Linklaters

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GCC update.

Update on UAE Commercial Companies Law

New regulations for companies in the United Arab Emirates ("**UAE**") may be imminent following the approval by the cabinet of a new companies law, according to a statement by the Minister of Economy, H. E. Sultan bin Saeed al-Mansouri on 4 December 2011. The draft companies law is not yet in force and has not been made publicly available. It is expected to replace the existing Commercial Companies Law (Federal Law No. (8) of 1984) (the "**CCL**").

There has been speculation as to whether the new companies law will contain incentives to encourage investment in the UAE, including potentially relaxing foreign ownership restrictions. It is reported that that the draft law allows the cabinet to issue a resolution specifying the forms of business, activities or groups in which greater foreign investment may be permitted. Currently, the CCL imposes ownership restrictions which require every company incorporated under the CCL to have not less than 51 per cent. of its share capital owned by UAE nationals (subject to certain exceptions). Often described as the "51/49 rule", this rule favours state nationals in the pursuit of commercial activities and effectively prevents foreign investors from owning more than 49 per cent. of UAE companies (excluding companies incorporated in free zones in the UAE).

Other key provisions of the draft law are reported to include provisions relating to the pricing of shares for public subscription (which may allow more market-driven pricing of shares on IPOs and rights issues), exemptions to shareholders' pre-emption rights on new share issues, corporate governance, company founders (in terms of flexibility in ownership levels and lock-up periods) and accounting principles.

A number of steps must be taken before the draft law comes into force. The approval of the Federal National Council, the Supreme Council and the President of the UAE is required. Once the draft law has been signed by the President, it will be published in the Official Gazette (publication must occur within a maximum of 2 weeks of signature). The law comes into force one month from the date of publication, unless otherwise stated.

This is a timely development ahead of next week's assessment by Morgan Stanley Capital International (MSCI), the index provider tracked by investors,

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as to whether UAE markets will be upgraded from "frontier market" to "emerging market" status. A relaxation of foreign ownership rules, together with the introduction of Delivery Versus Payment (DvP) service on local stock exchanges in April 2011, may assist the UAE in its bid to upgrade to emerging market status. An upgrade may generate increased demand for Abu Dhabi and Dubai listed securities.

Please click here to view the Linklaters client alert on Foreign Investment in the United Arab Emirates (March 2011).

Please click here to view Linklaters article on DvP service introduced in United Arab Emirates and Qatar markets from the May 2011 issue of GCC update.

Please contact Hardeep Plahe or Caroline Cheney for further information.

"The draft law permits the cabinet to issue a resolution specifying the forms of business, activities or groups in which greater foreign investment may be permitted."

Project bonds in the Middle East and the Jubail refinery sukuk transaction

The use of project bonds in the region

Project bonds have made only occasional appearances in the financing packages of major energy and infrastructure projects in the Middle East region to date, with the Dolphin Energy (2009) and RasGas (2006 and 2009) bond financing and refinancing transactions being the most notable issuances in a product market that has so far been slow to build momentum.

During 2009-2010, the Middle East continued to have an active bank market for funding infrastructure projects on a long-term basis. However, continued macro-economic weakness in Europe and elsewhere, compounded by increased bank regulation and the impact of Basel 3, has rapidly decreased the number of banks active in the infrastructure space. Despite this, significant infrastructure investment needs remain in the MENA region (the World Bank estimates that USD75-100 billion a year for the next five years is required to sustain economic growth[1]), resulting in a renewed focus on the bond market as a key source of long-term funding.

Traditionally, issuers of project bonds in the region have sought to capitalise on strong liquidity amongst U.S. investors, with Rule 144A tranches present in each of the bonds referred to above. More recently, project sponsors have looked to capitalise on pools of liquidity closer to home, with Saudi Arabia leading the way.

Jubail

Linklaters has recently advised the joint lead managers on the issuance of Saudi Riyal 3.749 billion (approximately USD1 billion) sukuk certificates by Arabian Aramco Total Services Company, part of the multi-source financing for a 400,000 barrel per day refinery and petrochemical project at the Jubail Industrial City in Saudi Arabia, a joint venture between Saudi Aramco and TOTAL S.A. The estimated construction cost for the project is over USD14 billion and the project's debt finance package encompasses approx. USD8.5 billion of senior secured debt, which now includes the sukuk.

One of the key challenges of the transaction was to integrate the innovative and complex Sharia sukuk structure into multi-source conventional financing arrangements (on which a separate Linklaters team advised the lenders), as well as negotiating (and meeting) a stringent set of sukuk accession criteria to preserve the pari passu position of the senior debt. The combination of the latest international standard project bond intercreditor techniques with a sukuk structure in the context of a greenfield project financing is an important development for project finance and the capital markets generally. Furthermore, the transaction represents the first ever Sharia-compliant greenfield project bond (sukuk) and is a major step forward in the development of the domestic capital markets in Saudi Arabia, which to date have seen only a handful of public sukuk offerings. The sukuk certificates were listed on the Saudi Stock Exchange (Tadawul) and offered onshore to a domestic investor base, evidence of the depth of liquidity which currently exists in the Kingdom. The transaction was also the first time a newly-incorporated special purpose vehicle has listed securities on Tadawul and, significantly for prospective entrants into the Saudi debt capital markets, the first time a previously unlisted company has listed sukuk (rather than equity) on Tadawul.

"Project bonds in the region have sought to capitalise on strong liquidity among US investors. More recently, project sponsors have looked to capitalise on pools of liquidity closer to home."

Please contact Richard O'Callaghan or Mark Jones (in Dubai) or Julian Davies or Adam Fogarty (in London) for further information.

Jurisdiction: Opting in to the Dubai International Financial Centre

Parties to civil and commercial agreements are now able to choose the courts of the Dubai International Financial Centre ("**DIFC**") to resolve disputes relating to their commercial agreements, following the signing of Dubai Law No. 16 of 2011 ("**Law No.16**") on 31 October 2011 by HH Sheikh Mohammed bin Rashid Al Maktoum, Vice President and Prime Minister of the UAE and Ruler of Dubai. This represents a significant extension of the scope of the DIFC Courts' jurisdiction which was previously restricted to disputes having a direct nexus to the DIFC.

Background to the DIFC Courts

The DIFC, a financial free zone in the Emirate of Dubai, is empowered to self-legislate in civil and commercial areas and its legislative system is based on English common law. The DIFC has its own courts, which are independent of the Dubai Courts and the UAE Federal Courts, and consist of a Court of First Instance and a Court of Appeal.

There are currently six judges in the DIFC Courts all with extensive judicial experience from a range of countries (including England, Singapore, Malaysia, New Zealand and Dubai). The DIFC Court allows the practitioners from any jurisdiction to have rights of audience provided they have been admitted to practice in their respective home countries.

How is the DIFC Courts' jurisdiction changing?

Since their inception in 2004, the scope of the DIFC Courts' jurisdiction has been limited to civil and commercial disputes with a direct nexus to the DIFC, for example where the dispute related to a company incorporated or carrying on business in the DIFC or a contract executed or a transaction concluded in in the DIFC.

Pursuant to Law No.16 of 2011, parties across the Middle East region and internationally may choose the DIFC Courts to govern disputes under civil and commercial agreements, provided that this is expressly agreed in writing between the parties before or after the occurrence of the dispute. A nexus to the DIFC will no longer be required in such cases. The DIFC Courts will continue to have jurisdiction in civil and commercial matters with a direct nexus to the DIFC even in the absence of such express agreement. The DIFC Courts may accept jurisdiction in circumstances where another competent court has declined to take jurisdiction in relation to a dispute, but not where a final judgment has been handed down.

Law No.16 of 2011 also governs how DIFC Court judgments, orders and awards can be enforced in other jurisdictions, supplementing the rules regarding enforcement in the Dubai Courts.

"Parties across the Middle East region and internationally may choose the DIFC to govern disputes under civil and commercial agreements."

Why choose the DIFC Courts?

The DIFC Courts offer a transparent, English-language, common law system in the midst of a predominantly civil law Middle East region, where the local courts require proceedings to be conducted in Arabic and where there is no system of binding judicial precedent. As the DIFC jurisdiction becomes more established, the ability to choose the DIFC Courts to resolve commercial disputes should, over time, allow parties a greater degree of certainty in the event of a dispute. Generally speaking, the procedural requirements in the DIFC are relatively straight forward and DIFC Courts should recognise a choice of law (such as English or New York law). The use of English rather than Arabic as the language of the DIFC Courts and the ability to use senior advocates from other jurisdictions to plead cases is also likely to be appealing to international parties.

Will this development lead to an influx of parties choosing the DIFC Courts to govern their commercial disputes?

The DIFC is a relatively newly established jurisdiction and accordingly DIFC law remains largely untested. As such, for large or complex transactions between international institutions, the certainty offered through the choice of (for example) English or New York law and the submission to the jurisdiction of the courts in those jurisdictions is likely still to remain.

Where transactions have a strong nexus to the Middle East region (and more particularly to Dubai) the DIFC Courts may well be an attractive option as an appropriate forum for dispute resolution because of the potential to take advantage of reciprocal enforcement agreements between Gulf Co-operation Council ("**GCC**") countries and the states of the Arab League, as well as between local courts in the UAE.

It remains to be seen how a DIFC judgment will be treated by other GCC countries but, in the meantime, parties to transactions involving Dubai-based businesses (where enforcement in "onshore" Dubai (outside the DIFC) is anticipated in the event of a dispute) are, in our view, the most likely candidates for the time being to consider submitting to the jurisdiction of the DIFC Courts.

This is because judgments, orders and awards issued or ratified by the DIFC Court may be enforced in the Dubai Courts without review of the merits, provided that the judgment, order or award is final and appropriate for enforcement has been translated into Arabic. Submitting to the jurisdiction of the DIFC Courts may therefore have significant advantages over submitting to the jurisdiction of either the Dubai Courts or a foreign court (in light of the challenges in enforcing foreign judgments in the Dubai Courts).

Please click here to view a press release on the extension of jurisdiction issued by the DIFC Courts on 31 October 2011 on the DIFC Courts' website.

Please contact James Martin or Caroline Cheney for further information.

New Guidelines for Gulf debt and sukuk issuers

The Gulf Bond and Sukuk Association ("**GBSA**") published its inaugural set of guidelines for Gulf debt and sukuk issuers (the "**Guidelines**") on 21 November 2011.

"The GBSA guidelines focus on best practice. They are not binding on Gulf debt and sukuk issuers."

The Guidelines focus on best practice around disclosure in investor relations, stating that issuers should set up a debt investor relations programme, establish a dedicated communications staff and an easily accessible website containing all relevant information. Under the new proposal, sovereign and government issuers should set up their investor relations office as part of an independent debt management entity or a department within another financial agency, such as the Ministry of Finance, Treasury or the Central Bank in the relevant country.

The Guidelines are not binding on Gulf debt and sukuk issuers. Therefore, the impact of these proposals and any persuasive authority they may bring remains to be seen. It is likely to depend on the demands of investors in future Gulf debt and sukuk and the willingness (or otherwise) of issuers to comply. The Institute of International Finance is understood to have given its full support to the principles outlined in the Guidelines.

Please click here for the press release on the GBSA website.

Please click here to view a copy of the Guidelines in Arabic.

Please click here to view a copy of the Guidelines in English.

Please contact Richard O'Callaghan or Rhona Byrne for further information.

Proposed changes to the DIFC corporate governance regime

In line with a recent review of corporate governance standards by the Dubai Government and the latest changes adopted by international standard setting boards including the Basel Committee on Banking Supervision and the Financial Services Board, the Dubai International Financial Centre ("**DIFC**") regulator, the Dubai Financial Services Authority (the "**DFSA**") has issued proposals relating to corporate governance and remuneration standards applicable to "Authorised Persons" (being those firms and market institutions operating in the DIFC and licensed by the DFSA).

The proposals

Whilst recognising that certain areas of corporate governance such as risk, compliance and internal audit functions are already adequately regulated, the proposals seek to enhance other areas, notably in relation to accountability and internal governance of the Authorised Person's governing body and senior management.

Amendments include changes to the DFSA overarching principles applicable to all Authorised Persons which stress that corporate governance measures must promote "sound and prudent management" in order "to protect the interests of customers and stakeholders". Further requirements have been included in respect of the composition, resources, powers and procedures applicable to the Authorised Person's governing body, along with rules relating to the roles assigned to senior management and persons undertaking compliance, risk management and internal audit functions. The introduction of "Best Practice" guidelines include the need for a code of ethics setting out acceptable and unacceptable conduct for employees and the establishment of committees at governing body level to deal with clearly defined mandates in respect of audit, remuneration, ethics/compliance and risk management.

"The proposals seek to enhance accountability and internal governance of the Authorised Person's governing body and senior management."

A key change is the introduction of a remuneration standard requiring an Authorised Person to have a remuneration structure and strategies which are well aligned with the long term interests of the firm. In particular, banks, insurers and dealers are singled out as firms which will require more robust measures to address the risk of remuneration policies which may expose the firm to unacceptable financial or reputational risks. Best practice guidance states that certain checks and balances must be in place where an Authorised Person's remuneration structure includes performance-based variable components (such as bonuses, shares based awards etc), especially where they form a significant portion of overall remuneration. Remuneration structures must also be communicated to stakeholders on an on-going basis. Information provided to the DFSA in respect of remuneration must also be provided in the annual report, including details of the most important elements of the remuneration structure (such as the relevant criteria used to determine performance-based remuneration).

The proposals recognise that corporate governance standards must vary from firm to firm taking into account the size, nature and complexity of the operations of financial institutions. For example, where an Authorised Person is a member of a group, they may adopt applicable group-wide corporate governance standards as a means of ensuring compliance with the DFSA Rules (although note that the Authorised Person's governing body must ensure that such standards are appropriate and make any changes as necessary).

Timescales

The consultation period has closed and a further announcement from the DFSA is expected in due course. Once in effect, the DFSA has proposed a transitional period of one year to allow Authorised Persons to make the necessary changes to achieve compliance, although the provisions will apply immediately to new applicants for licensed status.

Please contact Hardeep Plahe or Sian Rowlands for further information.

New Islamic Interbank Benchmark Rate

On 22 November 2011 Thomson Reuters launched the world's first Islamic finance benchmark rate, which is designed to provide a dedicated indicator for the average expected return on Sharia-compliant short-term interbank funding. The Islamic Interbank Benchmark Rate ("**IIBR**") uses the contributed rates of 16 panel members, each of whom is an Islamic bank or the Islamic arm of a conventional bank, to provide an alternative for pricing Islamic instruments to the conventional interest-based benchmarks used for mainstream finance. Rates for Sharia-compliant US dollar (USD) funding will be contributed by the 16-member panel at 10.45am on each business day (Sunday – Thursday) to Thomson Reuters systems and will be published daily on Thomson Reuters terminals and feeds at 11.00am Makkah time (GMT+3).

"The world's first Islamic finance benchmark rate is designed to provide a dedicated indicator for the average expected return on Sharia-compliant short term interbank funding."

The IIBR was established in co-operation with the Islamic Development Bank ("**IDB**"), Accounting and Auditing Organisation for Islamic Financial Institutions ("**AAOIFI**"), the Bahrain Association of Banks ("**BAB**"), Hawkamah Institute for Corporate Governance and a number of Islamic banks and Sharia scholars. The benchmark's ongoing implementation and integrity will be overseen by an Islamic Benchmark Committee of over 20 Islamic finance institutions chaired by Dr. Nasser Saidi, chief economist of the Dubai International Financial Centre, and a Sharia Committee consisting of four Sharia scholars.

The stated intention of the IIBR is for it to become an international reference rate for both conventional and Sharia-compliant transactions. However, it remains to be tested by the market.

Please click here for further information about the IIBR, the methodology, the list of the 16 member panel and the Sharia Committee on the Thomson Reuters' website.

Please contact Richard O'Callaghan or Rhona Byrne for further information.

NASDAQ Dubai and DFSA: Streamlining the listing process

The responsibility for maintaining the Official List of Securities in the Dubai International Financial Centre ("**DIFC**") transferred from NASDAQ Dubai to the Dubai Financial Services Authority ("**DFSA**") on 1 October 2011. The DFSA also updated the Offered Securities Rules (OSR) which now contain Interim Listing Rules. These rules, which are similar to the old NASDAQ Dubai Listing Rules, have been adopted as an interim measure before new DFSA Listing Rules come into force. These moves are welcome as they should streamline the regulatory process of listing on NASDAQ Dubai.

"The Interim Listing Rules, have been adopted as an interim measure before the new DFSA Listing Rules come into force."

Historically, NASDAQ Dubai took the lead in terms of reviewing listing documents. Listing documents in relation to IPOs followed the contents requirements for prospectuses set out in the DFSA's Offered Securities Rules. Once approved by NASDAQ Dubai, the DFSA would review the listing application along with the listing document. This occurred towards the end of the listing process. In some cases, this late stage review by the DFSA resulted in delay and a degree of uncertainty around the launch of an IPO as the parties worked together with NASDAQ Dubai and DFSA to resolve any issues resulting from the review.

The DFSA and NASDAQ Dubai have said that centralising the process at the DFSA should provide an efficient and effective regulatory structure. In our view this change should help address the issues discussed above. NASDAQ Dubai will continue to be responsible for the admittance to trading of securities on the exchange.

The DFSA and NASDAQ Dubai issued a press release on 13 September 2011 in which they stated that they had agreed to effect the transfer in view of the DFSA's proposed new Markets Rules (which are yet to come into effect). They said that without the transfer, the Markets Rules would have had the effect of considerably increasing the regulatory burden on issuers in the DIFC by duplicating regulatory oversight in respect of prospectus and listing approval processes.

Please click here to view the DFSA press release.

Please click here to view the notice of amendment to legislation on the DFSA website.

Please click here to view the new Offered Securities Rules (OSR) module of the DFSA Rulebook.

Please contact Richard O'Callaghan or Hardeep Plahe for further information.

Update on split of conventional and Islamic banking in Qatar

In February 2011 the Qatar Central Bank (the "**QCB**") issued directives to conventional banks in Qatar with Islamic banking operations requiring them to stop undertaking new Islamic banking activities and to close their existing Islamic operations by 31 December 2011.

Many commentators predicted that the QCB directives would lead to a flow of M&A transactions in the market as conventional banks in Qatar sought to dispose of their Islamic banking operations prior to the deadline imposed by the QCB. However, and perhaps due to the restrictive timeframes imposed, the reaction of the affected banks has been more conservative and thus far only International Bank of Qatar ("**IBQ**"), which completed the disposal of its Islamic banking operation, al yusr, to Barwa Bank Q.S.C. on 29 September 2011 (the "**IBQ Disposal**"), has opted for this course. It appears that other banks affected by the QCB ruling will instead wind down their Islamic operations.

The IBQ Disposal, on which Linklaters advised IBQ, was the first of its kind in Qatar and the first ever transfer of both an Islamic bank, and more generally, banking assets of this nature. In the absence of a statutory scheme to transfer banking business in Qatar, complex and innovative legal arrangements were required to transfer client agreements (including loans and deposits), employees, branches and the moveable assets within those branches and the transaction presented a number of difficult legal, operational and Sharia based challenges.

Please click here to view an article on the Segregation of Conventional and Islamic banking activities in Qatar from the May 2011 issue of Linklaters GCC update.

Please contact Scott Campbell or Steven Worthington for further information.

Margin trading to be permitted in Oman?

The Omani Capital Market Authority ("**CMA**") is proposing to allow margin trading on the local stock market, the Muscat Securities Market ("**MSM**"), in order to boost liquidity on the market. Following a ban on margin trading in Oman since 2001, the CMA has released a circular which proposes to introduce margin trading subject certain restrictions.

"The Omani CMA has released a circular which proposes to introduce margin trading subject to certain restrictions."

Margin trading allows investors to borrow money from a broker in order to purchase listed shares. The facility amount is in proportion to the initial value of share portfolio and the investor pledges its share portfolio as security for the loan. The loan is monitored against the value of the secured shares and, should the value of the secured shares fall below a certain threshold, the broker will typically require the investor to, for example, pledge additional shares or repay the loan (in full or in part).

The CMA proposals reportedly include the following restrictions on margin trading:

(a) the maximum amount that an investor may borrow is 50 per cent. of the value of the shares;

(b) if the value of the secured shares falls by 10 per cent., the investor will be required to repay the loan or the broker will be able to sell the secured shares and apply the proceeds to repay the debt. It is reported that Omani brokerage firms may request changes to the regime proposed by the CMA, including to allow the value of the secured shares to fall by 25 per cent. before the loan must be repaid;

(c) the interest rate of the margin loan should not exceed the maximum interest rate for personal loans set by the Central Bank of Oman (currently 8 per cent. per annum);

(d) only shares in companies selected by the MSM will be able to be purchased using margin trading. The list of companies will be reviewed every three months;

(e) restrictions on the total funds that can be allocated by brokerage firms to margin trading, the total funds/number of accounts that can be made available to a client and capital adequacy requirements; and

(f) brokerage firms who wish to offer margin loans will be required to apply for a separate licence from the CMA.

The CMA is expected to publish further guidance, providing greater detail on the new rules and their implementation.

Please contact Caroline Cheney or Hannah McKinlay for further information.

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