Hogan Lovells

Legal issues in establishing and doing business in the Gulf

Sean Harrison (Partner, Abu Dhabi)
Imtiaz Shah (Partner, Dubai)
Charles Kelly (Counsel, Abu Dhabi)

24 January 2012

1. INTRODUCTION

1. Introduction: The Presenters

- Sean Harrison
  - Sean is a corporate partner based in the Abu Dhabi office
  - He advises and represents a diverse spectrum of international clients, including public and private companies, sovereign wealth funds, governments, and highly sophisticated individual investors in industrial, energy, media and hospitality sectors
  - Sean has been based in Abu Dhabi for 4 years and has been advising clients in emerging market transactions in the Middle East, Africa and Asia for over 15 years

Email: sean.harrison@hoganlovells.com

Phone: +971 2 403 9613

Introduction continued

- Imtiaz Shah
  - Imtiaz is a corporate partner based in the Dubai office
  - He has been based in the Gulf for over 10 years and his practice comprises a mix of mergers and acquisitions, equity capital markets, investment funds, joint ventures, private equity and regulatory advice. He has advised on transactions in every country of the Arabian Gulf
  - Imtiaz is ranked as a leading lawyer for corporate work in the UAE in the 2010 Chambers Global Guide

Email: imtiaz.shah@hoganlovells.com

Phone: +971 4 377 9222

Introduction continued

- Charles Kelly

  - Charles is counsel in the Abu Dhabi office
  - Charles has extensive experience in advising multinational companies on all aspects of establishing a presence in the UAE. He also advises clients on UAE employment, regulatory, and intellectual property issues
  - Charles has been based in Abu Dhabi for over 10 years

Email: charles.kelly@hoganlovells.com
Phone: +971 2 403 9627

What the workshop will seek to cover

- An overview of the legal issues typically faced by a foreign investor looking to establish and do business in the GCC, with a particular emphasis on the UAE

- The workshop will cover the following topics: -
  - The GCC
  - Sanction Regime and FCPA issues
  - Establishing a business in the UAE (including the Free Zones)
  - Issues to consider when contracting with a UAE entity
  - Sovereign Immunity

2. THE GCC

2. The GCC - What do we mean by the Gulf/GCC?

- **Gulf Co-operation Council**: founded in 1981 to create a common economic area. Current members (6): Saudi Arabia, UAE, Kuwait, Bahrain, Qatar and Oman

- Similar economic and political structures – hydrocarbon based economies, dynastic rule

- Generally a legally protective environment for citizens

- Large expatriate populations often many times larger than the local population. Heavily drawn from other Arab countries, the Indian sub-continent and the Philippines

Stability in the GCC / Impact of the Arab Spring

- **Current situation** - Bahrain is GCC's hardest hit country, existing ethnic tensions. Some civil unrest in Saudi Arabia and Oman but the rest of the GCC seems stable

- **The GCC's reaction** to the Arab Spring has been to promote stability:

  – aid package for Bahrain, Oman, Jordan, Morocco, Egypt and Tunisia
  – increased spending on social services particularly in Saudi (health, housing, education, unemployment benefits) in an effort to prevent civil unrest
  – large increases in wages to citizens in the public sector in Saudi, the UAE and Qatar

- The outlook for the GCC (with exception to Bahrain) is politically stable, power will remain in the hands of ruling families. Position still unstable in the wider region – Syria/Iran

Stability in the GCC / Impact of the Arab Spring

NEGATIVE IMPACT

- Many projects/transactions are on hold as a result of the Arab Spring and there is general uncertainty in the market. We have seen a decrease of foreign direct investment in the Middle East by 17%. This decrease is felt in infrastructure, real estate development project spend and in the tourism industry

- The Arab Spring is concurrent with a global downturn and Euro-zone debt crisis. There has been a resultant fall in GCC stock markets

- Investors who would use GCC countries as a base from which to invest in the wider region are delaying investment and waiting for new governments to establish themselves (in Egypt, Iraq, Libya etc)

Stability in the GCC / Impact of the Arab Spring

BUT

POSITIVE IMPACT

- Unrest in the wider Arab region has lead to an interruption in the flow of oil and a benefitted the oil producing GCC states' economies

- Capital flow from the wider region to the more stable GCC countries which are now seen as "safe havens"

- More emphasis on anti-corruption measures and an increase in the prominence and role of traditional and social media

  – key media players have identified the Middle East as a major growth market for investment in traditional and social media

The legal system

- Civil law system (derived from the Franco-Egyptian model) in conjunction with Sharia principles
- Proceedings in Arabic and based on written argument. heavy reliance on expert testimony
- Three tiered court system in most GCC states
- Sharia law in commercial transactions is applied differently in across the GCC from being pervasive (eg Saudi Arabia) to minimal (eg Oman)
- In all GCC countries Sharia principles are used for family matters and inheritance through separate Sharia courts

Common legal characteristics

- The GCC countries are "young" legal jurisdictions which have seen rapid legislative change over the past 30 years; there can be a lack of clarity and inconsistent enforcement
- Brief laws and often little secondary legislation
- Certain activities limited to citizens
- Protectionist regimes for local agents
- Requirements for notarisation/legalisation/translation of many documents
- Limits on foreign ownership of companies

Some common legal problems in establishing a business in the GCC

- Performance risk of a local nominee shareholder. Legal complications can arise in attempting to minimise the risk of holding a minority shareholding

- Availability of centralised legal information and the publication of draft laws is limited compared to more developed markets elsewhere. Foreign investors resort to contractual means, such as warranty and indemnity protection to cover off potential liabilities where they are unable to assess the legal risk

- Enforcement of contractual terms is often problematic
  - specific performance as a remedy is rarely available

Some common legal problems in establishing a business in the GCC

- Business in the GCC often operates within a culture of consent. In western jurisdictions, acts are mostly permitted unless they are expressly prohibited. This is often not the case in the GCC where a number of official consents are required – current practice of authorities may be just as important as written laws

- Legal problems can arise in relation to financing arrangements in the GCC:

  - taking of security, especially in relation to shares in a UAE Company and more generally to charges over for another company's assets in any lending scenario

  - UAE law and practices relating to enforcement of security are largely untested

3. OVERVIEW OF SANCTION REGIME
AND
FCPA ISSUES

Overview

- US **Foreign Corrupt Practices Act** (FCPA) in effect for 30+ years
  - US enforcement against US and non-US companies remains vigorous
- OECD Convention on Combating Bribery of Foreign Public Officials entered into force within last decade
  - Includes North American and European countries as well as Australia/New Zealand, Argentina/Brazil/Chile, Japan and South Korea, among others
- FCPA/OECD prohibitions set anti-corruption compliance gold standard
- Increasingly, companies doing business internationally maintain Codes of Conduct and related anti-bribery/anti-corruption compliance policies and procedures designed to deter and detect non-compliant behavior by employees as well as third parties (e.g., agents)

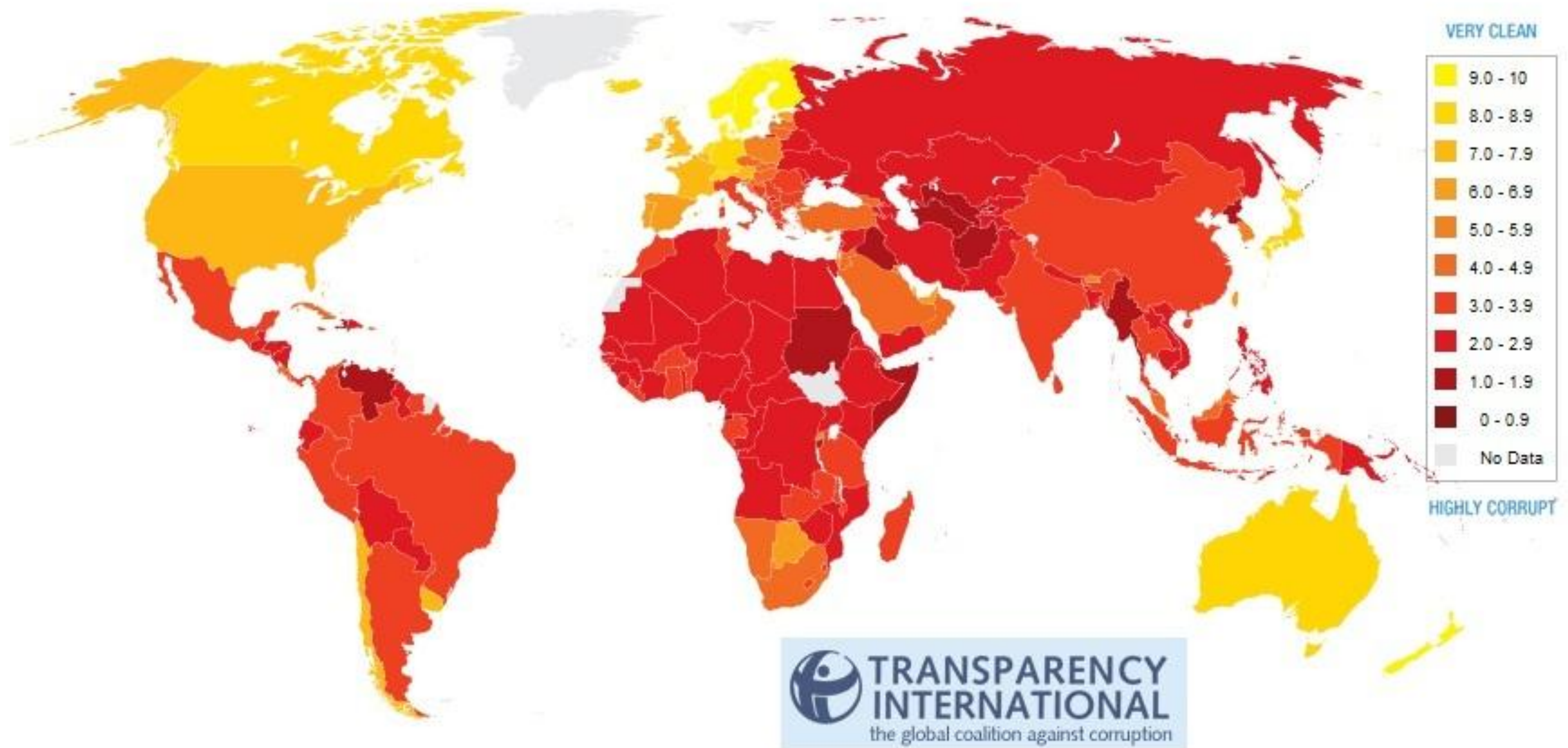
Foreign Corrupt Practices Act

- FCPA contains
  - Anti-bribery provisions that prohibit paying, offering or promising a bribe to a covered non-US official for the purpose of obtaining or retaining business or any advantage; and
  - Books & records provisions that impose accounting disciplines on publicly traded companies

Recent Enforcement Developments

- Increased FCPA enforcement by US authorities
  - Substantial increase in the number of new cases – 33 (in 2008) to 40 (in 2009) to 74 (in 2010)
  - Substantial increase in the amount of fines – 8 of the top 10 monetary settlements in FCPA history were reached in 2010
  - Penalties imposed against BAE Systems, Technip and ENI/Snamprogetti of more than $300 million each
  - Increased focus on prosecuting individuals
  - Extended jurisdictional reach to allow prosecution of parties acting outside the United States
- Recent enactment and entry into force of UK Bribery Act
  - Roughly equivalent to the FCPA, but broader in some regards
- Companies also must comply with the anti-bribery laws of all countries in which they conduct or seek to conduct business

Corruption Perceptions Index 2011



Corruption Perceptions Index 2011 (selected countries)

Country Rank	Country	2011 CPI Score
1	New Zealand	9.5
22	**Qatar**	7.2
24	United States	7.1
28	**United Arab Emirates**	6.8
46	**Bahrain**	5.1
54	**Kuwait**	4.6
57	**Saudi Arabia**	4.4
75	China	3.6
95	India	3.1
112	**Egypt**	2.9

Third Parties

- Significant FCPA risk associated with third parties acting on your behalf
- An agent, representative, contract employee, or other third party may not make (or offer or promise to make) a payment for the Company that the Company itself cannot make directly
- Suggests value of
  - Conducting appropriate due diligence and confirming commitment to compliance prior to retention
  - Including appropriate compliance provisions in the contract, and
  - Monitoring ongoing behavior
- Beware red flags, including
  - Close relationships with government officials
  - Absence of qualifications
  - Significantly above-market compensation

Other Significant Compliance Risk Areas

- Gifts
- Hospitality/Entertainment
- Sponsored Travel
- Political Contributions
- Charitable Donations

Overview of Sanction Regime

U.S. Economic Sanctions

- Administered by the Treasury Department's Office of Foreign Assets Control (OFAC)
- U.S. sanctions laws prohibit certain transactions with specific **countries, entities,** and **individuals**
- U.S. persons generally may not, without a license or other authorization from the U.S. Government
  - Export/import goods, services, or technology to/from, or enter into a distribution or sales agreement involving, a sanctioned country, entity, or individual
  - Approve or facilitate any of the above
  - Evade provisions of the sanctions regulations

U.S. Economic Sanctions

- OFAC maintains a List of Specially Designated Nationals (SDNs) – sets forth entities and individuals with whom transactions are prohibited (more than 11,000 entries), including
  - Terrorists and sponsors of terrorist activities
  - Narcotics traffickers and kingpins
  - Agents of sanctioned country governments
  - Weapons proliferators
- The SDN list changes frequently due to new designations by the U.S. Government
- The list is not all inclusive – activities with other persons or entities could be prohibited even though their names are not on the SDN list
  - For example, entities owned or controlled by SDNs are themselves SDNs
  - All citizens of Cuba (except those in the United States) and all entities owned or controlled by the Cuban Government or citizens of Cuba are considered SDNs, even though not specifically named on the SDN list

U.S. Economic Sanctions

- Certain countries are subject to U.S. sanctions at varying degrees of severity
  - Broad: Burma (Myanmar), Cuba, Iran, North Korea, Sudan and Syria
  - Limited: Belarus, Democratic Republic of Congo, Ivory Coast, Iraq, Libya, Lebanon, Liberia, Somalia and Zimbabwe

U.S. Economic Sanctions

- Definition of U.S. person varies among the different sanctions programs but generally includes
  - U.S. citizens, wherever located
  - U.S. permanent residents (i.e., "green card" holders), wherever located
  - Entities incorporated in the United States (including their non-U.S. branches)
  - Persons physically located in the United States
- In the case of Cuban sanctions, U.S. persons also include foreign incorporated entities that are owned or controlled by U.S. persons (i.e., foreign subsidiaries of U.S. companies)
  - Broad view of "control"
- Non-U.S. entities also may be restricted
  - Facilitation provisions
  - Reexport prohibitions

U.S. Economic Sanctions: Syria

U.S. Economic Sanctions on Syria As of August 18, 2011

- Effective August 18, 2011, Executive Order 13582 substantially expands U.S. sanctions against Syria and effectively imposes a comprehensive embargo
  – All property and interests in property of the Government of Syria are blocked
  – Prohibits all exports of services by U.S. persons or from the United States to Syria (including financial services)
  – No new investment in Syria by U.S. persons
  – No imports of petroleum or petroleum products into the United States
  – No transactions or dealings by U.S. persons in or related to petroleum or petroleum products
  – No approval or facilitation by U.S. persons of transactions above
- OFAC has issued a number of general licenses to permit certain transactions with Syria without prior authorization from OFAC

Transactions with the Government of Syria

- All property and interests in property of the Government of Syria must be frozen if such property and property interests:
  - are in the United States,
  - come within the United States, or
  - come within the possession or control of any "U.S. person" (which includes U.S. citizens and U.S. permanent residents, wherever located, as well as U.S. companies and their overseas branches)
- Such property and property interests may not be transferred, paid, exported, withdrawn, or otherwise dealt in
- Property and interests in property are broad concepts that can include goods, contracts, insurance policies, money, checks, accounts, stocks, bonds, bills of lading, letters of credit, and other interests
- Government of Syria is defined to include the Government of the Syrian Arab Republic, its agencies, instrumentalities, and controlled entities
  - Examples: government-owned banks, healthcare facilities operated by the Syrian Government, and state-owned enterprises

U.S. Economic Sanctions: Iran

U.S. Economic Sanctions on Iran

- Broad restrictions on activities by U.S. persons
  - Investment
  - Exports and reexports
  - Entering into contracts
  - Provision of services to, or retention of services from, Iran
- U.S. persons may not facilitate or otherwise be involved in the transaction
  - Applies when U.S. persons actually approve/facilitate and when ordinarily would be required to approve/facilitate
- Limited exemptions are available
  - Mere travel (but restrictions on types of activities in Iran and items that could be carried there)
  - Informational materials

CISADA (Overview)

- Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010
  - Signed by President Obama on July 1, 2010
- Primarily targets non-U.S. companies making a direct and material contribution to Iran’s petroleum sector
- Substantially expands the scope of existing law
  - Iran Sanctions Act of 1996 (“ISA”)
  - Iranian Transactions Regulations (“ITR”)
- Strengthens enforcement
  - Mandatory investigations
- Amplifies penalties
  - Addition of 3 sanctions, bringing the total “menu” to 9
  - President must impose 3 of 9 sanctions against violating entities
- Expands the scope of parent liability
  - Liability extended to an entity that owns or controls the acting company

CISADA (Overview of Scope)

- Petroleum and gas
  - Targets non-U.S. companies making a direct and material contribution (over specific monetary thresholds) to Iran's petroleum sector, exporting refined petroleum products to Iran, or expanding/maintaining Iran's refining capacity
- Government procurement
  - Companies seeking U.S. Government procurement contracts must self-certify that they do not engage in sanctionable activities (see below)
- Foreign financial institutions
  - Prohibits or strictly limits the holding of correspondent accounts by FFIs facilitating specified activities (e.g., weapons- or terrorism-related activities) with designated entities
- Export/import
  - Codifies the general prohibition on exports or imports of goods, services and technology to or from Iran
- Divestment
  - Sets out criteria for U.S. states to divest from companies engaging with Iran

Key Developments

<u>Iran:</u>

- With the expanded extra-territorial reach of the Iran Sanctions Act (ISA), as amended by CISADA, non-US subsidiaries of US companies may be affected by some of the new sanctionable activities under CISADA, even though such subsidiaries previously may have been able to engage in activities with Iran consistent with OFAC's Iranian Transactions Regulations

- CISADA expands the reach of US law to a broader range of activities of non-US companies that could expose such companies to liability under US law even though a particular activity with Iran does not have a US nexus

- The financial sanctions contained in CISADA, as implemented by OFAC's Iranian Financial Sanctions Regulations (IFSR), are of interest to non-US financial institutions because they provide for restrictions on dealings with US financial institutions if such non-US financial institutions have been found to have engaged in certain sanctionable activities
  - IFSR authorizes OFAC to list as SDNs “foreign financial institutions” that engage in certain activities
  - IFSR includes a broad definition of facilitation

- On Nov. 21, 2011, the President issued Executive Order 13590 (EO) that adds new types of sanctionable activities involving Iran for which the US Govt. could impose restrictive measures against any company
  - This EO represents a separate legal authority from the ISA/CISADA but it does have the same extraterritorial reach
  - The EO envisions the imposition of the same restrictive measures as those identified in the ISA/CISADA against any person or entity found to have been engaging in sanctionable activities
  - The sanctionable activites under the EO extend to petrochemical products and also restrict the provision of goods or services that directly and significantly contribute to Iran’s ability to maintain or enhance its ability to develop petroleum resources in Iran (when the activities exceed specified monetary thresholds)

Key Developments, Cont'd

- Significant expansion of multilateral sanctions against Iran
  - UN Security Council Resolution 1929 (June 2010)
  - EU economic sanctions against Iran, including Regulation No. 668/2010 (July 2010) and Regulation No. 961/2010 (October 2010)
  - Canada published new sanctions against Iran on August 4, 2010

Result:

- Numerous press reports identifying companies doing business in Iran
- Numerous companies have ceased business operations in Iran
- SEC and state authorities continue to actively assess significance of any business operations related to Iran (and other sanctioned countries)

National Defense Authorization Act for Fiscal Year 2012

- On 31 December 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012, which contains new sanctions provisions related to the Iranian financial sector

- The new sanctions involve measures against the Iranian financial institutions as well as measures that could be imposed on non-U.S. financial institutions that, after a specified period after the enactment, engage in certain activities involving the Central Bank of Iran and designated Iranian financial institutions

- The new law is expected to have an impact on foreign financial institutions and central banks doing business with the Iranian financial sector because it would create exposure for such institutions that could result in them being cut-off from the U.S. financial system. We note that the European Union (EU) is considering additional sanctions targeting Iran's ability to export oil to EU member states, but those measures have not yet been finalized

National Defense Authorization Act for Fiscal Year 2012

- In summary:
  - These provisions do not impose sanctions on non-financial entities outside Iran (i.e., the sanctions do not directly target non-U.S. companies doing business with Iran), but these new measures could indirectly impact the activities of such companies if non-U.S. banks refuse to process Iran-related transactions to avoid facing possible exposure under this new law
  - The measures against non-U.S. financial entities have a 60-day and a 180-day tolling period (depending on the measure) and further depend on additional findings by the President/U.S. Government – new sanctions are not triggered automatically
  - The new sanctions cannot be triggered by transactions involving the sale of food, medicine, or medical devices to Iran
  - The provisions set no specific dollar thresholds for transactions that would trigger restrictions under the new law
  - The intent behind these new restrictions is to dissuade non-U.S. financial institutions from processing Iran-related transactions in general, with special rules that apply to transactions involving the purchase of Iranian petroleum and petroleum products

United Nations and Iran

- UN Security Council Resolution 1929 (June 2010)
  - Creates and expands sanctions in the following areas:
    - Banking, financial and commercial measures, travel bans and assets freeze, nuclear issues, missile and arms proliferation, and illegal shipments
  - These sanctions target efforts to develop sensitive nuclear capabilities, delivery systems and conventional weaponry
  - They generally do not affect oil and gas trade and investment

European Union and Iran

- EU Measures against Iran (Regulation No. 668/2010) (July 2010)
  - Implements and expands upon UN Security Council Resolution 1929
- Scope of restrictions include
    - Ban on exports to Iran of most dual-use items (except certain telecommunications and information security items) destined for the Iranian oil and natural gas industry
    - Provision of technical assistance, training, investment, brokering services and financing related to such items destined for Iran
    - Ban on provision of insurance and re-insurance to entities in Iran and the Government of Iran
    - Prior authorization requirement for most transfers of funds to or from Iran above € 40,000
    - Prior notification requirement for most transfers of funds to or from Iran above € 10,000

European Union and Iran

- Scope of restrictions include
  - Ban on establishing presence in Iran by EU financial institutions
  - Duty on EU persons to "exercise vigilance" when doing business with Iranian entities, including those of the Iranian Revolutionary Guard Corps and the Islamic Republic of Iran Shipping Lines
  - Ban on exports of "key equipment and technology" for refining, liquefied natural gas, exploration and production of oil and natural gas in Iran, or to Iranian or Iranian-owned enterprises engaged in these sectors outside Iran
    - Includes ban on related technical assistance, training and financing
    - EU's proposed list of "key equipment and technologies" published on September 21, 2010
  - Ban on access to EU airports by all cargo flights operated by Iranian carriers or originating from Iran (except mixed passenger and cargo flights)

European Union and Iran

- Scope of restrictions include
  - Duty of all aircraft and vessels transporting cargo to and from Iran to submit additional pre-arrival and pre-departure information
  - Ban on EU-bound investment from Iran related to commercial activity involving uranium mining, production or use of nuclear materials and technology
  - Addition of entities to list subject to freezing of funds and visa/travel bans
  - Additional restrictions on EU Member State support for trade with Iran by extending to include
    - Private financial support in addition to public
    - Medium and long term commitments for financial support for trade with Iran

European Union and Iran

- EU published a Council Regulation imposing sanctions on Iran on October 25, 2010
- The sanctions include, for example
  - Additional restrictions on trade in dual-use items, other items that could contribute to Iran's WMD activities, equipment for internal repression, and key equipment and technology for the Iranian oil and gas industry
  - Investment restrictions, including ban on financing of Iranian oil and gas industry and Iranian enterprises involved in manufacture of banned dual-use, WMD and internal repression items
  - Ban on Iranian investment in the EU uranium mining and nuclear industry
  - Freezing of funds and economic resources of designated persons
  - Restrictions on transfers of funds to and from Iran
  - Restrictions on provision of financial services, including insurance, to Iran, and limiting Iran's access to the EU bond market
  - Restrictions on providing certain services to Iranian ships and cargo aircraft

U.S. Economic Sanctions: LIBYA

- US sanctions imposed on Feb. 25, 2011 on dealings with the Govt. of Libya and any entity owned or controlled by it have been effectively lifted in most part, through a series of general licenses issued by OFAC that authorize transactions with the new Govt. of Libya

- The only sanctions that remain relate to certain property of the Libyan Investment Authority (LIA) and any entity owned/controlled by LIA that has been blocked as of Sept. 19, 2011

- All other activities with Libya or the Govt. of Libya are no longer restricted under US sanctions

4. ESTABLISHING A BUSINESS IN THE UAE

4. Establishing a business in the UAE

- Dubai is the most popular jurisdiction for foreign companies' headquarters in the GCC
- No corporation or income taxes (save in relation to certain entities in the oil and gas and banking sectors)
- UAE has the most developed infrastructure in the GCC
- Abu Dhabi more relevant for work relating to the UAE public sector
- The tax free environment, high per capita income, number of available free zones and Arab spring have all served to consolidate the UAE and Dubai's status in particular (due in part to the number of free zones in the Emirate) as a legal and business hub

Where to set up: On-shore vs Free Zone – Features and factors to be considered

- What is your activity/industry?
  - Free Zones tend to be purpose built for businesses of one industry, eg DIFC for financial services.
- What are you land/office/warehouse requirements?
  - Costs of lease vary, if outright ownership of real property is desired this can be achieved in a free zone.
- Is location a factor?
- Distance from airport/port an issue?
- Is cost of rent/licence fees etc an issue?
  - Licensing costs can be higher in free zones, and rent in the DIFC for example is prohibitively expensive.
- Are capital requirements an issue?

Where to set up: On-shore vs Free Zone – Features and factors to be considered

Free Zone - Benefits

- 100% foreign ownership
- 100% repatriation of capital and profits
- 100% exemption from commercial taxes
- Faster and easier than onshore set-up
- No corporate taxes for 50 years, and subject to renewal
- Purpose built infrastructure
- Economics of scale
- One-stop shop
- Simple authority sponsorship of employees

Free Zone – Drawbacks

- Restrictions on activities in the UAE (generally can only be commercially active within the free zone)
- Can generally only have one class of shares (except the DIFC)
- Discretion of the free zone authority
- All shares must be fully paid on allotment
- Costs (licence/registration fees, rents) can be higher

What is a Free Zone?

- The UAE has established a number of free zones, principally in Dubai. These free zones are located in defined geographical locations and are usually dedicated to specific economic sectors. The most well known Dubai free zones are the:
  - Jebel Ali free Zone (often chosen as a jurisdiction for incorporation by investors wishing to use the Jebel Ali port)
  - Dubai Technology and Media Free Zone, (international IT and media firms such as EMC Corporation, Oracle Corporation, Microsoft, IBM, CNN, BBC, Reuters, Sky News and AP are based here)
  - Dubai International Financial Centre (DIFC), (where investment banks, financial advisors, accounting and legal firms are based).
- Each free zone (except the DIFC, see below) has its own implementing regulations. Features common to each free zone are: the ability for foreigners to own 100% of the share capital (in contrast to the position outside the free zone), the requirement to lease premises in the free zone and the inability to operate outside the free zone in non free zone areas of the UAE or "onshore"
- The DIFC can be thought of as a super free zone - in addition to the features above, it has its own laws (company, property, labour etc), based on the common law and published in English, and its own courts system. Other than the criminal law, it operates independently of the UAE legal system

Different zones available in Dubai and Abu Dhabi

Dubai

- Jebel Ali Free Zone (JAFZA)
- Dubai Airport Free Zone (DAFZA)
- Dubai Media and Technology Free Zone (DMTFZ)
- Dubai Silicon Oasis (DSO)
- Dubai Humanitarian City
- Gold and Diamond Park
- International Media Production Zone (IMPZ)
- Dubai Metals and Commodities Centre (JLT)
- Dubai Healthcare City (DHCC)
- Dubai Maritime City
- Dubai International Financial Centre (DIFC)
- Dubai Biotechnology & Research Park
- Dubai Industrial City
- Dubai Academic City (DAC)
- Dubai Logistics City
- Dubai Textile City
- Heavy Equipment and Trucks Free Zone
- Dubai Carpet Free Zone

Abu Dhabi

- Abu Dhabi Media Zone – established in 2008 and attracting media businesses such as those in television, radio, film, and animation with an aim to turn Abu Dhabi into a media production hub

Other Emirates

- Hamriyah Free Zone, Sharjah
- RAK Free Trade Zone
- RAKIA
- Ajman Free Zone
- Fujairah Free Zone

Free Zones – Qatar and elsewhere

Other free zones in the GCC

QATAR

- The Qatar Financial Centre (the "QFC") was established by the Qatar government in 2005, attractive legal and regulatory environment for financial services firms much like the DIFC in Dubai. The QFC allows 100% foreign ownership

BAHRAIN

- The Bahrain Logistics Zone ("BLZ"), Bahrain International Airport ("BIA") and Bahrain International Investment Park ("BIIP") ranked among the world's top 25 'Free Zones of the Future' from 700 worldwide, a report by Foreign Direct Investment Magazine (fDi), part of the Financial Times Business Group. 100% foreign ownership is allowed both in Bahrain's free zones and onshore

KUWAIT

- The Kuwait Free Trade Zone was established in 1998 at Shuwaikh harbour, allows 100% foreign ownership

OMAN

- Al Mazyounah Free Zone, development of this free trade zone's infrastructure is still underway

SAUDI ARABIA

- No free trade zones currently, but the under development King Abdullah Economic City expected

On-shore vehicles/structures

- When setting up on-shore in the UAE, foreign inward investors (“FII’s”) have 4 choices:-
  - Limited liability company (“LLC”)
  - Private Joint Stock Company (“PJSC”)
  - Branch Office
  - Joint participation (unincorporated joint venture)
- Partnerships are a permitted structure, but are reserved for UAE nationals
- LLC and Branch Office tend to be the most popular choices for FII’s

On-shore vehicles/structures

- In establishing any of the following 3 choices, it is necessary to have some form of association with a UAE national (or a company wholly owned by UAE nationals)

  – **LLC** – a UAE National(s) must own at least 51% of the shares
  – **PJSC** – a UAE National(s) must own at least 51% of the shares
  – **Branch Office** – a UAE National must be appointed as the ‘sponsor’

- In establishing a **Joint Participation**, the ‘local partner’ must be a UAE registered entity

Choice and structure of entity – issues to consider

- Proposed business activity
  - Restrictions on certain activities – for example, limited liability companies are not permitted to carry out: -
    - Insurance
    - Banking
    - Investment of funds on behalf of third parties
- Scope and nature of intended business relationship
  - Is the UAE national to be a 'silent' partner or to play an active role in the business and be a genuine joint venture business partner?

Choice and structure of entity – issues to consider

- OWNERSHIP AND MANAGEMENT CONTROL
  - Ownership
    - foreign ownership restrictions
  - Management
    - who will manage the business?
- ESTABLISHMENT CONSIDERATIONS
  - Time
    - is there a deadline to meet?
  - Cost/expense ($)
    - how much will it cost?
- TREATMENT OF INCOME
  - how will income from the UAE entity be treated for tax purposes in the home country of the FII if a branch office is used rather than an LLC?

LLC general characteristics

- No minimum share capital
  - Article 227 of the UAE Companies Law previously stipulated that AED 150,000 was the minimum capital requirement
  - In 2009, Article 227 was amended to remove the reference to the specified minimum capital
    - an LLC must now have "*sufficient capital to achieve the objectives of its incorporation to be specified by its partners*"
    - whilst in theory there is no longer a specified minimum capital, in practice the minimum share capital of an LLC proposed by its founding shareholders is subject to the approval of the UAE local authorities
- Number of shareholders (or 'partners')
  - Min: 2
  - Max: 50

LLC general characteristics, Cont’d

- 10% of the net profits must be retained
  - N.B. – taken into consideration when determining share capital
- Management
  - General Manager (“GM”) and/or Board of Directors (or ‘managers’)
    (N.B. max of 5 directors)
  - No restriction on who can appoint GM or Board
  - No restriction on nationality of GM or Board members

Advantages of LLC for the inward investor

- Limited liability
- LLC is a separate legal entity
    - separate personality to its shareholders
    - sign contracts in its own name
    - can sue in its own name
    - can be sued in its own name
- Regarded as “local” companies
    - advantage to business
    - some tenders may only be open to local companies

Disadvantages of LLC to the inward investor

- Share ownership restriction
  - Currently **49%**, BUT can create "**negative control**"
    - Under the UAE Companies Law, the company's memorandum of association can be drafted so that **shareholder decisions require approval of more than 51% of the issued share capital**
    - Profits can be split other than 51:49
      - Article 227 – "*Profits and losses shall be equally divided amongst the shares unless otherwise stipulated in the memorandum*"
      - This is subject to approval from the local authorities, but a split of up to 90%:10% in favour of the foreign shareholder is usually permitted
    - Management Control
      - no requirement for UAE national to be involved in the management, therefore possible to have 100% board control
      - shareholders agreement drafted to create as many 'board reserved matters' as possible (i.e. all matters except those prescribed in the Companies Law as matters for the general assembly)
      - the foreign shareholder can be named as the company's "General Manager" and under a separate management agreement can be entitled to a "management fee" which is payable in priority to any dividends, thereby maximising "profits" out of the company

Disadvantages of LLC to the inward investor

- Share ownership restriction

  – Free Zones might be preferable (100% foreign ownership permitted and can be set up with only one shareholder (wholly owned subsidiary)

- Minimum requirement of 2 shareholders - holding companies are not permitted

- Can take several months to set up

General characteristics of a PJSC

- At least 51% of the issued shares must be owned by UAE nationals (or companies wholly owned by UAE nationals)
  - in some cases, the minimum UAE national ownership is higher than 51%, e.g. Finance Companies
- Number of shareholders
  - Min: 3
  - Max: 50
- Minimum share capital of AED 2 Million
- Number of directors
  - Min: 3 (although can be greater under separate regulations, e.g. Central Bank regulations for Finance Companies)
  - Max:12
- Majority of directors (including the chairman) must be UAE nationals

General characteristics of a PJSC

- Prescribed form memorandum and articles of association to be adopted:
  - prescribed by Ministry of Economy ("MoE")
  - can be altered (subject to approval by MoE)
- Must provide Feasibility Study and Business Plan (in Arabic)
  - governance/management structure
  - UAE market analysis
  - business assumptions/financial projections
  - risk analysis
- Rarely adopted by foreign investors - usually only adopted in situations where an LLC is not permitted (e.g. investment companies), or where seeking greater flexibility regarding future stock market listing
- More time consuming establishment procedure than LLC

General characteristics of a Branch Office

- Must appoint a local ‘sponsor’
  - Sponsor must be a UAE national (or company wholly owned by UAE nationals)
  - Sponsor can be ‘active’ (e.g. providing promotional services), but usually their role is limited to assisting with registrations and admin formalities
  - Sponsor entitled to a fee (regardless of level of ‘activity’)
    - amount of fee depends on type of business carried on by the branch
    - can be % or fixed fee
  - Branch agency agreement
- Can employ/sponsor its own staff
- Can enter contracts in its own name
- Considered to be part of the foreign parent company

Advantages of a Branch Office to the inward investor

- 100% ownership
  - extension of the parent company
- 100% management autonomy
  - 100% management control
  - foreign parent company appoints the General Manager to manage the Branch Office on a day-to-day basis
  - no restriction on nationality of General Manager
  - sponsor should not play any management role
- Quicker than incorporating a LLC

Disadvantages of Branch Office to the inward investor

- Not separate from parent company
  - parent company must guarantee liabilities of the branch (undertaking from parent company must be submitted to Ministry of Economy as part of establishment process)
- Not considered a ‘local’ company
  - possibly excluded from being able to bid for certain projects
- Must appoint a local sponsor
  - Sponsor entitled to a fee (usually annual)
  - Termination of branch agency agreement usually requires payment of a compensatory fee

General characteristics of a Joint Participation

- Established by a formal agreement between at least 2 parties (one of which must be a locally incorporated UAE company)
- May not issue shares
- Joint liability between the partners
- In normal circumstances the joint participation would trade under the name and trade license of the locally registered partner
- The advantage of using this structure is that a joint participation does not need to be formally registered and can therefore be established immediately
- The main disadvantage of a joint participation is that it will not always be possible to obtain independent financing or to hire its own employees. All such activities are likely to be carried on in the name of the local party
- In practice, this is rarely adopted by inward investors

Proposals to change the Companies Law

- New draft law was approved by the UAE Cabinet in December 2011 (changes to the law have been in the pipeline for a number of years)

- Some businesses are expected to be able to be majority owned (or possibly wholly owned) by foreigners

  – it is yet to be clarified, but the expectation is that foreign equity participation of more than 51% will be permitted in certain sectors where there is a genuine demand for the particular services, where local investment is lacking or where additional foreign knowledge and expertise is required

  – it is unlikely that 100% foreign ownership will be permitted across the board, but it is anticipated that such sectors may include healthcare, education and professional services

- Also expected to reduce start-up costs

Proposals to change the Companies Law, Cont'd

- Other reported changes include: -
  - Companies may be incorporated with one shareholder (as opposed to the current minimum requirement of two)
  - Branch offices will no longer be required to appoint a 'sponsor'
  - Explicit permission to effect a lien on the shares of a limited liability company
  - Free zone companies carrying out activities outside their free zone (i.e. 'on-shore') will have to comply with the provisions of the new law if they wish to carry out business on-shore. A Ministerial Decree is expected to be issued setting out the conditions and procedures that must be followed in relation to the registration of free zone companies seeking to carry out activities on-shore. It is not yet clear however to what extent, if any, these companies must comply with the new law. The language of the new law implies that compliance by such companies will be limited to applying the provisions of the Ministerial Decree rather than having to comply with all the requirements of the new law

Agency and Distributorship

- Intended for foreign companies wishing to sell their products or services in the UAE without maintaining active local operations
  - no need to establish physical presence
  - only recurring expense is commission payable to the agent
- Commercial agencies can be registered or unregistered
- Arrangements between a principal and an agent to "*distribute, sell or offer for sale a commodity or service in the UAE in return for a commission or profit"* are governed by the UAE Commercial Agencies Law ("Agency Law")
- No real distinction in the Agency Law between a commercial agent, representative or a distributor, and the Agency Law also applies to franchise arrangements
- Registered commercial agent must be a UAE national (or a company wholly owned by UAE nationals)

Changes in the Agency Law

- Various provisions of the Agency Law (and, in particular, those surrounding termination and renewal of registered commercial agencies) have been amended over the years

- As is the case with most GCC countries, registered commercial agents in the UAE are afforded a great deal of protection under the Agency Law

- As a result, historically, it has usually been very difficult for a principal to terminate a registered commercial agency without having to pay some form of compensation to its registered commercial agent

Changes to the Agency Law

- Significant amendment in 2006 (the “2006 Amendment”)
  - essentially allowed a fixed term registered commercial agency to be unilaterally terminated by the principal on its expiry date, without having to pay any compensation to the registered commercial agent
- Further amendment in 2010 (the “2010 Amendment”)
  - has now essentially reversed some of the provisions set forth in the 2006 Amendment
- The 2010 Amendment states that a principal may not terminate or refuse to renew a registered commercial agency unless there is a “*material reason*” for termination or non-renewal. Additionally, a registered commercial agency may not be re-registered in the name of another agent (even if it was for a fixed term) unless
  - (i) the agency has been consensually terminated between the parties,
  - (ii) there are material reasons (satisfactory to the Committee) justifying the termination or non-renewal, or
  - (iii) a final court judgment confirming the cancellation of the commercial agency has been issued
- The 2010 Amendment also reinstated the Committee as the competent body to hear any dispute arising from a registered commercial agency. It further stated that the parties may only bring a claim before the courts once the issue has been considered by the Committee. The Committee’s decision may subsequently be challenged before the courts within 30 days from the date of the Committee’s decision

Changes to the Agency Law

- If a fixed term agency was registered between the effective dates of the 2006 Amendment and the 2010 Amendment, and with its term set to expire after the 2010 Amendment, then such agency will now be subject to the 2010 Amendment

- Therefore, principals who appointed registered commercial agents following the 2006 Amendment believing they would have a “get-out” at the end of the fixed term if the agency relationship did not work out, may now face issues trying to terminate their fixed term agencies, unless they can provide a “*material reason*” for termination or non-renewal

Changes to the Agency Law

- Following the 2010 Amendment, it has once again become extremely important for all principals to carefully review (and amend where necessary) their commercial agency contracts (both fixed and non-fixed term) to ensure that there are specific and measurable termination triggers contained therein that would facilitate the establishment of a "*material reason*" for termination or non-renewal in cases of breach or non-performance by the agent

- In doing so the principal should be able to mitigate against having to compensate the registered commercial agent in the event of termination of the registered commercial agency agreement

- In practice, though, any such amendment(s) will need to be carefully and sensitively raised, negotiated and agreed with the particular agent, and consideration should therefore be given to the agent's likely reaction to such discussions, vis-à-vis the current working relationship between the parties

Agency and Distributorship – considerations for defense contractors

- Special considerations apply regarding the appointment of intermediaries (including agents, representatives and distributors) for commercial sales to the UAE Armed Forces. In many defense contracts, the appointment of agents, representatives and middlemen are prohibited, as is the payment of commission in connection therewith

- A brief letter dated 9 December 1986 (the "Directive") from H.H. Sheikh Khalifa bin Zayed Al Nahayan, now the President of the UAE and Ruler of Abu Dhabi, issued in his former capacity as Deputy Supreme Commander of the UAE Armed Forces to H.H. Sheikh Hamdan bin Zayed Al Nahayan (then Undersecretary of the Ministry of Foreign Affairs) should be noted

- The Directive, the precise terms of which are not in the public domain and which were originally disseminated through the UAE Ministry of Foreign Affairs to the Embassies of those countries with defense industries servicing the UAE, is understood to prohibit the involvement and/or appointment of agents, representatives and middle-men and the payment of commission in connection with the procurement of most types of defense equipment and services

- We understand that contracts to which the Directive applies usually contain a detailed clause amplifying the Directive and placing substantial penalties on the contractor for breach. As usually written, we understand, the clause prohibits the foreign supplier from directly or indirectly entering into a consultancy or representational arrangement with a third party, to act as an agent or consultant to facilitate and promote the negotiation and finalisation of the applicable defense contract. It also prohibits the payment of commissions and remuneration in connection with UAE defense sales to secure an advantage and requires the contractor to confirm that there is no legally binding promise which would be contrary to the stated prohibitions

- Whilst it is understood that the Directive is not always universally applied to every procurement contract with the UAE Armed Forces, nevertheless, until an indication to the contrary is received from the appropriate Armed Forces procurement department that the Directive is not regarded as being applicable, a foreign principal should, we believe, proceed on the basis that it is applicable. It is important that company members associated with the promotion of defense products to the UAE are aware of the Directive and the restrictions from an early stage so as to avoid unwittingly establishing a relationship with an intermediary which might subsequently compromise the company's ability to give the undertakings/representations which the terms of a particular project tender or contract may subsequently require

Strategic Alliance/Industrial Partnership

- Playing an increasing role in efforts to diversify Gulf economies
- Contractual arrangements by which global companies, leaders in their fields, provide technology, education, and management expertise to the UAE to develop the economy
- Typically fee based or an “informal offset”
- Advantage to provider is to create long term regional relationships/partners
- Key Issue: brand protection vs local requirements
- Prevalence in regulated industries (Aerospace, Healthcare, Education)

Offsets

- Offsets found throughout the GCC
- Typically in the defence sector but spreading to aerospace, telecommunications and power
- In summary, principal is that major suppliers are required to ‘put back’/ ‘contribute’ into local economies
  - In the UAE, any supplier of more than US$10 million is required to add economic and commercial value to the UAE Economy equivalent to 60% of the awarded contract
  - In Saudi Arabia, Offset threshold is US$106 million but often waived up to US$1 billion, with an expected contribution of 35% of contract value
- In 2011 UAE Offset Program Bureau summarized the purpose of offsets as being:

“to support its [the UAE’s] plans for an advanced industrial base that delivers sustainable economic and social developments through industrial partnerships, capacity building, technology and knowledge transfer and creation of jobs for UAE citizens”

Offsets, Cont'd

- Results of offsets varied over last 40 years and impetus for reform. UAE review completed in 2010 and may serve as a model elsewhere
- Move to focussing on "output / results" rather than input
  - Since 2011 the majority of the UAE's offset policy is focused on measuring real and tangible results; a combination of net profit, export sales and the number of UAE nationals employed
- The precise method of calculating the relevant 'output' value, however, is confidential
- Multipliers are available for certain key technology
- Offset obligations are satisfied over a seven year period, by reference to incremental milestones of 5%, 10%, 10%, 15%, 15%, 20% and 25%, for each respective year. As a result, the OPB monitors and audits offset projects to ensure that they are both profitable and sustainable
- Early planning is a key feature of new guidelines in the UAE:
  - require an offset fulfilment plan to be developed in tandem with the procurement process of the UAE Armed Forces
- For a more detailed analysis please see:
  - "*The Development of and Key Trends in Offset Policies in the US, Europe and Important Emerging Markets"*
    Sean P. Harrison and Oscar Johnson (Hogan Lovells)
    96 FCR 189, 08/16/2011

5. CONTRACT ISSUES

5. Contract Issues

- There is little implied by local law – foreign investors are advised to follow *Caveat Emptor* approach in drafting

- Two of the key concerns when contracting with local entities are: -
  - Governing Law
  - Dispute Resolution

Governing Law

- Position in the UAE

  – Under Article 19 of the UAE Civil Code, the parties to a contract are generally free to choose the law that should apply to their contract. Article 19 is however over-ridden by Article 22 which expressly states that the provision of that Article (and certain other Articles of the Civil Code) "*shall not apply in cases where there is a contrary provision in a special law or in an international convention in force in the State*." Moreover, the provisions of a foreign law cannot be applied if such provisions are contrary to Islamic Shari'a, public order, or morals in the UAE

  – Notwithstanding the adoption of foreign law, the local courts will tend to have regard for local law in adjudicating disputes they consider as inherently local in nature. Thus, whilst they would listen to evidence as to the foreign law, their interpretation of that law may not always coincide with the interpretation of a domestic court of the territory concerned

Governing Law – what is the norm?

– This will depend on the nature of the contract and the identity of the counterparty, e.g.: -

- when setting up a joint venture company in the UAE, the norm will be for the shareholders agreement to be governed by UAE law (being the laws of the Emirate in which the company is to be incorporated, as well as the federal laws of the UAE as they are applied in that Emirate)

- in other commercial contracts, though, where a foreign party is entering into a contract with a UAE entity (other than a UAE or local Emirate government entity), it is not unusual to see English law (and very occasionally US law) chosen as the governing law

Governing Law – position of the Government/Government owned entities

- Under Abu Dhabi Law No. 6 of 2008 regarding Procurements, Tenders, Bids and Warehouses for the Emirate of Abu Dhabi ("the Procurement Law"), it is the intention of the Abu Dhabi government that contracts with its departments are to be governed by Abu Dhabi law, although there does appear to be the ability for exceptions to this; namely by virtue of
  - (i) changes to the 'standard form' approved by the relevant legal department and head of procurement, and
  - (ii) the ability of the Abu Dhabi Executive Council to disapply the provisions of the Procurement Law to any matter it so decides
- The Procurement Law (and its accompanying Guidebook) apply to all procurements of Abu Dhabi government departments:
  - "Procurements" is defined broadly as "*purchasing and importing materials, service contracts and contracts for all works*"; and
  - "government departments" is stated to mean "*any public department, corporation, agency or entity whose budget is part of, or attached to the general budget of the Abu Dhabi Government, and that has no independent financial system*."
- We are not aware, though, of any circumstances in practice where there has been any such approval to apply the laws of a jurisdiction other than Abu Dhabi or any decision by the Abu Dhabi Executive Council to disapply the Procurement Law. Therefore whilst it may, technically, be possible for an Abu Dhabi government entity to submit to a foreign law, we believe it is unlikely that this would be permitted in practice
- Interestingly, this differs from Dubai, where there are no stipulated exceptions to the rule that is not possible to apply any laws other than those of Dubai to contracts with its government departments

Governing Law – position of the Government/Government owned entities

- What is the position with government-owned entities?
  - To the extent a contract with a government-owned entity did not fall within the parameters of the Procurement Law (or a particular Emirate's equivalent piece of legislation), then the governing law of that contract will be a matter for negotiation between the two parties (in the same way as between any other 2 entities from different jurisdictions)
  - Some government-owned entities may have an internal policy that it will only enter into contracts that are governed by UAE law. In practice this is very difficult to negotiate against, especially if the contract relates to a UAE based subject matter
  - A number of government-owned entities are used to dealing with Western counterparties and will be open to accepting a foreign governing law provision
    - may depend on where the project is
    - if subject matter is in the UAE, most likely to seek UAE law

Limitations of UAE law

- The UAE was founded on 2 December 1971
- The UAE's laws are relatively undeveloped – its legislation has not grown and developed at the same pace as its economy
- A number of legal issues are not covered in the current legislation
- Legislation can be ambiguous (very few "official" English translations of the laws) and there is no system of court reporting – therefore difficult to assess and understand, on a continuing basis, the way in which the courts interpret and apply UAE legislation
- The concept of binding judicial precedent is of limited application – therefore the same decision may not always be reached in relation to the same set of facts and circumstances – courts are not required to follow decisions made by other courts

Use of English law/Third party legal system

- As previously mentioned, parties are free to choose the governing law of their contracts
- However, notwithstanding the adoption of foreign law, the local courts will tend to have regard for local law in adjudicating disputes they consider as inherently local in nature
- Thus, whilst they would listen to evidence as to the foreign law, their interpretation of that law may not always coincide with the interpretation of a domestic court of the territory concerned

Dispute Resolution - what is the norm?

- This will largely depend on the identity of the UAE counterparty

- The norm for foreign companies would be to opt for arbitration
  - Allows for selection of experts as arbiters
  - Increased confidentiality
  - Quicker than litigation
  - limitations of the local courts (discussed overleaf)

- The norm for UAE companies would be local courts, although those entities that are more familiar with contracting with Western companies are more likely to be open to arbitration

Limitations of local courts

- Less sophisticated than Western courts
- Timely
- Costly
- Unpredictable
- No system of binding precedent
- Conducted in Arabic (translation and notarisation of documentation)
- Require local advocate

Enforceability of Foreign Court Awards

- The enforcement of foreign judgments in the UAE is regulated by the UAE Civil Procedure Code, Federal Law No. 11 of 1992 ("the Civil Procedure Code")

- Foreign judgments may be enforced if the following conditions are satisfied: -

  – UAE courts did not have jurisdiction in the dispute
  – the foreign court had the requisite jurisdiction under applicable international rules to hear the dispute
  – the parties to the matter of the foreign ruling were served with due notice and validly represented at the foreign proceedings
  – the judgment is final according to the law of the court issuing the order
  – the judgment is not contradictory to a judgment or order already issued by a UAE court and does not comprise anything which is in violation of the public policy or morals of the UAE

- The Civil Procedure Code therefore provides for the enforcement of foreign judgments in principle, however, in practice, foreign court judgments are difficult to enforce in the UAE, especially in the absence of a treaty between the foreign country and the UAE which allows for reciprocity

- A treaty of reciprocity exists between the **GCC countries**, and with a number of other Arab nations. However, such treaties are virtually non-existent outside Arab league countries

- A treaty of judicial co-operation exists with the United Kingdom; however, this treaty does not expressly extend to the reciprocal enforcement of judgments

- In fact, **France** is the only country in Europe which currently has a treaty of reciprocity with the UAE

Enforcement of Arbitration Awards

- Pursuant to UAE Federal Decree No. 43 of 2006, issued on 13 June 2006, the UAE acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**")
- The UN formally approved the UAE's accession to the New York Convention on 19 November 2006
- Before the UAE ratified the New York Convention in 2006, foreign arbitral awards were dealt with in the same manner as enforcing foreign judgments pursuant to the UAE Civil Procedure Code
- Until 2010 there had been no known cases of enforcement in the UAE under the New York Convention. Uncertainties therefore remained in relation to how the UAE courts would actually interpret and apply the Convention
- In 2010, the Fujairah Federal Court of First Instance enforced a foreign arbitration award (issued under the LMAA) under the New York Convention. This was the first known case of enforcement under the New York Convention in the UAE
- The Fujairah judgment was followed in January 2011 by a similar decision by the Dubai Court of First Instance. The case again involved an award issued under the DIFC-LCIA arbitration rules. However, unlike the Fujairah case, enforcement was contested. This, together with the fact that the judgment comes from one of the more well known Emirates, means that it is more likely to be seen as "test case" than the earlier Fujairah judgment

Potential Forums

- In the Emirate of Abu Dhabi
  - Abu Dhabi Commercial Conciliation & Arbitration Center (ADCCAC)
    - ‘on-shore’
- In the Emirate of Dubai
  - Dubai International Arbitration Centre (DIAC)
    - ‘on-shore’
  - DIFC-LCIA Arbitration Centre
    - Founded in 2008
    - Partnership between Dubai International Financial Centre and the London Court of International Arbitration
    - ‘off-shore’

Recent developments in Dubai

- Following establishment of the DIFC-LCIA Arbitration Centre, there was uncertainty as to enforceability of DIFC-LICA awards “on-shore” in the UAE (i.e. outside the DIFC)

- In 2010, the DIFC Courts and the Dubai Courts issued the ‘Protocol of Enforcement between Dubai Courts and DIFC Courts’

- Subject to meeting procedural requirements, DIFC Court judgments can be enforced through the execution department of the Dubai courts

Recent developments in Dubai

- Procedure to enforce a DIFC-LCIA arbitral award on-shore: -
  - Convert the award into a DIFC court judgment
  - Present it to the execution judge at Dubai courts (under cover of a letter from DIFC Court Registrar to the Chief Justice of the Court of First Instance requesting enforcement)
  - Execution judge should convert the DIFC judgment into a judgment of the Dubai Court
    - avoids the need to undergo the ratification process under the UAE's Civil Procedure Code
    - N.B. – whilst the position appears clear for enforcement on-shore in Dubai, no formal agreements have been reached with courts of other Emirates and therefore there is currently some uncertainty as to how a DIFC-LCIA arbitral award would be enforced in the other Emirates (i.e. outside Dubai)

Sovereign Immunity

- Article 92 of the Civil Code provides that the State itself as well as public bodies upon which a judicial personality is conferred by law are considered independent judicial persons
- Article 93 of the Civil Code provides that a judicial person has a separate financial liability and legal capacity. It also has the right to engage in legal proceedings
- Article 94 of the Civil Code states that judicial persons are subject to the laws pertaining to them (by which it is understood to mean any law by which they are constituted and any other law from which they are not expressly or impliedly exempt)

Sovereign Immunity

- Article 15 of the UAE's Commercial Code (Federal Law No. 18 of 1993) states that "*the capacity of trader shall not apply to ministries of the State, its departments, organization, public institution, public utility organizations and institutions, associations and clubs, and those in free professions who do not pursue commercial activity. The commercial activity undertaken by these bodies shall be subject to this Law except where it is excluded*"

- Further, Article 16 states that "*the capacity of trader shall apply to all commercial companies established or owned or in which shares are held by the State or by public bodies or institutions and the provisions of this Law shall apply to them except which is excluded by a specific textual provision*". Therefore the ministries of the State, its departments, organizations, public institutions, public utility organizations and institutions are not subject to the Commercial Code (if and to the extent that they do not engage in commerce)

Sovereign Immunity

- However, the Commercial Code is applicable to commercial business performed by such parties (unless they are exempted by a specific provision). Commercial undertakings by the Federal Government or by commercial companies established or owned by it are caught by these provisions and as such cannot claim sovereign immunity in respect thereof

- Article 9 of the UAE's Civil Procedure Code provides for the way in which proceedings may be served on Ministries, Federal and Local Government Departments, Public Bodies and Public Institutions of whatever kind

- Article 25 grants the Federal Primary Court jurisdiction over all disputes arising between the State and individuals. The Federal Government is subject to the jurisdiction of the Federal Primary Court and is capable of suing and being sued

Sovereign Immunity

- In the Emirate of Abu Dhabi, no permission of any person/authority is known to be required as a pre-condition to take legal action against the Government of Abu Dhabi or a related entity

- This is different to the Emirate of Dubai: -

  – Filing of lawsuits by or against the Government of Dubai (and any department thereof), including public corporations, is subject to procedural requirements

  – Recovery debts or obligations of the Government of Dubai (and any department thereof), including public corporations, by attachment, sale by auction or taking possession in any other legal manner, of their properties is prohibited

Sovereign Immunity

- Article 247 of the Civil Procedure Code provides that:

  "*Without prejudice to what is stipulated by any other law, the following may not be seized: (i) public or private property owned by the State or one of the Emirates*."

- This Article clearly prohibits execution against property owned by the Federal Government or one of the Emirates, unless provided for in another law. Such immunity cannot be contractually waived. For such a waiver to be effective a Royal Decree waiving Article 247 of the Civil Procedure Code would be required

- In the absence of judicial pronouncement on whether the term "ownership" includes indirect ownership for purposes of Article 247, we cannot state with any certainty as to whether assets owned by an entity wholly owned by the Government of Abu Dhabi would be considered to be "*public or private property owned by the State or one of the Emirates*" for the purposes of Article 247 of the Civil Procedures Code. We would recommend a conservative interpretation, though

www.hoganlovells.com

Hogan Lovells has offices in:

Abu Dhabi	Colorado Springs	Houston	New York	Silicon Valley
Alicante	Denver	Jeddah*	Northern Virginia	Singapore
Amsterdam	Dubai	London	Paris	Tokyo
Baltimore	Dusseldorf	Los Angeles	Philadelphia	Ulaanbaatar*
Beijing	Frankfurt	Madrid	Prague	Warsaw
Berlin	Hamburg	Miami	Riyadh*	Washington DC
Brussels	Hanoi	Milan	Rome	Zagreb*
Budapest*	Ho Chi Minh City	Moscow	San Francisco	
Caracas	Hong Kong	Munich	Shanghai	

"Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. New York State Notice: Attorney Advertising.

© Hogan Lovells 2011. All rights reserved.

* Associated offices