LATHAM & WATKINS LLP

Doing Business in the UAE

A Guide to the Financial, Business, and Legal Considerations for Navigating the UAE's Dynamic Market

Fourth Edition

Contents

Surveying the Legal Landscape in the UAE

This guide provides an overview of the principal legal issues for foreign investors considering doing business in the United Arab Emirates (the UAE).

Country Background

Formed on December 2, 1971, the UAE is a federal state of seven emirates comprising Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah, and Umm Al Quwain.

The UAE federal constitution provides the legal framework for the federation and is the basis of all legislation promulgated at the federal and emirate level. Pursuant to the constitution, the federal government has exclusive jurisdiction in various substantive matters, including foreign policy, defense, and security. Legislation passed at the federal level has primacy over the local laws of each emirate. The local government of each emirate is, however, permitted under Article 122 of the constitution to regulate all local matters which are not subject to federal legislation or matters which are not expressly reserved in the constitution to the federal government (examples of such federal matters being foreign affairs, defense, and health). As such, the governments of each individual emirate retain substantial powers to regulate commercial activities, issue trade licenses, and affect the incorporation of corporate entities to the extent that such activity is not regulated under federal legislation.

The UAE judicial system varies significantly across the different emirates. Five emirates submit to a federal court system while Dubai and Ras Al Khaimah retain their own independent court systems. Abu Dhabi is unique in that it submits to federal courts while retaining its own parallel independent court system. All courts in the UAE exclude juries, are presided over by a single judge or a panel of three judges, and follow the same rules of civil procedure and evidence. Certain free zones have their own judicial systems, as well as their own rules of civil procedure.

Free Zones

The UAE federal constitution, the federal laws relating to free zones, and the powers reserved by the individual emirates under the federal structure, permit each emirate to set up economic free trade zones or “free zones” for general or industry-specific commercial activities. The purpose of free zones is to encourage foreign direct investment into the UAE. Free zone entities are generally permitted to have 100% foreign ownership, have laws and regulations issued in English, generally enjoy specialized customer care, and in some cases also enjoy certain tax benefits.

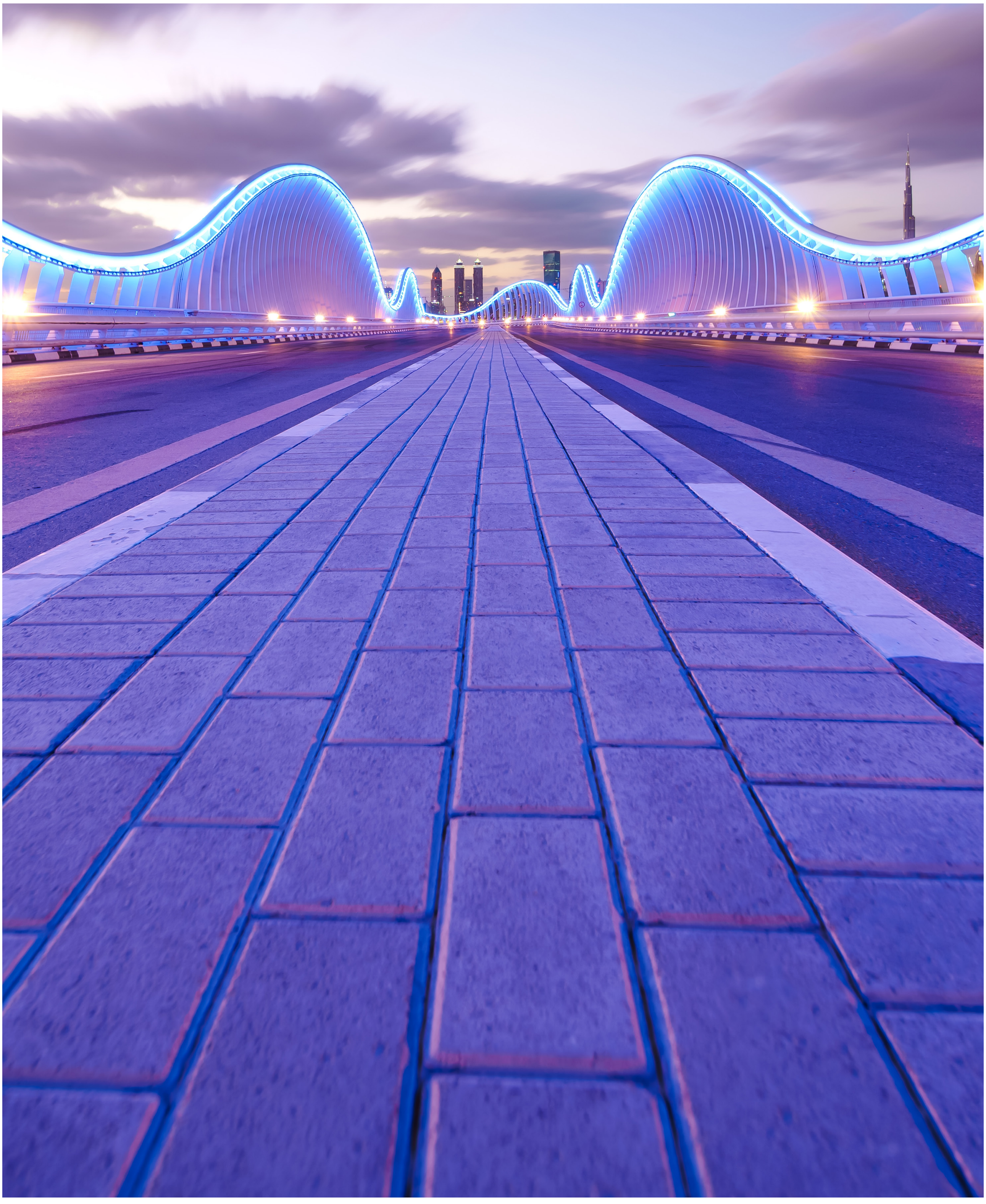
Free zones are authorized to enact their own laws and regulations in specific areas, which may in some cases override federal and emirate-level laws on the subject matter. For example, the Dubai International Financial Centre (DIFC), which is a financial free zone, has its own body of laws, including corporate laws, contract laws, and employment laws, as well as its own court system.

Unless otherwise stated, references in this guide to matters of law or practice applicable in the UAE generally refer to the wider UAE outside of the free zones.

Status of *Shari’ah* in the UAE

While the UAE federal constitution provides that *Shari’ah* is the main source of law, it is not the only source and its application is generally limited to: (1) being used by the courts as an interpretative aid if no express provision of legislation governing a particular question exists; (2) religious, morality, and personal law matters (e.g., inheritance for Muslims); and (3) transactions which are intentionally expressed to be *Shari’ah*-compliant, such as Islamic banking transactions. Outside of these limited areas, contractual terms that would be forbidden under *Shari’ah* are generally enforceable under the laws of the UAE. For example, a contractual term in a conventional commercial transaction requiring the payment of interest (which is a concept that is forbidden under *Shari’ah*) is, in general, valid in the UAE and would normally be enforceable in UAE courts.

Establishing a Legal Presence in the UAE



Establishing a Legal Presence in the UAE

In order to conduct business in the UAE, most foreign investors are required to establish a formal legal presence in the UAE, which will typically be through any of the following means:

- incorporating a local entity;
- registering a branch or representative office of a foreign company;
- establishing a free zone entity or free zone branch; or
- entering into a commercial agency relationship with a local agent.

Incorporating a Local Entity

Unlike many other jurisdictions, buying shelf companies in the UAE is generally not feasible due to stringent incorporation, ultimate beneficial ownership, and economic substance requirements.[1] While the UAE does not have a central public platform that compiles company information, the Department of Economic Development of each emirate does disclose certain basic information on registered companies including company name, commercial registration number, company address, contact details, and commercial activities.

As a general requirement, locally incorporated entities must obtain a commercial license from the Department of Economic Development (or similar government agency) of the emirate in which they are incorporated and, if necessary, authorization from industry-specific ministries or government entities in the relevant emirate or free zone (such as the Central Bank of the UAE).[2]

Locally incorporated entities may be formed as civil companies[3] or incorporated under Federal Law No. 32 of 2021 concerning commercial companies (Companies Law). All locally incorporated companies must be established in accordance with the Companies Law. The Companies Law requires companies to adopt one of the following legal forms:

- limited liability company;
- private joint stock company;
- public joint stock company;
- limited partnership; and
- joint liability company.

Of the entities listed above, most foreign investors choose to establish a limited liability company given that they are the most flexible in nature. The relevant licensing authority in each emirate also imposes a minimum capital requirement which varies depending on the nature of the business of the limited liability company. Pursuant to Article 76 of the Companies Law, a limited liability company must have sufficient capital to achieve the objects of its incorporation. Limited liability companies may not offer their shares for public subscription, a right reserved only for public joint stock companies. Nevertheless, a limited liability company may change its legal form in order to qualify for public subscription.

Under the Companies Law, a foreign investor may establish a 100% foreign-owned entity in mainland UAE, provided the activities the company would carry on are specified on a list issued by the Department of Economic Development in the relevant emirate. However, 100% foreign ownership is not permitted for entities carrying out activities with strategic impact.[4] A company undertaking activities with a strategic impact requires a majority UAE national shareholder or must be wholly owned by UAE nationals.

Opening a Branch or Representative Office

Articles 335 to 339 of the Companies Law permit foreign companies to open branches or representative offices within the UAE. A branch or a representative office of a foreign company may be wholly owned by foreigners.

The UAE does not impose minimum capitalization requirements for a branch, although the foreign company is required to provide a standard form bank guarantee from a local bank or an international bank with a branch in the UAE in the amount of AED50,000 (approximately US$14,000) and a letter from a locally registered auditor confirming its appointment.

The branch must have a commercial activity, which the relevant local authorities must approve in advance. The commercial activity of the branch must be the same commercial activity as its foreign parent company. With regard to trading activities, branches are not typically permitted to physically deal or trade in goods within the UAE, other than goods manufactured by their foreign parent or their foreign parent's group. A branch is, however, permitted to provide maintenance and repair services to customers of its foreign parent company.

Importantly, approval for the issuance of a license for a branch depends on the type of activity the proposed branch intends to carry on in the relevant emirate. Companies should therefore obtain initial approval from the relevant local authorities for the proposed activities of the branch prior to commencing the incorporation process.

A representative office is more limited than a branch office in the scope of activities that it is permitted to undertake. A representative office may only conduct marketing and administrative functions on behalf of its foreign parent company. A representative office typically gathers information on the local market, establishes relationships, and solicits orders to be performed by the foreign parent company.

Setting Up a Free Zone Entity

A free zone entity will generally take one of the following three forms: a branch of a foreign company, a free zone company, or a free zone establishment. The minimum capital requirements for companies established in free zones will vary between free zones; for instance, a private limited liability company in the Khalifa Industrial Zone Abu Dhabi must have a minimum share capital of AED150,000. Conversely, the DIFC does not formally set a minimum share capital for private limited liability companies.

The key limitation of a free zone entity is that it is generally only permitted to conduct business within the geographical location of the relevant free zone or internationally, and is limited to performing solely those activities specified in its license.[5] A free zone entity must typically hold one or more of the following licenses: (1) trading license, (2) service license, and/or (3) manufacturing/industrial license. In order for a free zone entity to engage in sales within the UAE (outside the relevant free zone), the entity will be required to retain the services of a commercial agent or distributor or establish an onshore entity.

Holding Companies

Pursuant to Article 268 of the Companies Law, a holding company may take the form of a limited liability company or joint stock company. The objects of a holding company are limited to (1) holding shares in joint stock companies and limited liability companies; (2) extending loans, guarantees, and other forms of finance to its subsidiaries;[6] (3) ownership of real estate and moveable assets necessary to achieve its objects; (4) management of its subsidiaries; and (5) ownership of intellectual property. A holding company may only carry on its objects through its subsidiaries.

In certain circumstances, entities incorporated in free zones may be used as offshore holding companies, meaning that they are used in transactions that do not involve operations physically situated in the relevant free zone. Examples of this practice include the use of companies incorporated under the offshore companies regime of the Jebel Ali Free Zone for use as a regional holding company, or as a holding company for the ownership of real estate assets in Dubai. Additionally, pursuant to the Prescribed Company Regulations of August 10, 2022 of the DIFC, prescribed companies (which are akin to holding companies) can be incorporated in the DIFC in certain situations and take advantage of the regulatory environment and court system offered by the DIFC.

While exceptions such as those mentioned above do exist, free zone entities are generally required to have physical operations within the free zone in which they are incorporated. Most free zones have a focus on attracting and retaining a particular industrial or economic sector, as evident in the names of free zones such as Dubai Internet City, Dubai Healthcare City, or Dubai Media City. While many of the UAE's free zones are physically located in Dubai, prominent free zones outside of Dubai include the Abu Dhabi Global Market (ADGM) and the Khalifa Industrial Zone in Abu Dhabi, the Hamriyah Free Zone in Sharjah, and the RAK Free Trade Zone in Ras Al Khaimah.

Establishing a Legal Presence in the UAE

Commercial Agency Relationships

Foreign companies wishing to import/distribute goods in the UAE but who do not wish to maintain a physical presence in the UAE, will generally enter into a commercial agency relationship with a UAE national, a private company that is wholly owned by UAE nationals, or a public company that is at least 51% owned by UAE nationals.

Commercial agencies enable foreign companies to leverage domestic expertise and to forego the high costs and difficulties in establishing a physical presence in the UAE. Commercial agents are common among foreign manufacturers and traders, especially in the large-scale importation of goods.

As a recent development under Federal Law No. 3 of 2022 on Regulating Commercial Agencies (effective from June 15, 2023) (Commercial Agencies Law), a foreign entity may sell its own products directly in the UAE without a commercial agent, provided that (1) the product did not previously have a commercial agent appointed in the UAE; and (2) the product is not subject to an existing commercial agency in the UAE.

The Commercial Agencies Law provides a number of protections to the registered agent, such as an exclusive right to represent the principal and trade in the principal's products in the UAE, and entitlement to commissions from the trade in the principal's products in the UAE (even if the registered agent was not directly involved in such trade).

Registered commercial agency agreements can only be terminated as follows:

- upon the expiry of the agreement (unless specified otherwise in the agreement, written notice of less than one year, or half the contract's full term, is needed to terminate under this limb);
- in accordance with the termination provisions contained in the registered commercial agency agreement;
- by the mutual agreement of the parties; or
- by court order (this route is usually reserved for disputes which cannot be amicably settled and may also result in compensation payments).

Notably, for agency agreements currently in place, the termination provisions of the Commercial Agencies Law will only apply from June 2025. Furthermore, if the commercial agent's investment exceeds AED100 million or if it has been a registered commercial agent for more than 10 years, then the termination provisions of the Commercial Agencies Law will only apply to that arrangement from June 2033 onwards.

General Legal Considerations

General Legal Considerations

Doing Business With the Public Sector

Foreign businesses that do business with the UAE federal government or any other governmental body must comply with the public sector procurement rules set forth in Financial Order No. 16 of 1975, the Federal Regulation of Conditions of Purchases, Tenders and Contracts (Public Tenders Law). The Public Tenders Law applies to federal but not emirate-level government projects. Individual emirates have their own local procurement rules, which are usually similar to the federal system. To bid for government contracts, bidders must typically register on the relevant eProcurement system. The Ministry of Finance will announce tenders and contracts for contracts with federal entities. On an emirate level, each emirate will have its own system whereby bids can be submitted.

Foreign Exchange Controls and Anti-Money Laundering

The UAE does not generally have any currency exchange controls and restrictions on the remittance of funds. Furthermore, free zone entities are permitted to repatriate 100% of their profits from the UAE in accordance with regulations in place in their respective free zones.

The UAE has recently strengthened its laws relating to money laundering, terrorist financing, and proliferation financing. The principal anti-money laundering and counter terrorist financing legislation is Federal Decree No. 20 of 2018 on Anti-Money Laundering and Combating the Financing of Terrorism and Financing of Illegal Organisations (AML Law), as amended by Federal Decree No. 26 of 2021. In conjunction with the AML Law, Federal Law No. 14 of 2018 on the Central Bank and Organization of Financial Institutions and Activities (Central Bank Law) provides for further anti-money laundering enforcement, and is supplemented by various pieces of guidance and standards issued by the UAE Central Bank, to ensure adequate supervision of all financial service companies in the UAE.

Additionally, as a member of the global Financial Action Task Force (FATF), the UAE has implemented anti-money laundering procedures to meet the standards of the FATF. The various free zones also have rules on preventing money laundering. For example, the Dubai Financial Services Authority (DFSA), serving as the DIFC’s financial regulatory agency, has detailed additional anti-money laundering rules in its DFSA Rulebook.

Bribery and Anti-Corruption

The UAE does not have a standalone bribery law, with bribery primarily being governed by Federal Law No. 31 of 2021 (Penal Code). The UAE has also ratified the United Nations Convention Against Corruption, through adoption of Federal Decree No. 8 of 2006, and has enacted federal and emirate-level legislation that targets bribery and corruption.

Bribery of a UAE public official (including any public servant, person assigned to a public service, as well as a foreign public servant or an employee of an international organization) is a criminal offence in the UAE. This applies equally to the public official and those who offer, accept, and facilitate bribes, whether or not they actually benefit from the bribe. Private sector bribery within the UAE is similarly prohibited. Penalties for bribery can include forfeiture of the bribe, up to five years in prison, and fines commensurate with the amount of the bribe.

Economic Substance

Entities incorporated in the UAE (both onshore and within free zones) which carry out certain activities are required to maintain an adequate “economic presence” relative to the activities they undertake.

The economic substance requirements apply to entities operating in any of the following fields:

- Banking
- Insurance
- Fund management
- Financing or leasing
- Shipping
- Holding companies
- Exploiting or holding intellectual property
- Headquarters
- Distribution and service centers

General Legal Considerations

While the National Assessing Authority and Ministry of Finance are charged with regulating economic substance, entities must self-assess to determine whether they are caught by the criteria.

Slightly different economic substance requirements apply to each relevant activity, but generally, economic substance can be evidenced through performing core income-generating activities in the UAE, being "managed" from within the UAE, having an adequate number of employees in the UAE, and incurring proportionate operating expenditure in the UAE. The requirements are generally less onerous for holding companies. Entities falling within the scope of the economic substance requirements are required to file a notification with the Ministry of Finance every financial year. The notification must provide detail on the relevant activities carried out, income generated, and related tax treatment. Additionally, entities that have earned income from a relevant activity must file a more comprehensive report with additional detail surrounding their financial operations.

Penalties for failure to comply range from financial fines to suspension or revocation of business licenses.

Taxation

VAT was introduced in the UAE on January 1, 2018, at a rate of 5% for the majority of goods and services, and is overseen by the Federal Tax Authority. VAT applies to all tax-registered businesses in the UAE (both onshore and within free zones). Businesses with an annual turnover of AED375,000 or more are required to register for VAT with the Federal Tax Authority through an online portal. Once registered, businesses must submit regular VAT returns and pay any VAT due to the Federal Tax Authority on all taxable supply of goods or services at each step of the supply chain. However, foreign businesses may also recover the VAT that they incur when visiting the UAE.

The UAE Ministry of Finance issued Federal Decree No. 47 of 2022 on the Taxation of Corporations and Businesses (Corporate Tax Law) which will primarily take effect from June 1, 2023. A corporate tax rate of 9% is applicable to the following taxable persons: (1) companies and other certain judicial persons incorporated in, or effectively managed from the UAE; (2) natural persons (individuals) who earn business income and hold, or are required to hold, a commercial license or otherwise permitted to conduct a business or business activity in the UAE; and (3) non-resident juridical persons (foreign legal entities) that have a permanent establishment in the UAE.

Entities incorporated in UAE free zones are also within the scope of the corporate tax as taxable persons, and will need to comply with the requirements set out in the Corporate Tax Law. However, the tax regulations set out a number of exemptions that will apply to entities incorporated in free zones which may allow them to avoid paying corporate tax based on the nature of their income.

There are no personal taxes of any kind in the UAE — i.e., no federal income tax, capital gains tax, or inheritance tax. Certain municipality taxes are levied at the emirate level on designated services.

Employment Law

In November 2021, the Ministry of Human Resources & Emiratisation (MHRE) announced an overhaul to the labor laws in the UAE, with the introduction of Federal Decree No. 33 of 2021 on Regulating Labour Regulations, which came into effect as of February 2, 2022 (Labour Law). The Labour Law introduced significant changes and replaced the previous Federal Law No. 8 of 1980 on Regulation of Labour Regulations (Old Labour Law).

The Labour Law applies to all employees working in the UAE. Certain categories of individuals are exempted from the law, including federal and emirate-level government employees, domestic servants, and employees of the armed forces, police, and security. In addition to the Labour Law, the MHRE has issued a number of ministerial resolutions and circulars which supplement certain provisions of the Labour Law, and in some instances have been used to clarify the application of certain provisions of the Labour Law.

The Labour Law affords certain protections for employees, including setting minimum standards on employing juveniles, working hours, vacation and public holidays, sick leave, maternity leave, employee records, safety standards, termination of employment, and end of service gratuity payments.

General Legal Considerations

Employee grievances are handled by a special program run by the MHRE, and the MHRE must also be informed if an employee is subject to the disciplinary code. Pensions and social security schemes in the UAE are governed by the Federal Law No. 7 of 1999 on Pensions and Social Security, as amended, applies to UAE and Gulf Cooperation Council (GCC) nationals.

Some free zones have their own employment laws and employee grievance procedures, although these generally mirror the provisions of the Labour Law. In some free zones, for example the DIFC and the ADGM, the employment laws differ greatly from the Labour Law.

The Labour Law requires that all employees must be employed on a fixed-term contract for a period of up to three years. Under the Old Labour Law, only full-time work was possible; however, the Labour Law now recognizes part-time, temporary, and flexible employment. The Labour Law also imposes mandatory internal policy obligations on employers with over 50 employees. The internal policies implemented must address employee work instructions and the criteria and controls for promotions, bonuses, holiday entitlement, and termination. The internal policies must also include a list of sanctions that may be imposed on offending employees, and the conditions and rules for their imposition.

Most employees working in the UAE, including in the free zones, have written contracts of employment. The MHRE requires a standard form contract of employment to be entered into and filed. Many employers also enter into further, more comprehensive employment contracts with their employees.

Another key provision of the Labour Law is a requirement to pay a statutory end of service gratuity (ESG) to non-UAE or GCC employees upon termination of their employment (subject to satisfying certain requirements). The ESG regime in the UAE is designed to take the place of a formal pension regime. ESG is calculated at a rate of 21 days of basic pay per year for the first five years of service and 30 days for each year thereafter, up to a maximum amount of ESG equal to two years of salary. ESG is payable as a lump sum on termination of employment. Employees summarily dismissed retain their entitlement to ESG, and reductions no longer apply if an employee resigns (as was the case under the Old Labour Law).

The DIFC has implemented the DIFC Employee Workplace Savings Plan (DEWS) as an end-of-service benefits plan which is a funded, professionally managed, and defined contribution plan. The DEWS plan requires employers to contribute 5.83% of an employee's basic salary with a service period of less than five years, and 8.33% of an employee's basic salary with a service period of more than five years.

UAE federal law also sets out preferences for hiring UAE nationals and, for some administrative positions, requires that only UAE nationals be employed. Following the introduction of the updated Labour Law, the MHRE has issued new emiratization requirements in an effort to increase participation of UAE nationals in the private sector. Under the new requirements, private sector companies with more than 50 employees must ensure that a minimum of 2% of its workforce are Emirati, and are required to increase their Emirati workforce in excess of their current quota through a 2% year-on-year increase until a 10% Emirati workforce is reached by 2026. However, separate emiratization requirements apply for the banking and insurance sectors, which require a 4% and 5% Emirati quota respectively. The emiratization policy applies to both the public and the private sector, and both local and international companies operating in the UAE are subject to the emiratization policy in the sectors for which such guidelines have been formulated.

Intellectual Property

The UAE is an attractive global business center and gateway to the wider Middle East region for international companies seeking to commercialize and exploit their brands, products, and technologies. In support of this status, the UAE recently passed new laws regulating trademarks, copyright, and patents, which became effective in 2021-22 and incorporated global best practices with respect to IP protection (https://www.moec.gov.ae/en/intellectual-property-legislations).

1. **Trademarks:** Trademarks are regulated by Federal Decree Law No. 36 of 2021 On Trademarks and Geographical Indications (effective as of January 2, 2022). Trademarks, designs, and logos can all be registered with the UAE Ministry of Economy. The UAE has also recently signed the Madrid Protocol,

an international treaty enabling trademark owners in one member country to protect their trademarks in other member countries via single filings with the World Intellectual Property Organisation (WIPO); it became effective in the UAE as of December 18, 2021. (https://www.wipo.int/madrid/en/) In the UAE, enforcement proceedings can be brought against suppliers of counterfeit goods and unauthorized sellers, with various sanctions and remedies available, including provisional prevention measures, seizures and confiscations, criminal sanctions, and damages covering lost profits.

2. **Patents:** In 2021, the UAE adopted a new law on industrial property rights, Federal Law No. 11 of 2021 on Regulation and Protection of Industrial Property Rights. Wide protection in respect of patented IP and other industrial property can be obtained in the UAE. The Ministry of Economy's Centre for Patent Registration is the competent registration authority. Previously, patent protection could also be achieved via filing patent applications to the Patent Office of the Gulf Cooperation Council (which includes the UAE and other Gulf states, such as Saudi Arabia) in Riyadh, however, the Patent Office does not currently accept new applications due to ongoing IP law reforms in the region.

3. **Copyright:** Copyright is regulated by the 2021 Federal Decree-Law No. 38 of 2021 on Copyrights and Neighbouring Rights. The UAE is party to international treaties, including the Berne Convention for the Protection of Literary and Artistic Works 1886, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, and others. In 2022, the UAE also launched a first collective management organization (CMO) in respect of IPRs, such as to enable the collection of certain royalty payments within the Gulf states. In the UAE, copyright can be registered with the UAE Ministry of Economy. Although registration is not mandatory, it ensures a verifiable record of the content of work as it existed at a specific time. This can be valuable evidence if a dispute arises and an author needs to prove a copyright claim (e.g., in a case concerning breach of copyright materials in a technology transfer project). While in most cases a license is required for a third party to use copyright-protected items, third parties can rely on the doctrine of “fair use” in certain circumstances to use copyright work even without a licensor’s permission, or apply to court for mandatory licenses.

However, when seeking to protect or exploit IP, companies should be mindful of a number of unique challenges under UAE laws, including the following:

- registration of IP in the UAE, which violates public order or public morals specific to the UAE, may not be possible;
- while an author may contract for the disposal of future works, a disposal by an author of the total body of his or her future intellectual work or more than 10 future copyright works is void;
- notwithstanding the limitation of disposal of future works, in most cases employers are deemed to be owners of works created by their employees during the course of employment;
- with respect to patents, inventions which are created in the context of employment and relate to the employer's field of activities by an employee whose employment agreement does not require inventive activity, belong to the employee, unless the employer notifies the employee otherwise, within four months of becoming aware of the invention, and pays remuneration for the invention;
- with respect to copyright, license agreements must be entered into in writing, and could be registered with the authorities (for which purpose they should be in or translated into Arabic);
- a trademark licensee does not have a right to initiate certain types of legal proceedings in its own name against infringing entities;
- authors with respect to copyright, and inventors with respect to patents, are entitled to remuneration for creation of IP and to seek a review of any consideration agreed upon with the transferee as to whether it is fair; and
- moral rights cannot be waived or assigned (including a right to prohibit modification and a right to withdraw a

work from circulation), even if the author has assigned economic rights (however, considerable limitations are now in place on how these rights can be exercised).

Companies looking to develop, protect, or exploit IP in the UAE need to give thought to including mechanisms in their contracts to address these challenges:

- if a company is licensing its IP, it should oblige the licensee to register any licenses in the UAE and notify the company of claims relating to IP infringements;
- each company should establish contractual and organizational arrangements in respect of IP with its employees and contractors, in particular, it should have specific provisions on ownership of IP in underlying agreements, require employees and contractors to notify to the company creation or any relevant IP, and potentially execute retrospective assignments subject to remuneration, if appropriate; and
- when dealing with moral rights, impose clear compensation obligations in the event that an author seeks to exercise them to the prejudice of the owner of economic rights to the IP, e.g., by withdrawing their work from circulation.

In addition, companies should consider taking steps to register IP ownership rights or licenses independently of any underlying agreement relating to such IP.

Data Protection and Cybersecurity

Data is one of the most valuable assets of a company. The UAE recognizes this, and therefore operates a complex legal framework that has sought to impose data handling obligations with respect to various forms of data.

In September 2021, the UAE issued its first comprehensive federal level Data Protection Law, Federal Decree No. 45 of 2021 (Data Protection Law), which became effective in January 2022 and will become enforceable six months after the publication of forthcoming Implementing Regulations.[7] The Data Protection Law applies to organizations in the UAE that process personal data (information relating to an identified or identifiable individual, e.g., employees, business contacts, website visitors), and to organizations outside of the UAE that process personal data of individuals who are located in the UAE. This means that an organization is in scope of the Data Protection Law if it offers goods or services to individuals in the UAE, or otherwise processes UAE individuals' personal data, even if the organization has no local UAE presence.

The Data Protection Law contains similar concepts and compliance requirements as other international privacy regimes such as the European Union General Data Protection Regulation (GDPR), however, organizations should consider some areas of divergence. Some of the key compliance requirements include:

- compliance with data processing principles, including a requirement to process personal data fairly, lawfully, and transparently, to only process personal data for specified purposes, to limit personal data processing to the minimum personal data necessary, and to apply appropriate technical and organizational security measures to protect personal data;
- providing individuals with privacy notices;
- having a legal basis for processing personal data, such as the prior consent of the individual or a legal obligation to process personal data;
- responding to individuals' rights requests, such as providing individuals with a copy of their personal data and amending and deleting personal data on request;
- maintaining a detailed record of the organization's personal data processing operations;
- notifying the UAE Data Office, and in some cases impacted individuals, of a personal data breach; and
- implementing a valid transfer mechanism to transfer personal data outside of the UAE.

Possible penalties (e.g., fines) for non-compliance with the Data Protection Law will be set out in the Implementing Regulations.

Organizations should review their current data protection compliance program to assess gaps which need to be remedied to comply with the Data Protection Law.

In addition to the federal level Data Protection Law, organizations should also be aware of a number of free zone and sector-specific data protection laws in the UAE. The Data Protection Law does not apply to the processing of certain types of personal data which are subject to sector-specific data protection legislation (such as the processing of health data and banking and credit data). The Data Protection Law also does not apply to processing within scope of certain free zone-specific data protection laws, such as the DIFC and ADGM. Many organizations will therefore need to navigate both sectoral and free zone-specific data protection laws, alongside the new Data Protection Law.

Further, other UAE laws impose a number of additional data protection requirements and rights, such as those relating to consumer protection and cybercrimes, including:

- a right to freedom and confidentiality of communications. Individuals have a right to complain about invasions of this right to privacy;
- it is a criminal offence to publish personal data (such as photos) relating to an individual without their consent;
- it is a criminal offence to access or disclose certain communications without consent; and
- there is a prohibition on the invasion of an individual's privacy by means of an IT system without the individual's consent and unless otherwise authorized by law.

Given the complex framework of obligations applicable to processing personal data in the UAE and personal data about individuals in the UAE, we recommend to always obtain specific advice prior to processing personal data. Organizations that process personal data should adopt and maintain industry-standard data security measures.

Governing Law

Jurisdictions which have, and rely upon, large bodies of case law (particularly common law jurisdictions such as the US and the UK) tend to have more developed bodies of commercial and corporate law than the UAE. The same is true, to an extent, of other civil law jurisdictions as well. Laws and cases in the UAE tend not to be as readily available, or available with reliable English translations, as in those other jurisdictions. Accordingly, when a foreigner enters into contracts with a party located in the UAE (other than an entity connected to federal or emirate governments), non-UAE law is commonly selected, with a notable tendency to select English law (or, in some instances, New York law or Delaware law) as an alternative.

Companies should to ensure that the selection of a governing law is made expressly, that the selection of a governing law extends to non-contractual obligations arising out of or connected to the relevant contract (where appropriate), and that the selection and/or the law itself will be recognized in any enforcement action in the UAE. Parties should also be aware that the selection of a non-UAE law will not prevent mandatory rules of UAE law impacting on contractual obligations in some circumstances (especially if contractual obligations are performed in the UAE or if enforcement is sought in the UAE).

While including such provisions may be helpful as a matter of practice, whether a foreign jurisdiction or arbitration clause would be recognized by the UAE courts in practice remains uncertain. The UAE Civil Code and general law in the UAE gives the UAE courts broad powers to hear and adjudicate matters involving a UAE party, therefore inevitably prompting a risk that a UAE court could purport to take jurisdiction over a matter despite an express provision providing for an alternative jurisdiction. UAE legislation provides that the UAE courts have jurisdiction to hear actions brought against UAE nationals, UAE corporate entities, and foreign citizens having an address or place of residence in the UAE, irrespective of any agreement between the parties in respect of jurisdiction and applicable laws.

Dispute Resolution

Arbitration

International arbitration is the preferred method of dispute resolution for cross-border transactions relating to the UAE. The primary reason for that, and one of the key features of international arbitration, is the relative ease with which arbitral awards can be enforced in countries around the world due to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which well over 140 countries are a party. The UAE acceded to the New York Convention in 2006, which means that foreign arbitral

General Legal Considerations

awards should be as easily enforced within the UAE as local arbitral awards. As a result, many parties doing business in the UAE (both foreign- and locally based) tend to refer any disputes arising out of or in connection with their contracts to final and binding arbitration.

Dispute Resolution Options in the DIFC

The DIFC Courts' jurisdiction includes matters which are referred to the DIFC Courts by private parties on a consensual basis, whether or not such parties are DIFC-domiciled entities, in addition to all matters pertaining to the parent companies of DIFC-registered branches.[8] The practical effect of these changes is to enable non-DIFC persons to opt in to the jurisdiction of the DIFC Courts, including through the inclusion of forum selection clauses in ordinary commercial contracts and finance documents, irrespective of a nexus to the DIFC.

In 2021, Dubai Decree No. 34 of 2021 abolished the DIFC Arbitration Institute and transferred its jurisdiction to the Dubai International Arbitration Centre (DIAC). Arbitration in the DIFC Courts subject to a DIFC-LCIA Court of International Arbitration (LCIA) are now procedurally governed by the DIAC Arbitration Rules 2022. These rules have been adapted to reflect the latest developments in the international arbitration field, the needs of the business community, as well as containing provisions on expedited arbitration and an alternative process for appointing arbitrators.

A common concern that remains with respect to DIFC Court judgments is the procedure for enforcement of those judgments. At least within the UAE, however, established procedures and codified guidelines ensure that DIFC Court judgments are adequately enforced by the Dubai Courts or the other emirates of the UAE. Pursuant to the Protocol of Enforcement between the Dubai Courts and the DIFC Courts (Protocol of Enforcement), all judgments, orders, and awards issued or certified by the DIFC Courts will be enforced by the Dubai Courts, provided that the relevant judgment or order has been translated into Arabic and constitutes a final judgment.[9] Crucially, the judge recognizing and executing the judgment at the Dubai Courts has no authority to review the merits of an order or judgment during any enforcement proceeding. The procedure established by the Protocol of Enforcement essentially facilitates the conversion of a DIFC Court judgment into an order of the Dubai Courts. Thereafter, automatic enforcement can be achieved not only onshore in Dubai, but in the other emirates of the UAE as well.

Nevertheless, the question remains as to whether the courts of other GCC countries will similarly enforce an order of the DIFC Courts that has been converted into a Dubai Court judgment pursuant to the Protocol of Enforcement. In theory, a region-wide treaty should support pan-GCC enforcement — the GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegations (GCC Convention). This treaty provides that all member states shall ensure that their domestic courts enforce the final judgments of the courts of other member states. However, the GCC Convention authorizes the courts of member states to reject enforcement if the judgment in question is deemed to be contrary to the provisions of Islamic *Shari'ah*, the provisions of a member state's constitution or public order.

Competition Law

The UAE regulates competition through an extensive framework of laws, implementing regulations, and cabinet resolutions (primarily Federal Law No. 4 of 2012 on the Regulation of Competition, the Implementing Regulations of the Competition Law of 27 October 2014 along with Cabinet Resolutions No. 13 of 2016 and No. 22 of 2016 (collectively, the UAE Competition Laws)).

Primarily, the UAE Competition Laws regulate the following:

- Restrictive Agreements — agreements which abuse, restrict, or prevent competition, including agreements that aim to fix purchase or sale prices of goods or services, are prohibited.
- Abuse of Dominance — parties with a dominant position in a market (defined as a market share of more than 40%) are prohibited from taking any action which limits or prevents competition. This effectively prevents actions such as predatory pricing, refusal to conduct transactions with certain parties, or forced cross-selling.
- Merger Control — Merger filings are also required for proposed transactions if (1) the combined market share of the parties to the transaction exceeds 40% of the relevant market; and (2) the economic concentration would affect competition in the UAE market or enhance

a preexisting dominant position. If the thresholds specified are met, the parties are required to request approval from the Competition Department in writing prior to concluding the transaction.

The UAE Competition Laws provide an exemption for establishments owned or controlled by the UAE federal government or a local government of an emirate according to the controls specified by the cabinet. This exemption also applies to all acts carried out by establishments under the control of the UAE federal government or local government of an emirate if either (1) an establishment is fully owned by the UAE federal government or a local government of an emirate; or (2) an establishment is no less than 50% owned by the UAE federal government or a local government of an emirate.

المرسال

Al-Mirsal

Please visit www.al-mirsal.com to view Latham's Middle East blog, which is produced in English and Arabic and highlights industry and legal developments relevant to the region.

Endnotes

1 We are aware of some corporate service providers in the UAE offering shelf companies incorporated in certain free zones.

2 These business activities and corresponding government agencies include, among others: industrial projects (Ministry of Finance), health services (Ministry of Health/ relevant health authority depending on the emirate where such service will be provided), engineering consultants and related technical services (municipality authority of the relevant emirate), law firms (the Ruler's Court of the relevant emirate, e.g., Government of Dubai Legal Affairs Department), banking and financial services (UAE Central Bank), recruitment agencies (Ministry of Human Resources & Emiratisation), sea cargo, freight forwarding, and cargo clearing (Department of Ports and Customs).

3 Civil companies may only be established in the emirates of Dubai and Sharjah and are typically established to practice certain types of professions, and are subject to separate rules and regulations.

4 The activities with strategic impact are (1) security and defence activities; (2) banking and finance companies (regulated by the Central Bank); (3) printing currency or bank notes; (4) telecommunications; (5) Hajj and umrah (pilgrimage) services; and (6) fisheries-related activities.

5 The relevant license will be issued by the free zone authority regulating the free zone in which the company is incorporated. In certain instances, a free zone entity may be able to apply for an additional license from a UAE authority that has jurisdiction outside of the free zone (for example, the Dubai Department of Economic Development) if it is conducting certain kinds of permissible business in a particular emirate outside of the free zone of incorporation.

6 With the introduction of holding companies, the Companies Law also includes a definition for "subsidiaries" in the context of holding companies.

7 As of the date of publication (April 2023), the Implementing Regulations have not been published and it is not clear when they will be published.

8 Dubai Law No.12 of 2004 as amended by Dubai Law No.16 of 2011.

9 The Protocol of Enforcement extends to arbitral awards issued by the DIAC, however, these awards must first be ratified by the DIFC Courts before being enforced by the Dubai Courts.

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