal and no one is above the law.'

Now the law may be created in many ways: by royal decree, by statutes passed by a parliament, by regulations made under delegated authority, by judges. In each and all of these cases the requirement, but not the implementation, is simple: to create a body of law which is clear and understandable to the ordinary man and which is accepted by him as sensible regulation. It was put very well by Thomas Jefferson, the writer of the American Constitution – who said: 'Common sense is the foundation of all authorities, of the laws themselves and of their construction.'

For it is critically important for the well being of the law that it is founded on principles which will commend themselves to the people: they must feel that they work in harmony with their society and in accordance with the majority views. In the United Kingdom the laws are, or at any rate were, based on a set of morals or moral beliefs in general acceptance in society. The law here is and must be the same: a set of principles, supported by laws and regulations, which govern society and which have general acceptance. Indeed in Oman, it is very clear; Article (2) of the Basic Law 1996 states that 'Islamic Shariah is the basis of legislation'.

To reduce that to everyday life, the law of contract must require that the parties to the contract must keep faith with one another and deal fairly. This may be seen not merely as a moral obligation but also as a pragmatic necessity. It is only by holding citizens to the bargains they have made that trade can work, and work it may be said, to everyone's advantage; not just the parties to the

agreement but to all those who ultimately will be affected by it.

We should be under no illusions – most contracts we make will have effects on people who were not parties to the contract. To give a simple example, a person who enters into a wholesale contract for the sale of food to a retail grocery shop is, when setting the price, affecting all consumers who subsequently buy food in the shop.

So much for the theory of the rule of law. The theory is not enough, what are needed are mechanisms to set down the law and to enable it to be enforced. It is in this area that we find the intriguing difference of the two great systems, which are introduced below.

The two great systems

Civil law

Civil law is a modern system of law based upon Roman law. In common usage, it also refers to rules governing private legal affairs, as distinct from public and criminal law. The law that had been in force throughout the Roman Empire when it controlled most of Europe and the Middle East, broadly speaking the area surrounding the Mediterranean Sea was supplemented by Germanic Laws, when Germanic and Central European tribes carried out their great conquests. The invaders observed the principle of personal rather than territorial law, permitting the former Roman subjects and their descendants to follow the Roman law in their affairs with one another. This situation continued throughout the Dark Ages.

Then in the 11th and 12th centuries, as part of the revival of interest in classical culture, there was resumption of systematic study of Roman law. Extensive commentaries on *Corpus Juris Civilis* as it was known, were produced and by the 16th century this became the basis of legal science throughout Western Europe. The next step was to state these principles in a structured form or a code. The *Code Napoléon* of 1804 was the first and is the most famous such work.

Napoleon had brought together learned jurists from within the empire to draw up a comprehensive set of codes consistent with natural law by which all subjects could understand their rights and obligations to one another and the state.

It is said that 'the Code Napoleon... was conceived as a complete legislative statement of principles rather than rules and as a truly revolutionary enactment designed to remake the law in the image of a new and better society. It was founded on the premise that for the first time in history a purely rational law should be created, free from all past prejudices and deriving its content from 'sublimated common sense'; its moral justification was not to be found in ancient custom, monarchical paternalism or religious beliefs but in its conformity with the dictates of reason. And thus its fundamental precepts are presented with the claim of universality, namely, as

an assertion that a legal order is legitimate only when it does not contradict such precepts.'

Napoleon's victorious armies imposed the French Civil Code on various territories, notably the Netherlands, Belgium and Italy. After the downfall of Napoleon, the Code's prestige caused the adoption of similar codifications, in the form of either direct translations of the French Code or national codes based on the French model but with local modifications. These codes include those of the Netherlands (1838), Romania (1864), Italy (1865), Portugal (1867) and Spain (1889). Under the Ottoman Empire, a Civil Code, based upon both the French and other principles, was introduced in Egypt in the mid-19th century.

The present version of the Egyptian Civil Code was first drafted in 1949. The 1949 code followed the French civil law model. The code focuses on the regulation of business and commerce, and does not include any provisions regarding family law. The code also provided for Islamic law to have a role in its enforcement and interpretation. Article 1 of the code provides that, 'in the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity.'

The Egyptian Civil Code has been the source and inspiration for numerous other Middle Eastern jurisdictions, including Libya, Jordan, Bahrain (2001), Qatar (1971), the commercial code of Kuwait and, more recently, Oman. The civil law approach has been introduced here over a period of time and is now reflected in the law setting up the system of courts in 1999.

During his days in exile in Elba, Napoleon remarked that the Code would be his greatest and most enduring legacy which would live beyond his defeat at Waterloo. His observation was apt and today outside of the countries following the English common law tradition, the organisation and structure of his Code endures. It has been carried by Spanish conquistadors, Dutch navigators and Portuguese adventurers as they conquered parts of the new world and extended their empires.

Civil law creates unified legal systems by working out with precision the conclusions to be drawn from basic principles. The civil law judge is bound by written law principles, stating in his judgement the particular provision which forms the basis of his decision, and not any previous judicial decisions.

Common law

On the other hand, the common law is the legal system prevailing in England, most member countries of the Commonwealth of Nations and the United States. The

name stems from medieval theory that law administered by the king's court, following the conquest of William I in 1066, is the common custom of the realm and not the custom of local jurisdiction that was applied in local or manorial courts. The term common law is also used to mean the traditional element in the law of any common law jurisdiction as opposed to its statute law.

Common law represents the law of the courts (and therefore of the land) as expressed in judicial decisions. The doctrine of binding judicial precedent, which provides that the decision of a higher court is binding on a lower court and that the doctrine of one judge is binding on another, is perhaps the most characteristic feature of the common law and is the most significant difference between common law and civil law.

Other key features of the common law system are trial by jury and the doctrine of supremacy of law. In this system, not all law is judge made; statutes are enacted to make new law. Even then, in interpreting statutes, courts have recourse to common law doctrines.

Differences

There are many differences between civil law and common law traditions including the relevance of a constitution, role of the courts, legal education, judicial appointments and development of law. Let us examine some of these differences.

Constitution

The concept of a constitution, something very sacred for common law countries, is relatively recent in civil law jurisdictions. The constitution in civil law jurisdictions can be easily amended, and comprehensively addresses relations between the state (government) and people as well as being subject to the will of the people as determined by the legislature.

By contrast, the constitution in many common law countries enjoys a high status in jurisdictions as the supreme law so that any law or decision contrary to the provisions of the constitution is considered *ultra vires* and hence invalid. The concept of a constitution has been around for a very long time and it is not easy to amend a constitution in common law countries. Unlike the civil law system, the constitution enunciates a few principles in expansive terms and the constitution is considered to be the paramount statement of the will of the people.

The British Constitution is the exception to this. It is often said, incorrectly, that there is no constitution, but it is not written down in an ordered, codified way. It is to be found in a number of sources: the Magna Carta (1215), the Bill of Rights (1688), the Human Rights Act (1998) and judges' decisions.

Structure of legal system

The civil law system is based on a comprehensive set of codes adopted by the law-making authorities which are set out in a logical manner addressing all possible issues. The common law system is based on judicially-developed principles derived either from cases or legislative enactments.

Drafting of laws

Civil law codes and statutes are concise, while common law statutes are precise. Indeed, civil law statutes provide no definitions, and state principles in broad, general phrases. Common law statutes, on the other hand, provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions.

This difference in style is linked to the function of statutes. Civil law statutory general principles need not be explained, because they are not read restrictively and need to be stated concisely if the code is to be exhaustive. Common law statutory provisions need not be consistent, because they cover only the specific part of the law to be reformed, but must be precise, because the common law courts restrict rules to the specific facts they are intended to cover.

Courts

The courts in a civil law jurisdiction are dedicated to specific areas of law such as criminal, labour, and commercial with separate appeals courts for specific civil and administrative processes. Typically in common law countries, there are courts of general jurisdiction hearing all matters with usually a single hierarchical appellate process culminating in a supreme court.

The proceedings in civil law courts are 'inquisitorial' in nature with the judges actively asking questions with respect to evidence and other aspects of the case, with a view to establishing the facts. By contrast, the common law court hearings are 'adversarial' in nature and the proceedings normally culminate in a trial in which the opposing lawyers seek to prevail with arguments, with the judge as referee. Under the common law, the outcome in criminal cases is decided by the jury and in other cases by the judge.

Judiciary

Another important difference between the two legal systems is that in civil law countries the judiciary is a profession selected by students as a career choice and is similar to a civil service position in which advancement is by tenure. On the contrary, in common law countries, judges are selected after years of demonstration of competence in practice and elevation to higher courts is based on demonstration of

demeanour, reputation and ability. Hence, the common laws judges are of more advanced years.

Evidence

The presentation of evidence before courts in civil law jurisdictions involves a limited set of submissions by each party and responses to enquiries from the court and there is a preference for written documents.

In common law jurisdictions each party fashions a series of enquiries, examinations and reviews of all relevant documents and testimony. Unlike civil law courts there is a preference for oral testimony based on the underlying belief that the truth can be better determined in a face-to-face confrontation before the court.

A major difference between civil law and common law is that priority in civil law is given to doctrine (including the codifiers' reports) over jurisprudence, while the opposite is true in common law.

This difference in priority can be explained by the role of the legislator in both traditions. French civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law.

Conclusion

The world is moving towards the harmonisation of laws and this will inevitably have an impact on the future of these two legal systems. We should expect to see more uniformity between the various aspects of civil law and common law.

The two systems are slowly converging. This is happening in two principal ways. The first is by one country adopting elements from the practice of another country. This process is a two way street, so that common law countries adopt elements of law from civil law countries and vice versa. An example of the first is the adoption, by the United States, a common law country, of a common commercial code (a civil law concept) applicable to all states across the country. Another example, going the other way, is the slow move to acceptance, in a number of civil law countries, of judge-made precedent.

The second way is through international treaty (sometimes call 'conventions'). These treaties have an increasing tendency to exhibit elements of the common law approach, with increasing length and detail. This may be clearly seen in the treaties relating to the European Union. Those made before the joining of the UK, as a common law country, were relatively short and of general principle. Those made after the UK joined have become longer and much more detailed.

There are at the same time many jurisdictions with a mixed legal system, where one of these two legal traditions is mixed with another legal system. A

prominent example in this respect would be Egypt where both civil law and Islamic law are applied.

There are a growing number of multilateral institutions in the world which are responsible for preparing rules, regulations and draft laws to be applied in member states of these organisations to increase uniformity and harmonisation. This is especially true for institutions such as the World Trade Organization and the European Union. Other examples of institutions working to develop uniform law include the Hague Conference on Private International Law, International Institute for the Unification of Private Law and regional initiatives such as the Organisation for the Harmonisation of Business Law in Africa (OHADA). Their activities accelerate the convergence of the legal systems.

Neither a system of common law or civil law is perhaps, in any theoretical sense, 'better' than the other. What matters is that in the continuing search for justice, each system continues to strive for clarity, accuracy and accessibility.

Notes

* This paper is adapted from a lecture given by Stephen Sayer at the University of Nizwa, 19 November 2008.

Arbitrability of intellectual property disputes

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There are several different forms of rights or areas of law giving rise to rights, which together make up intellectual property (IP). The term relates, in particular, to patents, plant variety rights, designs and models, copyright, software, integrated circuits, know-how and distinctive signs including trademarks. This article is concerned with three areas of IP: copyrights, trademarks and patents, and especially with the determination of the validity of a particular property right.

The traditional obstacle to using arbitration to resolve IP disputes was a fundamental concern as to arbitrability. This arose from the fact that some IP rights derive from legal protection granted on a national basis by the local sovereign power, which afford the beneficiaries certain exclusive rights to use and exploit the IP in question. The existence, extent, meaning and application of such rights could legally only be definitively investigated, reviewed, explained, expanded, curbed, revoked or confirmed by the authority which issued or granted the right, by another specifically appointed body under that system or, in certain situations where very specific questions of law arose, by the courts of that country. This had the effect that rights and entitlement to IP, and the legal issues which flowed from those rights, could not usefully be referred to, or considered by, an arbitral tribunal.¹

There are four main advantages of using arbitration in IP:

- The parties can ensure that the case is heard by someone experienced in the applicable copyright, patent or trademark and the relevant technology, rather than submitting the case to a judge or jury.
- It can bring a cooperative approach to the dispute that evaluates the non-legal business considerations of the parties' relationship because IP often requires solutions and remedies that call for a continuing relationship between the parties.
- Arbitral awards do not serve as precedent, therefore it is argued that arbitration is well suited for areas in which the relevant legal principles have not yet been developed, as an arbitral award would not have the far reaching legal consequences of a court decision.²
- IP rights, especially technology patents, are almost by definition a closely guarded secret. This would risk

being lost during public court proceedings. The requirements of confidentiality for IP disputes go beyond the normal considerations which may be found in any commercial dispute, as a party to an IP dispute will often be interested in safeguarding confidential information.

Arbitrability is a crucial issue in IP disputes. It is particularly relevant to both the jurisdiction of the arbitral tribunal and the enforcement of arbitral awards under the New York Convention. Generally speaking, disputes relating to IP rights, which are typically national in character, and often, dealt with multinational portfolios, will give rise to questions of recognition and enforcement in more than one jurisdiction.³

One of the main issues relating to arbitration in IP disputes concerns the necessity of a contractual link between the parties in arbitration. Arbitration is only possible when parties have agreed, either before or after the dispute has arisen, to confer jurisdiction over the dispute to an arbitral tribunal. In IP matters in general, disputes often arise as a result of an infringement of a right by a third party which has not entered into an arbitration agreement with the party entitled to exercise the right.

It is quite essential that the arbitration agreement covers the IP dispute. To make sure of this, it is important to use broad language in drafting the arbitration agreement such as 'arising out of or related to', to cover non-contractual IP claims. Also, it may be helpful to provide explicitly that the issues of arbitrability and validity of the arbitration agreement are subject to arbitration if the purpose is to cut off pre-arbitration recourse to court proceedings.

Obviously, there is a need to establish certainty in the law relating to the arbitrability of the validity of patents, trademarks and other forms of IP created by grant or registration.⁴ The ability to arbitrate IP varies from one country to another. While there is a wide recognition that arbitrability of IP disputes is desirable, national laws do not reflect this wider recognition.

The awareness of the importance of using arbitration and other alternative disputes resolution (ADR) in resolving IP disputes has been growing vastly in the Arab world. A new arbitration and mediation centre for

IP disputes has recently been established in Amman/Jordan under the auspices of the Arab Society of Intellectual Property (ASIP). Its aim is to promote the use of ADR in IP disputes at a high international level of services.

Notes

- 1 Final Report on Intellectual Property Disputes Arbitration, The ICC Int'l C Arb Bull 9/No 1, May 1988 pp37-73, at 38.
- 2 B Niblett, 'The Arbitration of Intellectual Property Disputes', World Forum on the Arbitration of Intellectual Property Disputes (WIPO and the AAA Conference, Geneva 3-4 March 1994).
- 3 Final Report on Intellectual Property Disputes Arbitration, The ICC Int'l C Arb Bull 9/No 1, May 1988 pp37-73, at 41.
- 4 J Bridgeman, 'International Arbitration of Intellectual Property Disputes: The Arbitrability Question', I L T, vol 11, No 5, May 1995 pp104-106, at 104.

The UAE legal system continues to develop

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In preparing this article, we decided to obtain views from some of the 80 lawyers at our independent UAE law firm, as well as general counsel at a number of our multinational clients. In essence, we asked co-contributors to comment on the present status of the UAE economy, as it continues to mature, and the parallel development of the UAE legal system.

As many readers will know, the UAE consists of seven emirates – the two largest, Abu Dhabi and Dubai, accounting for more than 90 per cent of the GDP. Since 2003, UAE GDP growth has averaged about ten per cent per annum. The latest Bank of America/Merrill Lynch report on the UAE cites a number of key factors behind the country's continued economic advance, notably Abu Dhabi's increasing hydrocarbon production and revenues, extensive new infrastructure projects, the emergence of Dubai as a financial and service hub, the real estate boom, healthy population growth and the availability of credit for the development of new enterprises. Growth is projected to continue in the high single digits for the next two to three years. Meanwhile, those responsible for the administration of law in the UAE are faced with the challenge of ensuring that the legal system is able to meet the demands of the rapidly developing economy.

In this article, we propose to develop the theme of legal reform, by assessing recent government interventions in three different areas: corporate and financial, real estate and dispute resolution.

Among those approached while canvassing opinions for this article, was Andrew Wright, general counsel at Dubai International Capital (a member of the active Dubai Holdings Group, notable for making a number of recent high profile investments, both within the UAE and internationally). Speaking from his office in

the Dubai International Financial Centre, Dubai's dedicated free zone for international financial activities, Andrew observed:

'The continued growth and maturity of business and law in the UAE is an undoubted success story. Although, in today's interconnected world, the UAE cannot be said to be unaffected by adverse economic considerations in the global economy, the relative impact is considerably less for a variety of economic reasons, including initiatives supported or sponsored by government bodies and domestic business. This growth necessitates continued development of the UAE legal system, and legislators endeavour to respond as necessary to modify law, regulations and practices with a view to facilitating economic stability and growth.'

Melika Betley, Regional Legal Adviser, HSBC, added:

'It is well known that a number of new laws and regulations are in the process of being developed and introduced. There is also a major governmental initiative to enable more efficient access to sources of laws, including English translations where appropriate. The authorities are aware of and are focused on the need to continue to enhance the legal system, and the various human resource and training initiatives being undertaken by governmental and quasi-governmental bodies and entities are strong indications of the importance placed on such matters.'

Companies and finance

Under existing rules, with certain exceptions, no foreign investor may hold more than a 49 per cent equity stake in a locally incorporated company. This restriction might have been intended to lead to the formation in the UAE

of numerous joint venture limited liability companies (LLCs), with foreign investors and local partners equally represented on the board of the new company and working together as a team to ensure sound management and the adoption of good corporate practice. In many past cases, however, local partners were reluctant to contribute towards the capitalisation of such companies (local equity contributions generally being funded by means of non-recourse or limited recourse loans from the foreign investor) and often had limited involvement in the management of the venture, sometimes being content with a flat annual fee in return for notional participation. Foreign investors were also, in many instances, keen to increase their economic share above 49 per cent and therefore encourage such arrangements.

Government authorities at both the federal and emirate level view such 'fronting' arrangements as largely undesirable from the point of view of national economic development, and appear determined to address the situation. The new Companies Law, currently at drafting stage, is likely to introduce a framework for foreign investors to own in excess of the 49 per cent shareholding, in a variety of sectors. It is, however, possible that the detail, in terms of maximum levels of foreign ownership and applicable sectors, may be deferred to subsequent implementing regulations.

Against this background, the Dubai government's policy of establishing free zone areas (where companies can be totally foreign owned, including the Dubai International Financial Centre) may be seen as part of a continuing campaign to stimulate the development of the emirate as a dynamic business centre. The vision of the Ruler, H H Sheikh Mohammed Bin Rashid Al Maktoum, is of a commercial haven where professionally managed companies, operating to international standards, can operate and compete in a well regulated legal environment. The recent policies of both the federal government and the governments of the other emirates indicate their determined efforts to create an open and expanded market. In the words of Dr Hadeef Al Dhahiri, the Minister of Justice, 'The UAE government believes in the free market and is open to globalisation'.

It is significant that, in addition to recent regulatory measures such as the Anti-Money Laundering Law and the establishment of the Emiratisation Securities and Commodities Authority to supervise capital markets, the UAE government has embarked on a programme of legislation designed to strengthen the country's framework of commercial law. Measures expected to be introduced will include an amended companies law, a competition law and a foreign investment law. The collective effects of these reforms will be to enhance and clarify access to the UAE market for foreign investors in certain sectors, raise levels of corporate governance and transparency, control the past practice of notional participation by UAE nationals in joint ventures with foreign investors, and police anti-competitive arrangements.

Real estate

Some five years ago, a ground-breaking initiative by the Dubai government enabled all non-UAE nationals to invest in property within the emirate. This triggered a real estate investment boom in Dubai and it is generally recognised that market regulation struggled to keep pace with the rapid expansion of the real estate sector. However, conscious that the Dubai real estate market, fuelled by aggressive speculation, faced reputational risks, the Dubai government has recently taken matters in hand.

By way of example, a new Escrow Law has been introduced, the effect of which is to impose financial and accounting obligations on developers, so as to ensure a safety net for off-plan purchasers of real estate. In essence, developers selling units off-plan are required to ensure that sales proceeds are deposited into an escrow account and are prohibited from using the funds held in the account except for the purposes of the applicable development project.

Further protection for off-plan purchasers is provided by the new Dubai Pre-Registration Law. Under this enactment developers can no longer charge a private sector 'transfer cost' (commonly two per cent of the transfer price) each time a property changes hands. Moreover, developers may only market real estate through brokers who have been formally approved by the Real Estate Regulatory Authority. Developers are, however, still permitted to retain up to 30 per cent of the funds paid by the purchaser as liquidated damages, in case an agreement for sale is terminated owing to the fault of the purchaser.

The introduction by the Dubai government of another innovative property measure, the much-needed Strata Law – has clarified the rights and obligations of developers, purchasers and occupiers in respect of so-called 'strata properties'. This is where a building or land has been divided into units designated for absolute ownership and owners have the benefit of common use facilities. Additionally, the new law will facilitate the management and administration of such properties, on the basis of a set of rationalised and equitable rules. Since a large proportion of recently completed and ongoing construction projects in Dubai consist of high-rise buildings and building complexes within mixed-use developments, these rules are likely to be of considerable benefit to large numbers of commercial and private property investors and occupiers.

Furthermore, a mortgage law will provide greater clarity and security for borrowers and lenders. Under the provisions of the new law, parties to a financed property purchase will be required to submit full financial documentation when registering the mortgage, and only mortgages granted by registered financial institutions will be accepted.

A further boost to investor confidence in the Dubai

real estate market has resulted from the creation of a new property court, set up to deal exclusively with property-related cases within the emirate. This court is aiming to commence sittings in October 2008 and will no doubt be kept busy, given that there are reported to be more than 500 property cases pending in Dubai.

The Dubai Government's intervention in the real estate market with this ambitious legislative programme of reform is indeed remarkable. It is not, however, unique. The Abu Dhabi Government is also conducting a wide-ranging review of its existing property laws. New Abu Dhabi legislation is currently being drafted to deal with strata property issues and in January 2009 green construction regulations are expected to be issued. These new construction rules will establish standards for sustainable development and create a model for environmental responsibility. The other five emirates are following suit with legislative improvements in the real estate sector.

Regulatory controls over the real estate market have been standard in western jurisdictions for many years and the fact that similar rules are now being introduced in the UAE is a measure of governmental determination to catch up with more developed markets. At the present rate of progress, it is likely that the UAE real estate market will soon achieve a level of sophistication thought improbable by many just a few years ago.

Dispute resolution

The UAE's commitment to a globally open economy, within a sound legal framework, is mirrored by advances in the area of dispute resolution.

Arsalan Shaikh is legal counsel for the Dubai Multi Commodities Centre, a Dubai Government entity that owns and manages Dubai's Gold and Commodities Exchange and commercial property at Jumeirah Lake Towers. Arsalan is positive that 'best practice' is driving government authorities to accept greater accountability than ever before. He believes the authorities now know they will face criticism if they do not achieve what is expected of them and says 'there are no ivory towers any more'. There is, he adds, a feeling that there are no longer any hiding places for government. So, while recognising that this change of attitude renders it more likely that government authorities will be subject to suit, Arsalan is definite that it makes for greater accountability on the part of government entities. He also highlights the introduction of The New York Convention on the Enforcement of Foreign Arbitral Awards in the UAE in late 2006. This underlines the government's awareness of the need to engage fully

with the international business community of economically advanced countries and in this context to support the rule of law, to the best of its ability.

Not all, though, feel quite as positive at this stage. Patrick Keating, managing director of First Group International, a regional trading group that operates in Turkey, Saudi Arabia and UAE, questioned whether the courts in this country have sufficient experience to handle heavyweight commercial disputes. In particular, he expressed doubts about the capacity of the court-appointed experts relied upon by the judges to investigate complex and technical cases. Patrick believes court processes are insufficiently developed to cope with modern day commercial problems.

The UAE is, however, actively addressing such management concerns and the need for improved skills. In Abu Dhabi, a federal training programme for judges and court employees has recently been announced. The training will be provided by international experts, with a view to enhancing the expertise of the commercial court. In Dubai, newly appointed judges are being trained to operate in the new Property Court, while the Dubai court system is now linked to 'AskDubai', a website enabling the public to inform the courts of any difficulties they are experiencing in case management.

The area of arbitration has, of late, witnessed significant advances. The draft federal Arbitration Law published in 2008 aims at incorporating international best practice into both domestic and international arbitrations in the UAE. It seeks to adopt the UNCITRAL model law as applicable to both, but substantially updates and enhances the original 1985 model with more than 45 supplementary provisions. The Dubai Government also enacted a new Arbitration Law in 2008 to handle cases within the Dubai International Financial Centre.

The advances are not, however, confined simply to new legislation. Dr Hussam Al Talhuni has, for the past six years, been Director of the Dubai International Arbitration Centre. He is aware that the rate of economic change currently outpaces legal developments, but stresses the commitment of those with an influential voice, such as his own, to improve matters. Dr Talhuni is busy thinking of ways to further advise the federal government on improving the whole area of dispute resolution in the Gulf region. He foresees Western-style case management systems being adopted by judges who will actively encourage mediation and conciliation. There will, says Dr Talhuni, be visits to common law jurisdictions to learn of their processes, and his message to the IBA in late 2008 was that the UAE legal system is keen first to catch, then to match, the region's phenomenal pace of economic development.

Stopping the wash cycle: a look at money laundering from a UAE perspective

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Money laundering has been defined by the UAE Central Bank as ‘any transaction aimed at concealing and/or changing the identity of illegally obtained money, so that it appears to have originated from legitimate sources.’

The covert operations of money launderers are not likely to be of immediate interest or concern to the person in the street. For governments and regulatory authorities around the world, on the other hand, stemming the flow of ‘contaminated’ money through the arteries of their countries’ financial systems, is a major and continuing preoccupation.

In this respect, the UAE Government is in no different position to other governments. Indeed, given the UAE’s strategic location and its rapid development as an international entrepôt and financial centre over the past few years, the task facing the UAE Government, is probably greater than most. In the event the UAE has taken its responsibilities with regard to the suppression of money laundering very seriously. In particular, it has actively supported the Financial Action Task Force (FATF) and other such international anti-money laundering agencies, and has sought to implement the FATF Forty (+Nine) Recommendations for the combating of money laundering and the financing of terrorism, with the necessary policy initiatives and legislative controls.

The UAE’s first significant counter money laundering measure took the form of a circular issued by the Central Bank to all banks and other financial institutions (banks) in November 2000. The circular recognised that, as a consequence of technological innovation, financial markets had become ‘globalised’. It drew attention to the ease and rapidity with which funds could now be moved across borders to facilitate the concealment of crime and imposed new duties on all licensed banks in the UAE. It was made obligatory for all banks to obtain detailed information about their customers by implementing the so-called ‘Know Your Client’ (or KYC) procedure, and to appoint dedicated ‘compliance officers’. The circular also required banks to file ‘suspicious transaction reports’ (STRs) in relation to any questionable fund or asset transfers and gave examples of the kind of transactions the banks should watch out for.

The next step was the enactment in 2002 of Federal Law No 4 regarding the criminalisation of money laundering (in Arabic, ‘*ghasl al amwal*’ or literally ‘asset washing’) (the AML). Besides creating the new offence of money laundering, for which severe penalties were prescribed, the AML also established a National Anti-Money Laundering Committee. This consists of representatives from the Central Bank, the Ministry of the Interior, the Ministry of Justice and others. The committee has responsibility for formulating anti-money laundering regulations for the UAE, representing the country at international anti-money laundering fora, working with bodies (in particular FATF). In addition, the AML formally constituted an anti-money laundering unit – the Financial Information Unit (FIU, also known as the Anti-Money Laundering and Suspicious Cases Unit) within the Central Bank. The role of the FIU is to gather STRs from the banks and pass on prima facie evidence of AML contraventions for further investigation by the enforcement agencies.

The UAE Government’s latest initiative in its anti-money laundering campaign is Federal Law No 1. This was introduced in 2004 and relates to the Combat against Terrorism Offences Law (CTOL). The significance of the CTOL is that it expressly outlaws the financing of terrorist organisations and the abuse of the banking system for this purpose.

There is little doubt that the effect of the disclosure regime, imposed by the AML and the CTOL on the finance industry has been considerable. The larger banks (whether international or locally established) were, in most cases, already subjecting potential clients to stringent KYC procedures before the introduction of the new legislation. The difference is that, in a part of the world where privacy is jealously guarded and there is some aversion to making any disclosure with regard to personal or business affairs, banks now have legal justification for requesting detailed account opening information.

In short, the anti-money laundering regime now in place in the UAE has created an environment where the need to ‘disclose’ is generally accepted and in which most bankers (whether retail or investment) are

able to confirm that they know all about their clients and about their clients' transactions.

There is, nevertheless, a perception within the UAE finance industry, that certain 'fringe' institutions still do not necessarily observe the scrupulous standards in regard to the opening of new accounts. It has also been noted that *hawaladars* (money transfer agents) remain outside the formal banking system, having been merely 'invited' to register with the Central Bank on a voluntary basis. Given the unregulated status of such agencies, it would be hardly surprising if *hawalas* were not occasionally used as a conduit for the transmission of suspect funds.

A similar perception exists in relation to the brokerage and insurance sectors, regulated by the Emirates Securities & Commodities Authority and the Insurance Authority respectively. The suggestion is that, while the vast majority of brokerage and insurance companies in the UAE are well-managed and strictly compliant, a certain number of smaller concerns in each sector have failed to develop a culture of compliance. Therefore, brokerage and insurance business is still being accepted in cases where there are sufficient 'warning signs' to have deterred a broker or insurer acting in good faith. In this way illegally-sourced funds can still enter the UAE financial system, despite the legislative defences that are now in place.

The emergence of a UAE real estate market, whereby non-nationals can purchase freehold property in certain development areas, is also thought to be another likely point of entry for 'hot' money into the banking system. Cash is not an acceptable means of payment for a property transaction, but there is a suspicion that some vendors in the UAE ignore this

rule of prudence. They could not afford to do so unless they were confident of being able to secure the resultant cash proceeds by some means or other.

Notwithstanding certain weaknesses, the UAE Government's anti-money laundering regime is generally agreed to be as effective as that of any comparable state, if not more so. However, could its perceived defects be remedied?

Given the diverse nature of the crime of money laundering and the ingenuity of launderers, the solutions are unlikely to be simple or quick. However, perhaps the traffic in *hawalas* and sales of real estate could be brought under tighter control and the regulatory bodies eventually acquire the resources to 'police' the activities of banks, brokers and insurers more intensively. The introduction of a VAT scheme, currently under discussion by the UAE Government, could also have a deterrent effect. The disclosure and accounting disciplines that such schemes entail is bound to make it more difficult for the 'rogue' element in the trading community to conceal money laundering ventures.

It remains to be seen how the UAE Government will continue to counter the corrosive effects of money-laundering in the future. However, in its short history, this country has successfully contended with greater challenges.

Note: The Dubai International Financial Centre operates under a separate legal regime from the UAE as a whole, although the provisions of the criminal law are applicable within the DIFC.

Legal risks arising from 'floating employee' arrangements in the Arab Middle East

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Multinational companies face various legal obstacles and economic costs when conducting business in the Arab Middle East. As a result, an increasing number of multinationals are considering a different approach to operating within the region: hiring one or more employees from the relevant Arab jurisdiction, even though the multinational employer itself does not maintain a formal office in that country. In other words, a non-resident employer hires a resident employee. This arrangement is known as 'floating employment', because the in-country personnel (floating employees) are not anchored to any in-country legal or physical infrastructure. These floating employee arrangements raise a number of legal issues for an employer.

Any short-list of the current biggest boom towns on earth would include such Arabian Gulf locations as Dubai, Abu Dhabi, and Qatar. Governments and businesses in the oil and gas exporting countries of the Arab Middle East, awash in 'petro-dollars', have become increasingly attractive customers for multinational businesses.

Of course, many major multinationals have been operating across the Middle East for decades. In most cases they have the resources needed to enter new markets without resorting to any short cuts. Huge multinationals can usually formally establish a local branch or subsidiary, get it fully licensed, and staff a legally-compliant local operation that meets all the requirements of local corporate, tax, employment, and immigration laws. Indeed, entering a new local market in this way, formally establishing a registered commercial presence, is almost always the best practice.

As many markets in the Arab Middle East, however, become increasingly attractive to foreign businesses, many smaller multinationals (those 'new-to-market' for the Arab Middle East) are taking their first steps into the region. These smaller multinationals may seem reluctant to make the significant commitment entailed in a formal, registered, commercial presence, at least until market potential actually results in some commercial success.

The economies of many 'business-friendly' countries in the Arab Middle East are over-heated, with galloping

inflation, which further increases the cost of doing business. Many countries in the region are still accurately described as 'high risk, high reward' markets, offering not only opportunities but also sometimes encountering restrictions and complexities. UAE law, for example, currently requires that any locally-incorporated subsidiary be 51+ per cent owned by UAE citizens.

Multinationals might prefer to establish a local branch in the region, but the procedural hurdles for setting up such an office can sometimes be daunting. In the UAE, for example, a foreign investor must appoint and compensate a UAE 'sponsor' in order to establish a branch office.

In the face of such obstacles and costs, some (particularly smaller, new-to-market) multinationals may try to take small, initial steps into the Arab Middle East, seeking to avoid the 'all-in' model of formally registering a local presence. One increasingly prevalent approach consists of physically placing employees in the target country within the region, even though the multinational employer itself does not maintain a formal registered presence there. In other words, a non-resident employer hires (or 'seconds') a *resident employee* in a particular country in the Arab Middle East. This arrangement is known as 'floating employment', because the in-country staff ('floating employees') are not directly anchored to any local legal entity or in-country physical infrastructure maintained by the employer. These arrangements, unfortunately, are legally risky.

'Floating employees' working for foreign employers

The marked upswing in proposed 'floating employee' arrangements is not surprising, given recent technological advances. Prior to the 1970s, a multinational's in-country local manager needed dedicated office space, a secretary and other support staff. Today's floating employee, on the other hand, can work efficiently from home, relying on computer/e-mail/internet, video-conference software, cell phone, and express courier deliveries.

While technology may facilitate floating employee

arrangements, the legal concerns necessitate caution, especially because advances in technology are also associated with enhancements in enforcement by local regulators. Adopting a floating employee arrangement in the Arab Middle East is usually not the best practice. Indeed, a multinational should generally not hire an employee who is resident and working inside a country in the region, unless the employing entity is (or is about to become) registered to do business there.

The 'floating employee' arrangement raises a number of local legal problems involving the following: commercial registration requirements, corporate income tax, labour/employment law (including issues with would-be independent contractors) and immigration law (including visa/work permit requirements). These are addressed in turn below.

Commercial registration

If a multinational engages an employee who makes only short, limited, intermittent business visits into an Arab country but without establishing a local residence, without signing contracts and without demonstrably generating revenue in-country, that employer probably does not cross customary 'doing business' threshold in the jurisdiction. Once this threshold is crossed, however, a multinational employer should generally register in the country's commercial registry which is the local equivalent to a US state's secretary of state business registration office.

In most countries in the Arab Middle East, the seemingly simple question – *when does a foreign company cross this threshold and become obligated to register itself in the local commercial registry?* – lacks a simple answer. Qatar, for example, requires every natural or 'juristic person' to register in the local commercial registry before 'engaging in commerce'. However, 'engaging in commerce' is a somewhat ambiguous term in Qatari commercial registration law. Some provisions of Qatari law seem to fix this threshold at the point of a foreign company actually setting up a local branch office. Like Qatar, many other countries in the region offer no clarity about what constitutes a level of 'doing business' sufficient to trigger local commercial registration requirements. By comparison, Article 31 (2) of Syrian Legislative Decree No 151 (1952) sets out an illustrative list of factors that indicate when a foreign company might have established a *de facto* (unregistered) local branch office subject to local registration requirements, namely:

- hiring workers paid by the employer (the floating employee situation);
- buying or renting local real estate in the employer's name;
- opening a local bank account in the employer's name;
- listing the employer in a local telephone directory;
- subscribing to a PO box (or a 'telegraph address') in

the employer's name.

As Syria's (expressly non-exhaustive) list suggests, the question of whether a multinational must get a commercial registration depends not only on whether there is a 'floating employee' relationship, but also on any other activities that the employer conducts locally. This might include leasing office space or office equipment, publishing telephone listings or establishing bank accounts on behalf of the non-resident company, or transacting business locally with local customers and generating income locally. Of course, a non-resident employer would have a hard time denying it has a local business presence in a particular country if its 'floating employee' used business cards and stationery indicating that the multinational has a fixed place of business there.

Once an employer's in-country employee triggers the local threshold for commercial registration, the question becomes: *what must the company file?* In non-Arab jurisdictions around the world, registration requirements may include:

- registering the local business office as an unincorporated local branch;
- providing a local address;
- naming a local resident agent (and sometimes even naming an entire board of directors, even though the local branch technically is not a separate entity);
- empowering a local authorised agent via an apostilled (and translated) power of attorney;
- registering with (or filing disclosures with) local tax, social security, and other government authorities.

In countries in the Arab Middle East however, the commercial registration requirement will usually be tied to a requirement that the foreign company establishes a formal local presence, such as a local subsidiary or branch office.

What if an out-of-country employer violates these registration rules locally in a country in the Arab Middle East? In many countries in the region, local commercial registry officials have police power to investigate and charge a foreign business that flouts local registration laws. In addition, commercial registration laws allow for fines to be imposed. Generally speaking, however, enforcement officials in the Arab Middle East tend not to search actively for 'floating employees' who conduct limited and discreet in-country activities. Officials who enforce these laws may take a pragmatic approach, initially warning an unregistered business, letting the employer choose to either 'regularise' or shut down local operations.

Non-compliance could result in costs higher than these statutory fines. For example, a multinational with an in-country 'floating employee' may be unable to take certain steps that require proof of commercial registration, such as renting office space, opening a bank account, importing goods through customs, or making a sale to a government entity. In addition, not having a local commercial registration number can

result in violations of other local laws, in particular: corporate tax requirements, employment rules, and immigration/work permit mandates.

Corporate tax

Bahrain and the UAE are 'tax haven' jurisdictions that currently do not assess any general corporate income tax. Almost every other country in the Arab Middle East imposes tax obligations on businesses that generate taxable income locally. Any multinational operating in the region through a local floating employee (even if the employer is registered as non-profit making in its home country) making it exposed to liability under these local corporate tax laws.

Whether any corporate tax is due is a fairly straightforward question. Where the local country and the multinational company's home country have executed a tax treaty for avoiding double taxation, liability for any local tax is fairly straightforward. Every country in the Arab Middle East has indeed ratified tax treaties. Unfortunately, the Arab world's network of tax treaties is less extensive than those of many other regions and relatively few of these countries have comprehensive tax treaties with the US. Where there is no applicable tax treaty, local income tax laws apply. Home-grown definitions of taxable income and domestic principles of tax liability, regardless of what corporate taxes the multinational company may pay back home.

For example, a new income tax law in Saudi Arabia defines 'persons subject to taxation' as including non-residents who earn income 'from sources within the Kingdom,' which in turn is defined as income 'derived from an activity which occurs in the Kingdom.' The absence of a comprehensive US/Saudi tax treaty means that revenues generated by a Saudi-resident floating employee (such as in-country support personnel for a multinational's product sales) expose the multinational's otherwise arguably foreign-source income to Saudi Arabian income tax.

In tax matters involving an unregistered local permanent establishment, the multinational might try to argue that its local floating employee plays a mere supporting, non-revenue-generating, role. Whether this argument will prevail depends on the specific facts and relevant definitions under local corporate tax law. That said, if local (in-country) customers buy products or services, or pay bills through the floating employee, the multinational may struggle to argue that its in-country operations generate no taxable local revenue. This applies especially, but not necessarily, if the local employee has power to bind the company.

Labour/employment/independent contractor law

Every country in the Arab world regulates relationships between employers and employees, imposing rules on

matters such as:

- employment contracts/fixed-term agreements/probationary periods;
- part-time/temporary work;
- limitations on working hours/overtime pay/wage rates;
- holidays/vacation;
- health and safety;
- social security/social insurance contributions;
- personal income tax withholdings/contributions;
- termination of employment/severance pay, and particularly in the Middle East, mandatory end of service payments.

Generally, local employment laws will apply to even a small local start-up operation of a foreign-owned employer. As such, a multinational which hires or assigns an employee to reside overseas generally must follow local employment rules, as a matter of mandatory law. This applies even if the employer and employee agree on a choice of law clause in their employment agreement purporting to apply the law of the employer's home country.

The fact that employment context choice of law clauses tend not to block the application of local employment law can be a frustrating one to learn, but is perfectly logical when thought of in reverse. Imagine a Moroccan-based tour operator that posts a Moroccan employee in Detroit for a year. Imagine both the Moroccan tour operator and the Detroit-based employee sign a choice of Moroccan-law clause. Few, if any, Michigan employment lawyers would argue that that clause effectively divests the application of American and Michigan wage per hour, unionisation, health and safety (OSHA), discrimination, and other employment laws. Choice of law in the employment context usually works the same way in the Arab Middle East countries. In the UAE for example, the labour law invalidates any provisions of an employment contract that contravenes that law, unless the contractual provision is more beneficial to the employee.

In short, comprehensive employment laws in the Arab Middle East will usually apply to a multinational's local employees, regardless of their nationality and any choice of foreign law clauses. While *local* employers usually have the information and the means to comply with local employment laws, an overseas-based multinational with no other local presence faces a significant challenge in these floating employee situations. Full compliance with local employment laws is difficult because the floating employee is essentially working 'off-the-books'. An unlicensed foreign employer without a local taxpayer ID number and without a local social insurance (social security) registration cannot register with local tax and social security agencies. As such, neither the employer nor the employee would satisfy local payroll/withholding/social insurance obligations.

In a few Arab countries, an employer's failure to

register local employees might offer a defence to an employee's labour law complaints. In Bahrain, for example, a 'floating employee' would have difficulty seeking redress of claims under an employment agreement with an unregistered, non-resident employer. Similar results may be likely in other Arab jurisdictions that require employment agreements to be registered with the local ministry of labour. These jurisdictions, incidentally, would be likely to refuse registration of a non-resident employer's labour contracts with local resident personnel. In a number of other Arab countries, however, a 'floating employee' could probably sue a non-resident multinational employer in the local courts. In these Arab countries, local courts can exercise their own form of 'long-arm' jurisdiction over non-resident employers, ie, local civil and commercial procedure codes may authorise local courts to hear lawsuits relating to most contracts executed or implemented (in whole or in part) within the relevant country.

One strategy for sidestepping local employment-law hurdles is for the multinational employer to 'second' its local resident employees onto the payroll of some already-up-and-running local in-country employer – such as one of the multinational's local commercial agents or distributors. Under a carefully drafted secondment arrangement, the local employee can be employed by the local business partner, but render services for the non-resident multinational. In turn, the multinational reimburses all costs (and perhaps pays a premium) to the local business partner/employer. This can be an excellent method for resolving the legal issues relating to a floating employee arrangement.

Another strategy is for the multinational employer to engage the local service provider not as a floating employee, but as an independent contractor or consultant. However, structuring a would-be independent contractor relationship in place of an employment relationship is not necessarily a fool proof solution. The first question to ask here is: *'If structuring this as an independent contractor relationship is such a great idea, why don't we also engage all this person's counterparts, back home, as independent contractors?'* Usually there is a simple answer to this question: *'Because that is clearly not credible – these people obviously work as employees, under the applicable tests.'* If the job position would fail the employee versus independent contractor tests at home, it is also likely to fail the tests in the host country. These tests tend to be surprisingly similar from country to country. Applicable law tends not to defer to parties' choice of labels when determining the true nature of the relationship, but rather imposes a 'facts and circumstances' test. Mischaracterising a *de facto* employee as a contractor can lead to significant liability, especially when the relationship ends.

Engaging an overseas service provider as an independent contractor will be legitimate when the service provider is truly an independent party, free to

work for others, not subject to supervision or discipline, and paid by the task, not compensated like an employee. If a legitimate independent contractor relationship is structured (and implemented) carefully, it could resolve the commercial registration, corporate tax and labour law issues that arise in the floating employee context.

Immigration law

When engaging a floating employee (or even an independent contractor) to work and live in the Arab Middle East, a multinational is especially likely to face immigration law issues whenever the service provider is not a local national. Indeed, in certain countries in the region, floating employees and independent contractors are especially likely to be non-nationals. For example, in Qatar, Kuwait and the UAE, very few local nationals are employed in the private sector working for multinational companies.

An expatriate employee who makes limited, short or intermittent business visits to an Arab country will probably not be subject to work-permit or residency visa requirements. For example, under Qatar's 1963 Entry and Residence of Foreigners Laws (article 17), 'a foreigner entering Qatar for a visit or commercial activities which take *no more than one month* shall be exempted from' Qatari immigration requirements.

Otherwise, any expatriate working in an Arab country as a full-time floating employee or independent contractor needs to obtain a residency visa and work permit. In many countries (including the key Arabian Gulf states of Saudi Arabia, the UAE, Kuwait and Qatar), an expatriate must be sponsored by a local national or a locally-registered business in order to obtain a local work permit and residency visa. Sponsorship is usually formalised by the sponsoring party and the sponsored party executing an employment contract. In other words, in a floating employment arrangement, a non-resident multinational's employee would need to be formally employed by another party inside the Arab country, with the expatriate's residency visa and work permit tied to the latter employment relationship.

In addition, in Arab Middle Eastern countries, a local employer's expatriate employee generally should not be engaged in personal business interests, and certainly not by the employee independently hiring himself to work for another employer simultaneously. Of course, these dual-employer situations raise not only legal but also practical difficulties, for example, conflicts of interest (the inherent impossibility of an employee maintaining dual loyalty). In this context, an expatriate's need for a local sponsor/employer further complicates the 'floating employee' arrangement of a multinational with no local presence in the Arab country.

Multinationals that launch business operations in a

new country are almost certain to face hurdles. In the Arab Middle East, some non-local employers might be tempted to hire an employee to work and reside in a country where the employer is not formally registered. When a company places a 'floating employee' in a country where the employer has no legal or physical infrastructure, the parties are likely to encounter local 'doing business' legal rules – ie, local requirements concerning commercial registration, income tax, labour/employment law, and immigration law. The best strategy is always to confront these challenges directly, avoid short-cuts, and comply with local regulations. In short, foreign employers that try to undertake business activities in the Arab Middle East 'on the cheap' quite often end up paying a higher price.

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The credit crunch and its effects on the Middle East

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A pipeline rather than drip-feed is now firmly anchored to the arm of the global banking system. It remains to be seen how long it will take before the medicine finds its way into the declining world economy desperately in need of a functioning banking system to mitigate the impact of whatever harsh realities lie ahead.

The analysis of the root causes of the crisis has become ever more nuanced. The initial explanation of a sub-prime lending frenzy has been complemented by an awareness of the repackaging of toxic products into alluring parcels of CDOs, CMOs or other artless acronyms. Institutions bought them and they became, directly or indirectly, a component of the pensions and savings of ordinary people who now owned 'derivatives'.

Therefore after a few abortive attempts in the 1980s and '90s, the word 'derivative' finally fulfilled its destiny to be declared a *bona fide* villain of the piece.

For 'derivative', read 'unholy complexity'. A cry has gone up for a return to 'simple old-fashioned' banking. If this means rigorous analysis of a bank customer's financial standing or the viability of a business proposition, then it sounds a rather good idea. But a call for simplicity as a good in itself, is both impractical and naïve. The world is a complex place and isn't going to dumb down for long. In the wake of a disaster, people are cautious; they are, to an extent, self-regulating. A motorist will drive more carefully having witnessed an

accident on the other carriageway; more carefully, that is, for a mile or so before picking up speed again.

Accordingly, governments and regulators must use this breathing space (it may not feel like one) to learn from and respond to this fiasco. The signs are that this is happening.

Firstly, there is an emerging appreciation that regulatory oversight has become overly reliant on supervision by reference to general principles. This has been a reaction to an earlier 'tick box' approach whereby if the relevant forms were filled in, all was fine. This was analogous to noting that the car is illegally parked, but failing to spot the pedestrian trapped under the front wheel. Furthermore, supervision focused on those institutions perceived to be especially risky while allowing ostensibly rock solid institutions to self-certify their compliance (after Northern Rock we now know that having 'Rock' in your name guarantees nothing). This approach was vaunted for its efficient use of finite regulatory resources, but begged the question as to whether the resources deployed in supervision were indeed sufficient. In the current climate, perhaps there will be less focus on the cost of compliance than on the ultimate cost of its absence.

Secondly, there is a debate on how to recognise the relevant macro-financial forces. How will we know when the world economy has a particularly over-valued asset (or liability) on its books? And even if there is an authoritative body that could raise the alarm, what

mechanism would ensure that the warning was heeded?

In this context, and as a prelude to a brief reflection on the impact of the current crisis on the Gulf Region, it is worth highlighting observations made by His Excellency Sultan N Al-Suwadi, the Governor of the UAE Central Bank to the IMF in October 2008.

The IMF having reviewed its Surveillance Agenda, His Excellency commented on the risks to global stability emanating from 'advanced economies' (such as the US) and the '...disconnect between grave technical findings and the more upbeat headline messages that obscure the degree of concern...'. Accordingly, he expressed support for the priority areas identified in the Surveillance Agenda, which were:

- enhancing the IMF's early warning capabilities;
- better understanding of macro-financial linkages;
- better integration of bilateral surveillance; and
- focus on external stability.

Precisely an agenda for these times.

Turning to regulation within the Arab region, the adoption of Western templates of financial oversight may be questioned in light of recent events. But as indicated above, the difficulties did not stem from defects in actual rules (or indeed the lack of rules); rather it was the methodology of the supervision by regulators that was at fault. This, coupled with an ignorance of the macroeconomic position, precipitated the collapse.

Perhaps there will be a short term shift within the region towards concentrating on domestic investors (as suggested by Dr Ramady in 'The National' recently), but achievement of the region's long term goal is arguably predicated on engaging with the wider economic community. If that remains the case, then the trajectory of change (reforming the regulatory system) still makes sense, with the caveat that it applies everywhere, not just in this region. The regulator must be in step with developments in the market, whether new derivative instruments or novel trading platforms or mechanisms. The regulator must be resourced to oversee initiatives. This will require staff who are properly qualified to understand the business models being policed as well as the system requirements for proper monitoring. Otherwise the regulator risks lagging behind the market again, requiring a 'catch-up' period. Such periods are usually associated with accidents.

There is another reason for maintaining the current trajectory. Governments and regulators are looking for sustainable methods of buttressing and stabilising the financial system. Given the relative strength of the region (and the fact that this crisis was not of its making but that it will feel some of the impact), the region is well placed to have its concerns firmly on the international agenda. The region has adapted to the needs of the wider economic community. The traffic can and should go both ways.

Luxembourg: a promising jurisdiction for Islamic finance

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Luxembourg has been a major financial centre for many years. Its mutual fund business is one of the largest in Europe, with 2,170 investment funds which represent 23 per cent of the European fund market and net assets totalling EUR 1,733,030 billion. Luxembourg's financial centre has developed steadily and has a good reputation. Several factors account for this success.

The country has a stable political system and one of the world's strongest economies, enjoying the highest per capita income in the world. This is based on sound public finances and a dynamic and highly international, multicultural workforce at the heart of Europe. Other important factors are its investor-friendly tax environment and strong banking secrecy laws. This is particularly important when it comes to Islamic finance, which is based on specific mechanisms that typically lead to an increased tax burden. The

adverse tax consequences of Islamic finance will remain relatively limited in Luxembourg. Furthermore, Islamic finance will benefit from Luxembourg's unique tax advantages for investment vehicles. Both direct and indirect adverse tax consequences will remain relatively limited under Luxembourg law.

Limited adverse indirect tax consequences

The main indirect taxes in Luxembourg are stamp duty, land tax and value added tax (VAT).

Stamp duty and land tax

Property transfers are numerous in Islamic finance, as they are used as a means of funding the purchase of various assets in typical contracts such as *Ijara*, *Istisna'a*, *Murabaha* or *Musharaka*. As property transfers are

subject to stamp duty and land tax in most jurisdictions this peculiarity usually results in multiple taxation and an increased tax burden.

However, this adverse tax consequence is alleviated under Luxembourg law for two reasons: the narrow scope of stamp duty and land tax, as well as a favourable tax regime for leasing. The scope of stamp duty and land tax is limited to mainly immovable property located in Luxembourg. Leasing of immovable property, which is widely used in Islamic finance, enjoys a special tax regime which ensures that no double tax will be levied, despite the double property transfer inferred by the leasing contract.

VAT

Consumption of goods and services is subject to VAT, a tax harmonised in the EU. While financial activities in general, whether they are based on interest-bearing loans or on the sale and purchase of corporate units and shares, are broadly exempt from VAT, this is not always the case of leasing. Leasing, which is widely used as a means of funding in Islamic finance, is therefore more likely to fall within the scope of VAT.

Luxembourg's VAT rates, which are among the lowest in the EU, are therefore advantageous to Islamic finance.

Limited adverse direct tax consequences

For the fund-receiving company

Whereas payments of interest are deductible from a company's taxable income, distribution of profits, such as dividends, are not tax deductible. Islamic finance allows dividend payments but interest revenues are not Shariah-compliant. This will typically result in an increased taxable income and a heavier tax burden.

However, under Luxembourg law, financial costs are deductible from the fund-receiving company's tax benefit under specific regimes such as participative loans and leasing contracts. These are not based on the payment of interest and therefore may be used in Shariah-compliant structures.

For the investor

Contrary to interest payments, distributions of dividends by Luxembourg resident companies are in principle subject to a 15 per cent withholding tax.

However, the EU Directive and double taxation treaties relief may apply under rather mild conditions, resulting in a leakage-free repatriation of funds to an investor's jurisdiction of residence. Following the introduction of a Law of 16 December 2008 (Bill 5924), an exemption of dividend withholding tax now also applies to distributions made to fully taxable entities who are residents of a country which has concluded a double taxation treaty with Luxembourg. This applies even if the treaty itself does not provide such benefit.

Prevention of international double taxation

Cross-border deals carry a risk of international double taxation. Islamic finance is quite likely to involve such cross-border deals, as investors may be residents of Middle Eastern or Asian countries.

Risks of double taxation however are limited by Luxembourg's strong tradition of implementing treaties, numbering over 50, aimed at preventing double taxation. Luxembourg is determined to pursue this effort and has recently ratified such a treaty with Hong Kong. This particular double taxation treaty will apply retrospectively to Luxembourg as of 1 January 2008 and to Hong Kong from 1 April 2008.

Unique tax advantages of Luxembourg investment vehicles

Luxembourg offers unique tax benefits to certain vehicles which appear to be Shariah-compatible and can therefore be used in Islamic finance.

A whole range of Luxembourg investment vehicles are available for Islamic finance mechanism purposes. Examples include the SICAR (*Société d'Investissement en Capital à Risque*), the SICAV (*Société d'Investissement en Capital Variable*), the FCP (*Fonds Commun de Placement*), the SPF (*Société de Gestion de Patrimoine Familial*), the SIF (*Specialised Investment Fund*) or the Securitisation Vehicle. These vehicles all have specific and very competitive taxation regimes, which may result in broad tax exemptions.

However, certain international tax treaties concluded by Luxembourg may not apply to situations where both investment vehicle and investors are almost completely tax exempt.

Conclusion

Luxembourg can be seen as an attractive jurisdiction for Islamic finance as the specific adverse tax consequences appear rather limited and unique local tax benefits apply.

Moreover, Luxembourg's Government is keen to maintain its tax competitiveness. Traditionally, this can be explained by the small size of the country which needed to attract various businesses from abroad in order to develop the national economy. It remains a priority, as demonstrated in the Prime Minister's State of the Nation speech in May 2008 and the enactment of several competitive tax measures on 16 December 2008. These included duty abolition and a decrease of the corporate income tax rate from 22 per cent to 21 per cent.

The Grand Duchy recently demonstrated its determination to become a major centre for Islamic finance, by creating an Islamic Investment Funds Working Group. The Group is working closely with the Ministry of Finance in order to make Shariah-friendly adjustments to existing investment vehicles.

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