MIDDLE EAST COMMITTEE

2015 Year in Review

Advance Copy*

EDITOR

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*This publication of the Middle East Committee of the American Bar Association Section of International Law (SIL) is a complete copy of the Committee’s contribution to the SIL’s forthcoming Year-in-Review publication. The articles appearing herein cover their respective topics as of December 1, 2015, unless otherwise indicated. The contributors to this publication are responsible for the information and views conveyed in their respective articles; the editor is also responsible for all other content. This advance copy may be edited for publication in final form in the Year-in-Review.
EDITOR’S INTRODUCTION

Welcome to the Middle East Committee’s review of select 2015 Middle East legal and regulatory developments. The Committee is pleased to share with its members and friends this advance, full copy of its contribution to the ABA Section of International Law’s forthcoming 2015 Year-in-Review.

This publication covers legal developments that advance key policy priorities, such as measures designed to bolster foreign and private investment in Saudi Arabia and Kuwait and a new UAE companies law that, among other things, enhances regulatory clarity and corporate governance in line with international standards. Also in the UAE, a new common law forum—at the recently opened Abu Dhabi Global Market—is discussed, including its potential implications for choice of law and forum selection domestically and regionally. On the labor and employment law front, our contributors cover important developments in Qatar and Saudi Arabia—both jurisdictions have amended their laws to reflect the interests of employers, employees, and regulators.

The Iran Nuclear Deal—clearly of regional and global scope and significance—is covered, with discussion of the P5+1 Joint Comprehensive Plan of Action (JCPOA), sanctions issues, the views of Iran’s leadership, and some expected consequences for business. In the rule of law sphere, a case from Turkey—the “Sledgehammer” case—is described in intriguing detail, demonstrating one intersection of politics, the law, and the judiciary, and how a domestic matter can take on cross-border dimensions for Turkey, a country that bestrides Europe, Asia, and the Middle East physically, culturally, and politically.

In acknowledgement of Syria, this publication closes with selected excerpts from a poem—a tribute to Syria’s people, culture, and places—by the late Syrian poet Nizar Qabbani, whose work has long been celebrated in the Arabic-speaking world. While not the subject of an article in this publication—and beyond its scope and capacity—Syria does and should loom large in the minds of legal professionals concerned with fundamental issues of international law and policy, such as: sovereignty and its limits; power and its limits; the laws of armed conflict and their enforcement; the roles and accountabilities of domestic and foreign state and non-state actors; the rights of children and refugees; and, the efficacy and consistency of the “international system” in enforcing international law and upholding declared international norms.
Finally, I extend the Committee’s sincere thanks to each and all of the authors who, on behalf of the Committee, have contributed their time and talents to this publication and the forthcoming Year-in-Review. Thanks also to the editors of the Year-in-Review for their hard work.

I hope that, like me, you find this publication to be informative and of relevance to your law practice or other business.

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The Iran Nuclear Deal*

Sarah Oliai**

The “#IranDeal is not a ceiling but a solid foundation. We must now begin to build on it,” tweeted Iranian Foreign Minister Mohammad Javad Zarif on July 14, 2015, as Iran reached agreement on its nuclear program with the permanent members of the United Nations Security Council and Germany. Full implementation of the Joint Comprehensive Plan of Action (JCPOA) will significantly change the Iranian nuclear program and accompanying sanctions regimes.

Key aspects of the JCPOA restrict Iran’s nuclear program in many ways over several years, including: prohibitions on weaponization activities, research, and development; restrictions on acquisition, enrichment, and stockpiling of plutonium and uranium; multifaceted restrictions on specific facilities and centrifuge manufacturing; and continuous access to facilities and monitoring by the International Atomic Energy Agency (IAEA). In exchange, the European Union and United States will provide sanctions relief in several sectors, including nuclear-related sanctions, energy sectors, financial and banking measures, and U.S. licensing for commercial

*Editor’s Note: This article was revised in February 2016.

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1 Javad Zarif (@JZarif), TWITTER (July 14, 2015, 6:24 AM), https://twitter.com/JZarif/status/620946867371810816; see also Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif, Vienna, 14 July 2015, EUROPEAN UNION, EXTERNAL ACTION (July 14, 2015), http://eeas.europa.eu/statements-eeas/2015/150714_01_en.htm. The five permanent members of the U.N. Security Council are China, France, Russia, the United Kingdom, and the United States (collectively, the P5; with Germany but excluding Iran, the parties to the JCPOA are the P5+1).


passenger aircraft and related parts. Importantly, the JCPOA contains “snap back” provisions, whereby sanctions can be re-imposed in the event of significant non-performance.\footnote{See JCPOA, Annex II – Sanctions-Related Commitments, U.S. DEPARTMENT OF STATE (July 14, 2015), available at \url{http://www.state.gov/documents/organization/245320.pdf} (specifying in note 6 at page 8 application of these commitments for non-U.S. persons; U.S. persons and U.S.-owned or U.S.-controlled foreign entities will still be generally prohibited from conducting transactions of the type under the JCPOA without authorization by the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC)).}

Arrangements to its Safeguards Agreement on Implementation Day. With the IAEA’s verification that Iran met its commitments, January 16, 2016 marked Implementation Day when sanctions waivers took effect.

Even before Implementation Day, some Western companies were looking east. Sephora, a French cosmetics company, was reportedly in talks with distributors in Iran to open several stores in 2016. In November 2015, the U.S. Department of the Treasury’s Office of Foreign Assets Control expanded its list of medical supplies available for export to Iran under general licensing (31 C.F.R. 560.530(a)(3)), creating potential for increased sales of medical supplies to Iran. U.S. waivers also include licensing for the sale of commercial passenger aircraft and related parts.

As others look in, Iran is looking outward. Currently, Iran is working to increase its oil production. Even before the JCPOA was finalized, senior executives from Royal Dutch Shell,
Total, and Eni met with Iran’s oil minister to discuss “potential areas of cooperation with Iran, assuming sanctions are lifted.”

Iranian President Hassan Rouhani visited several European countries in late January while Iran announced significant deals with companies including Airbus and Peugeot. Sanction waivers will also allow Iran to export pistachios, carpets, caviar, and saffron to the United States.

However, Iranian Supreme Leader Ayatollah Ali Khamenei has said the nuclear deal will not lead to détente with the West. With snap back provisions for noncompliance embedded in the JCPOA and U.N. Security Council Resolution 2231, others may be hesitant to rush to Iran for business without greater certainty in the regulatory landscape. Even with full compliance under the JCPOA, “U.S. statutory sanctions focused on Iran’s support for terrorism, human rights abuses, and missile activities will remain in effect and continue to be enforced.”

The JCPOA is the most recent piece of the international community’s response to curbing Iran’s nuclear program, and full compliance with the agreement will significantly alter the regulatory and political landscape for the next decade and beyond.

21 See, e.g., Brian Murphy, Iran’s Leader Backs Nuclear Deal with Warning to West over Sanctions Relief, WASHINGTON POST (Oct. 21, 2015), https://www.washingtonpost.com/world/irans-leader-backs-nuclear-deal-with-warning-to-west-over-sanction-relief/2015/10/21/12de5b54-77ec-11e5-bc80-9091021aeb69_story.html.  
23 Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA), supra note 2, at 3.
New Companies Law; Public-Private Partnerships; Privatization of Public Projects; New Capital Markets Law to Watch

Ibrahim Sattout and Dania Dib*

In 2012, the Kuwait parliament promulgated the New Companies Law (NCL)\(^1\) which substantially changed the corporate legal landscape in Kuwait. Amongst the changes introduced, the NCL allowed for the creation of new types of companies, recognized shareholders agreements and convertible bonds and *sukuk* (Islamic “bonds”), and accelerated and modernized the incorporation process.

During 2014 and 2015, the Kuwait legislature continued to modernize the regulatory frameworks for businesses and foreign investors. We highlight below the most significant legal developments of 2014 and 2015.

Public Private Partnerships

Law no. 116 of 2014 pertaining to public private partnerships projects (PPP Law) was issued on August 17, 2014\(^2\) and became effective in April 2015 upon the issuance of its executive regulations.\(^3\) The PPP Law repealed BOT (Build Operate Transfer) Law no. 7 of 2008 and introduced substantial changes to the existing regime. The PPP Law and its executive regulations, amongst other things:

1. established the Kuwait Authority for Partnership Projects (KAPP) with wider powers;

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(2) created a competition committee to supervise the bid process;

(3) required a winning consortium to establish one or more consortium companies to hold the consortium’s shares in the project company;

(4) expressly provided that the public tenders law will not apply to PPP projects; and,

(5) established a grievance committee to receive and resolve grievances resulting from the procurement process which did not exist under the BOT Law.\(^5\)

The new regime outlines in detail the bid process, from the expression of interest to the conclusion of the partnership contract.

In addition, the PPP Law and its executive regulations exempted foreign nationals from restrictions on foreign ownership of shares in Kuwaiti companies. Thus, the project and the consortium companies established under the PPP Law may have foreign shareholders with more than 49% of the capital.

Most importantly, under the new regime an investor may now provide security over certain assets of the project owned by the investor, the proceeds of the project, its shares in the project company and in the consortium company. In addition, the new security regime recognized step-in rights for the first time in Kuwait and regulated the direct agreements to be entered into between the parties. In addition, lenders are now permitted, in the event of default of the investor, to acquire the investor’s pledged shares in the project company or request their sale.

The PPP Law and its executive regulations resolved the uncertainty created by the previous regime in respect of the ownership of shares which are not subscribed by the public. Under the PPP Law, at least six percent but not more than 24 percent of the shares shall be allocated to public entities, no less than 26 percent is to be allocated for subscription by the winning bidder, and the remaining 50 percent is reserved for Kuwaiti nationals. Pursuant to the new regime, the 50 percent allocated to Kuwaiti nationals shall be held by KAPP on behalf of Kuwaiti nationals until commencement of operations. However, where the value of shares


\(^5\) See Law No. 7 of 2010, Kuwait Al Yom No. 964 of February 28, 2010, Page A.
reserved for subscription by Kuwaiti nationals and fractional shares resulting from the
distribution process have not been settled, KAPP may, at its discretion, sell the same at market
value to public entities or the winning bidder, or on the stock market.

Promotion of Foreign Direct Investment

In 2013 the Kuwaiti legislature created a new legal framework for the promotion of
foreign investment in Kuwait through the promulgation of Law no. 116 of 2013 (PDI Law).\textsuperscript{6} The
new regime entered into force on December 14, 2014 upon the issuance of its executive
regulations.\textsuperscript{7} The PDI Law established the Kuwait Direct Investment Promotion Authority,
repealed law no. 8 of 2001, and addressed a number of the foreign investors’ concerns which
were not previously covered. It is hoped that these changes will align Kuwait with the other
countries in the region in terms of attracting foreign investments.

Under the PDI Law, foreign investors may now establish a presence and operate in
Kuwait without the participation of a Kuwaiti partner, through one of three vehicles: (1) a
Kuwaiti entity fully owned by the foreign investor; (2) a branch, or (3) a representative office
(authorized to study the market and opportunities without conducting actual commercial
activity). The PDI Law also details processes to obtain all needed registrations and approvals, as
well as tax and duties exemptions.

To be eligible for a license under the PDI Law, a foreign investor must satisfy certain key
criteria, including demonstrating that its activities will lead to the transfer of technology,
modern methods of governance, practical and technical experience, advanced technical
marketing to Kuwait, and jobs creation.

Qualifying foreign investors may benefit from all or some incentives and exemptions of
the PDI Law, such as exemption from paying income tax for up to 10 years from the starting
date of operations. In addition, an investment may be wholly or partially exempted from
customs duties on import of machinery, tools, spare parts, raw materials, and semi-processed
goods. The investment is also protected against forfeiture or expropriation, and may be

\begin{itemize}
  \item \textsuperscript{6} \textit{Kuwait Al Yom} No. 1136 of June 16, 2013, page 113(A).
  \item \textsuperscript{7} Resolution No. 502 of 2014, \textit{Kuwait Al Yom} No. 1214 of February 14, 2014.
\end{itemize}
transferred to another foreign or a Kuwaiti investor. Additionally, the repatriation of dividends, capital and returns is permitted without limitation.

**Privatization of Public Projects**

In an effort to attract the private sector to become more involved in public projects, the Kuwait legislature promulgated in 2010 the privatization law\(^8\) which sets the general rules for privatization and for opening public services and state-owned companies and projects to the local and foreign private sector. The law also provides for the establishment of the Supreme Council for Privatization.\(^9\) The executive regulations of the law were issued in 2015.\(^10\)

The law and its executive regulations emphasize consumer protection; preservation of the environment and national wealth and resources; and the protection of employees, particularly Kuwaiti employees. The law also imposes certain limitations and excludes certain sectors from the law’s ambit, such as education, health, and oil and natural gas production and refineries.

Under the privatization regime, in order to be privatized, projects should be wholly owned by the state and should already exist. Moreover, shares of companies to which a public project is to be transferred should be distributed as follows: (1) 35 percent auctioned to joint stock companies listed on the Kuwait Stock Exchange and other companies approved by the Supreme Privatization Council; (2) 20 percent to be held by governmental entities; (3) five percent to be subscribed by existing project employees; and, (4) 40 percent sold equally to all Kuwaiti nationals.

**Capital Markets Law to Watch**

In the wake of the 2008 financial crisis, governments around the world have made tremendous efforts to create new regulatory regimes capable of assessing the risks arising from the volatility of capital markets. Kuwait’s regulators followed the trend and issued the first law

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\(^8\) Law no. 37 of 2010.


regulating the capital markets in 2010.\textsuperscript{11} To fill gaps and further enhance the rules which appeared following the law’s implementation and its bylaws issued in 2010 and 2013, regulators introduced the first major change to the existing regime in 2015. On November 10, 2015,\textsuperscript{12} the Kuwait Capital Markets Authority (CMA) formally issued amendments to the bylaws. Notably, the CMA has incorporated into the amended bylaws most, but not all, of its previously issued resolutions and directives. We look forward to following the capital market practice in the coming months to determine how it will be affected during the period when the amendments are implemented.

\textsuperscript{11} See Law No. 7 of 2010, \textit{Kuwait Al Yom} No. 964 of February 28, 2010, Page A. The Executive Bylaws were issued in 2011; See Kuwait Al Yom No. 1018 of March 13, 2011, page E.

\textsuperscript{12} Decision No. 72 of 2015, \textit{Kuwait Al Yom} No. 1261 of November 10, 2015.
QATAR

Labor Law Amendments

Emma Higham and Yasser Shabbir*

Amendment to Labor Law Article 66

Article 66 of the Qatar Labor Law No. (14) of 2004 (Qatar Labor Law) was recently amended by Law No. (1) of 2015 (the Amendment). Article 66 previously required that salaries (Salaries) and any other sums to which an employee is entitled under a contract of employment be paid to the employee's account at a bank agreed upon between the parties, or to an agent appointed by the employee. Payment now must be made directly from the employer's local Qatari account into a Qatari account in the name of the employee. The new system creates an entirely domestic transaction between the employer and employee. The Amendment applies to employees whose employment is governed by the Qatar Labor Law.

Article 66 remains the same notwithstanding the Amendment, insofar as Salaries must continue to be paid in Qatari currency. Furthermore, Salaries of employees employed on an annual or monthly basis must be paid at least once monthly. Salaries of all other employees must be paid at least every two weeks. The material change is that once the Amendment takes effect, an employer will be obliged to transfer the Salaries directly into employees' Qatari accounts within designated time periods.

Ministry of Labor Decision on Wages Protection System

The Minister of Labor and Social Affairs (Minister) recently issued Decision No. (4) of 2015 (Decision) setting out both the controls and procedures required to apply the Amendment.

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1 Qatari laws (save for those issued by the Qatar Financial Centre to regulate internal business) are issued in Arabic and there are no official translations, therefore for the purposes of drafting this article we have used our own translations and interpreted the same in the context of Qatari regulations and current market practice.
which it refers to as the Wages Protection System (WPS). The Decision was published in the Official Gazette on 7 July 2015 and took effect the following day.

The WPS's stated aim is to ensure an employer's payment of Salaries on specified dates and in accordance with employment contracts and applicable Qatari laws. The Decision requires employers to transfer Salaries via the WPS to the appropriate Qatari banks and financial institutions within a period of seven days following the salary due date specified in the employment contract. An employer will only be relieved of its payment obligations after the transfer has occurred and the monies have been received by the Qatari banks and financial institutions.

The Labor Department may also request that a detailed report from an employer, in the form prepared by that department and approved by the Minister, showing the employer's approval of the payment of all of its employees' Salaries for a specified period of time.

**Penalties for non-compliance**

If an employer believes that it does not have sufficient time to put the necessary measures in place to accommodate the Amendment and implement the WPS, an employer is entitled to request an extension. The decision to grant an extension is dependent on the facts and circumstances of each case as presented, and ultimately is within the discretion of the Minister.

The Amendment has introduced a penalty for every employer who fails to comply with Article 66. The penalty may constitute either: (i) imprisonment of up to one month, and/or (ii) a fine of a sum between QAR 2,000 and QAR 6,000 per employee. In order for an imprisonment penalty to be issued to a corporate employer, an individual would need to be joined as a party to the claim. The individual would usually be the general manager or an authorized signatory of the employer. An unpaid employee will also remain entitled to submit a claim to the Labor Court.

Further, if an employer fails to transfer its employees' Salaries via WPS within seven days of the Salary due date, the Minister may either suspend the issuance of any new work permits to the employer and/or suspend all of the employer's transactions with the Ministry, provided that the suspension shall not include the authentication of any employment contracts. Suspension
may only be removed by the Minister, or his designee, once the employer submits proof that all unpaid Salaries have been transferred and received.

We understand that the Ministry has established a separate inspection unit in order to monitor compliance with the WPS.
SAUDI ARABIA

Foreign Investment Liberalizations; Labor and Employment Law Amendments; Draft Bankruptcy Law

Amgad T. Husein, * Mahmoud Abdel-Baky, † and Jonathan G. Burns‡

1. Introduction

Saudi Arabia is a jurisdiction that is constantly developing its many assets, including its infrastructure, local economy, knowledge base, and human capital. Policymakers and high level government officials in Saudi Arabia, including members of the Royal Family, continually seek to enhance and develop these assets year by year through implementation of new regulations, policies, and programs, as well as revision of existing regulations, policies, and programs.

In 2015, Saudi Arabia undertook several legal developments, including in the areas of foreign investment, amendments to labor and employment law regulations, a new companies law, and the start of a dialogue on a complete overhaul of the existing bankruptcy and insolvency law regime.

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2. Foreign Investment Liberalizations

Saudi Arabia has historically taken a protectionist and cautious approach to foreign investment. Fellow members of the Gulf Cooperation Council (GCC)1 enjoy the ability to invest and do business in Saudi Arabia on nearly the same level as Saudi Arabian nationals pursuant to the Economic Agreement between the GCC States.2 Nevertheless, non-GCC members face certain regulatory hurdles when attempting to invest and do business in Saudi Arabia.

2.1 CAPITAL MARKETS LIBERALIZATION

The Capital Market Authority (CMA) is charged with supervising, regulating, and nurturing the growth of the sole stock exchange in Saudi Arabia, Tadawul. Since the official inception of Tadawul in the 1980’s, trading thereon by foreign persons, firms, and institutions has been severely restricted. Indeed, since only citizens of GCC member-states and natural foreign persons holding a highly coveted residency permit could own, buy, and sell securities directly on the Tadawul, foreign firms and institutions could only invest in the market through a third party by engaging in equity swaps, mutual funds, and exchange-traded funds and were not permitted to directly hold ownership over the securities.

On 21 July 2014, the Council of Ministers issued Resolution No. 388 dated 24/9/1435H giving the CMA the authority to promulgate rules easing the restrictions on foreign participation in the Tadawul. Shortly thereafter, on August 21, 2014, the CMA issued a draft of the Rules for Qualified Foreign Financial Institutions Investment in Listed Shares (the Rules) for public comment for a period not to exceed 90 days.

Following the public comment period, the final Rules were issued and put into force on 4 May 2015, which largely mirror the draft form of the Rules that were initially released. In large part, the Rules seek to allow "Qualified Foreign Investors" (QFIs) and their clients to enter the market with the ability to directly own, buy, and sell listed securities upon receiving registration from the CMA as such.

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1 The member states of the GCC are six: Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman.

2.1.1 Qualification as a QFI

In order to be registered as a QFI by the CMA, an entity must first submit its application for registration to an Assessing Authorized Person (AAP). The AAP is charged with investigating the application and determining the applicant’s compliance with the Rules. Particularly, the Rules require that an entity applying for registration as a QFI must:

(a) be a bank, brokerage or securities firm, fund manager, or insurance company;

(b) be licensed or otherwise subject to regulatory oversight by a regulatory authority in a jurisdiction with securities regulation standards no less vigorous than those enforced by the CMA;

(c) have not less than SAR 18.75 billion (USD 5 billion) assets under management (AUM) (though the CMA has discretion to reduce this required amount to SAR 11.25 billion (USD 3 billion)), which shall include assets held by the applicant or its group for the purpose of investment as well as assets managed by the applicant or its group on behalf of others; and

(d) have at least five years of experience in the securities business industry.

Upon determination of the same, the AAP shall submit the applicant’s application to the CMA for review.

2.1.2 Additional Rules for QFIs Acting on Behalf of Clients

The Rules provide that a QFI must satisfy additional requirements in order to invest in the Tadawul on behalf of clients of the QFI. First, the clients must be individually approved by the AAP as a QFI Client, which is achieved by submitting an application on behalf of each client to the AAP, who shall examine the application against the Rules. Thus, the applicant must:

(a) notify the AAP of its intention to invest on behalf of clients;

(b) disclose the identities of the clients to the AAP; and

(c) undertake to be responsible for the management of the clients’ Tadawul investments.
In accordance with the Rules, a client may only be approved as a QFI Client if it is:

(a) a collective investment scheme (such as an investment fund) incorporated or licensed in a jurisdiction with securities regulation standards no less vigorous than those enforced by the CMA; or

(b) a financial institution that satisfies the requirements in paragraphs 2.1.1(a) through 2.1.1(d) above.

Unlike the applicant’s application for registration as a QFI, the clients’ applications to be qualified as QFI Clients are not required to be submitted to the CMA for approval, but are subject to the discretion of the AAP.

Finally, additional clients may be approved as QFI Clients after the applicant has been successfully registered and has commenced trading.

2.1.3 Application Procedure

Upon receiving the application, the AAP has five days to determine whether it is in compliance with the Rules. Within one day of such determination, the AAP must notify the CMA of its determination and provide a brief statement supporting the same. The CMA then must make a final determination "without delay."

2.1.4 Ongoing Restrictions on and Requirements of QFIs

After receiving approval as a QFI, the QFI and its QFI Clients (if any) are subject to ongoing restrictions and requirements.

(a) Limitations on Foreign ownership

While the Rules do indeed liberalize restrictions on the trading activity of foreign investors in the Tadawul, they are still nonetheless narrowly tailored in some respects to constrain foreign investors in the market. Specifically:

(i) QFIs together with their affiliates (if any), and QFI Clients together with their affiliates (if any), may not own more than five percent of the total issued share capital of any one issuer listed on the Tadawul;

(ii) QFIs and QFI Clients in the aggregate may not own more than:
(aa) 20 percent of the total issued share capital of any one issuer listed on the Tadawul; and/or

(bb) 10 percent of the total issued share capital of all issuers listed on the Tadawul; and

(iii) foreign (non-GCC) investors (including both QFIs and non-QFIs) in the aggregate may not own more than 49 percent of the total issued share capital of any one issuer listed on the Tadawul, including interests acquired through equity swaps.

(b) Reporting and Disclosure Requirements

The Rules require a QFI to regularly provide reports on and disclosures of certain specified information.

(i) Annual Disclosures

The QFI must provide a copy of its annual report and consolidated accounts to its AAP every year.

(ii) Ongoing Disclosures

The QFI must immediately inform the AAP of certain specified “Notifiable Events.” These include, for example, the commencement of any bankruptcy, insolvency, criminal, legal, or regulatory proceedings against the QFI or any of its QFI Clients in any jurisdiction, as well as any knowledge of a violation of the Rules committed by the QFI or any of its QFI Clients.

(iii) Waiver

Finally, notwithstanding all of the above, the CMA has absolute discretion to waive any or all of the Rules as applied to any applicant or client thereof upon direct application to the CMA, or at its own initiative *sua sponte*.

2.2 Liberalization of Wholesale and Retail Trade and Distribution Sector

Prior to Saudi Arabia’s 2005 accession to the World Trade Organization (WTO), non-GCC investors could hold only up to 51 percent ownership in wholesale trade and retail entities.
With the 2005 WTO accession, Saudi Arabia liberalized this restriction and allowed non-GCC investors to hold up to 75 percent ownership in wholesale trade and retail entities.

During the Custodian of the Holy Mosques King Salman’s visit to the USA in September 2015, which included meetings with prolific businesses and their representatives, the Saudi Arabian General Investment Authority (SAGIA) announced that non-GCC investors will be permitted to wholly own wholesale trade and retail entities in Saudi Arabia, subject to certain conditions.

The conditions for full non-GCC ownership of wholesale trade and retail entities in Saudi Arabia have yet to be revealed. Some potential conditions may include higher Saudization percentage requirements, higher paid-up capitalization requirements, and stricter training requirements for Saudi Arabian employees. It will be interesting to see what conditions are applied, as well as whether or not such conditions outweigh the benefits of full ownership in wholesale trade and retail entities in Saudi Arabia for non-GCC investors.

At present, SAGIA has only issued a press release (see https://www.sagia.gov.sa/en/Investor-tools/Press-releases/Announcement/) which invites international companies to submit an application, which will be assessed on a case-by-case basis for now. Thus, SAGIA is taking a slow, methodical, and cautious approach to the liberalization of this sector, which accounts for nearly ten percent of the local economy.4

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3 Saudization is the colloquial term used to refer to Saudi Arabia’s official government policy of encouraging the employment of Saudi Arabian nationals in the private sector. The policy of Saudization is enforced and implemented through several programs and regulations in Saudi Arabia, including the Nitaqat Program, which categorizes employers on a color-coded scale based on the industry in which they operate and the ratio of Saudi Arabian nationals in comparison to expatriates employed. Depending on the color in which the employer is categorized, certain penalties (or benefits) may apply.

3. **AMENDMENTS TO LABOR AND EMPLOYMENT LAW REGULATIONS**

Under Saudi Arabian law, the employment relationship between employer and employee is governed comprehensively by the Labor and Workmen’s Law (the Labor Law).\(^5\)

In early 2015, the Labor Minister announced an overhaul of the Labor Law that would include 38 amendments (the Amendments) to its statutory provisions. The Amendments were approved by HRH King Salman by Royal Decree no. D/46 dated 5/6/1436H. (corresponding to 25/3/2015G) and came into force on 18 October 2015 when they were published in the Umm Al-Qura, Saudi Arabia’s Official Gazette.

As a whole, the Amendments largely purport to boost Saudization and increase workers’ rights in general, while a small, but important, number of provisions cut in favor of employers. The below description summarizes ten noteworthy changes to the Labor Law out of the 38 total Amendments.

### 3.1 Notice Period and Judicial Remedies (Articles 75, 78, and 77)

Originally, Article 75 forbade the termination of an indefinite term (i.e., open-ended) contract without 30 days’ notice\(^6\) and a “valid reason.” Further, Article 78 originally gave an employee who was found to have been terminated for an “invalid reason” in violation of Article 75 the express right to petition for reinstatement in the position from which he was fired.

In this regard, Article 77 originally gave the Commission for the Settlement of Labor Disputes (the Labor Commission) wide discretion to award “indemnity” to the prejudiced party where a breach of Article 75 was determined, which in some cases included the reinstatement of a disgruntled and/or litigious employee.

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\(^6\) The 30-day notice period applied to monthly paid employees, while a 15-day notice period applied to all other employees. In practice, the vast majority of employers in Saudi Arabia pay their employees in arrears on a monthly basis.
(a) **Article 75**

Article 75 as amended now requires no less than 60 days' notice, as well as the original “valid reason,” to terminate an indefinite term contract.

(b) **Article 78**

Article 78 as amended now explicitly repeals a former employee’s express statutory right to seek reinstatement from the Labor Commission if it is determined that he was terminated for an “invalid reason.”

(c) **Article 77**

Article 77 as amended now allows the parties to specify liquidated damages in their employment contract in the case that either terminates the relationship without a “valid reason.” However, in the event that liquidated damages are not specified, the harmed party shall be entitled to an amount equivalent to:

(i) in the case of indefinite term contracts, 15 days wages for each year of employment; or

(ii) in the case of fixed term contracts, the wages due for the remaining period of the contract

which, in either case, is capped at an amount equivalent to two months of the employee’s wages.

Taken together, Articles 75, 78, and 77 as amended discontinue the possibility for former employees to seek reinstatement upon a finding that termination was without a valid reason. As well, the amendments allow the parties to specify liquidated damages in the case that such a finding is determined. However, liquidated damages provisions are not always upheld under Saudi Arabian law and are subject to the *Shari‘ah* (Islamic law) principle that a harmed party should be compensated only for actual losses, no more and no less.

It will be interesting to see how the labor courts will interpret liquidated damages provisions under amended Article 77. However, for current purposes, it may be worthwhile to include in all employment contracts a clause stating basically, that “the Employee hereby agrees
that the Employer’s liability to the Employee shall be limited to an amount equal to two (2) months of his base monthly wage.”

3.2 Probationary Periods (Articles 53 and 54)

The Labor Law provides that the employment contract may designate the first 90 days of employment as a probationary period wherein either party may terminate the contract without any liability.

Prior to their amendments, Articles 53 and 54 together limited an employee’s probation period to 90 days, with the exception that an employer who assigns an employee to different job responsibilities could place the employee on an additional 90-day probation period so long as both parties agreed in writing to the additional period.

(a) Article 53

Article 53 as amended states that the 90-day probation period may be extended by an additional 90 days by the written agreement of both parties. The language of the amendment is open to various interpretations, but it seems to require the employer and employee to come together at the end of the initial 90-day probation period and execute a separate, subsequent, additional written agreement to extend the probation period by an additional 90 days. That is, this amendment does not appear to allow the parties to simply set the probation period at 180 days in the employment contract from the outset.

(b) Article 54

Article 54 as amended states that, in addition to the event of an alteration of the employee’s job responsibilities, the employee can also be placed on an additional probation period if the “relationship between the parties has expired for a period of not less than six months,” which means that the employee can be placed on an additional probation period if/when he returns from a leave of absence of six months or more provided that both parties have agreed. Thus, before an employee takes a leave of absence of six months or more, the employer may wish to execute an agreement with him to the effect that the employee’s first 90 days back with the company will be on a probationary basis.
3.3 Non-Compete and Confidentiality Clauses (Article 83)

Originally, Article 83 stated that a former employee’s covenant not to compete and to protect the employer’s trade secrets upon termination must be in writing and specific in terms of the venue and type of work. It also required the covenants to be specific in terms of the duration, with the exception that the duration of the covenants could not exceed two years.

Article 83.1 as amended retains the rules with regard to covenants not to compete upon the employee’s termination.

Article 83.2 as amended severs the rule with regard to covenants to protect the employer’s trade secrets upon the employee’s termination from the two-year limitations period, but requires the covenant to be specific in terms of time. Thus, the employment contract may specify a fixed duration wherein the former employee is forbidden from disclosing the employer’s trade secrets that is in excess of the former two-year limitation period. The fixed duration should be reasonable, otherwise it may not be upheld by the labor courts.

Article 83.3 as amended provides that the employer may sue a former employee for a violation of Articles 83.1 and/or 83.2 within a period of one year of his discovery of the violation, even if the lawsuit is brought after the expiration of the fixed duration of the covenant. However, the violation must have been discovered within the fixed duration.

3.4 Geographic Relocation of Employee (Article 58)

Originally, Article 58 required a valid reason to transfer an employee to another geographic place of work in Saudi Arabia, provided that the transfer did not cause “serious damage” to the employee.

(a) Article 58.1

As amended, Article 58.1 allows the employer to transfer the employee to another geographic place of work in Saudi Arabia so long as the employee approves it in writing. Ostensibly, this approval can be obtained simply by including in the employment contract a provision whereby the employee pre-approves in writing the employer’s decision to transfer his geographic place of work, in case this ever becomes a necessity.
(b) Article 58.2

In addition, Article 58.2 as amended allows the employer to transfer the employee’s geographic place of work for any reason and without the employee’s approval for no more than 30 days per year so long as the employer bears the employee’s costs and expenses for doing so.

3.5 Leave for Female Employees (Articles 151, 152, and 160)

(a) Maternity Leave (Articles 151 and 152)

Originally, Articles 151.1 and 151.2 required an employer to provide maternity leave to a female employee beginning four weeks before the expected date of birth, as determined by a “physician of the establishment” or a medical certificate authenticated by a health agency, and extending six weeks thereafter.

Originally, Article 152 required payment of no less than half pay for a female employee with one to three years of service and full pay for a female employee with three years of service or more during their maternity leave. Further, Article 152 originally stated that a female employee who received maternity leave at half pay during a given year is entitled to only half pay during her annual leave, and a female employee who took maternity leave at full pay during a given year shall not be entitled to full pay during her annual leave as well.

(i) Article 151

Articles 151.1 and 151.2 as amended require the employer to give the female employee at least ten weeks of fully paid maternity leave, to be divided as the employee desires. However, she must take maternity leave for the six weeks immediately following delivery. Further, the employer must allow the female employee to begin her maternity leave at least four weeks prior to the date of birth, as determined by a medical certificate authenticated by a health agency. For example, a female employee can begin her maternity leave one week prior to the birth of her child, in which case she is entitled to nine weeks of paid maternity leave thereafter. In addition, a female employee on maternity leave has the right to extend the leave period one additional unpaid month.

Article 151.3 as amended provides that a female employee who gave birth to a child who is in need of permanent care due to sickness or other reasons shall be entitled to one
additional month of paid maternity leave, and may extend the leave one additional unpaid month, for a potential maximum of eighteen weeks of paid and unpaid maternity leave.

(ii) **Article 152**

Article 152 was repealed in its entirety, which means that female employees in all cases are entitled to fully paid maternity leave in addition to fully paid annual vacation leave.

(b) **Death of Husband (Article 160)**

Islamic law requires that a woman who has divorced or whose husband has passed away must observe an *iddah* period (during which she may not re-marry) in order to determine whether she is pregnant, in which case the child would be deemed to be a descendant of the deceased or ex-husband for custody and inheritance law purposes. Originally, Article 160 provided that a female employee whose husband passed away was entitled to 15 days paid leave.

(i) **Article 160.1**

Article 160.1 as amended provides that a Muslim female employee whose husband passes away shall be entitled to four months and ten days of paid leave and, if she is pregnant during this period, may extend the leave on an unpaid basis until birth. Any period of leave remaining after birth may not be rolled over.

(ii) **Article 160.2**

Article 160.2 as amended provides that a non-Muslim female employee whose husband passes away shall be entitled to the original 15 days of paid leave, and further permits the employer to request supporting documentation of the death in all cases.

### 3.6 Statutory Grounds for Termination (Article 74)

Originally, Article 74 contained five specified events where termination of the employment contract was expressly permitted. As amended, Article 74 adds three additional events where termination of the employment contract is expressly permitted, including:

- 74.6 final closure of the business;
- 74.7 termination of the activity in which the employee was engaged; and
74.8 any other reason provided by any other law.

In general, the addition of these three further events does not appear to be novel or drastic, as grounds for termination in Clauses 74.6 and 74.7 were in practice already covered by Clause 74.5 (providing for termination of the employment contract in the case of “Force Majeure”).

3.7 Compensation for Work Injuries (Article 137)

Before its amendment, Article 137 provided that an employee who suffered a work injury was entitled to compensation in the amount of his full pay for 30 days, plus 75 percent of his pay thereafter for the duration of his treatment up to one year, whereupon the employee would be classified as disabled and eligible for compensation. As amended, Article 137 provides that an employee who suffers a work injury is entitled to compensation in the amount of his full pay for 60 days, then 75 percent of his pay thereafter for the duration of his treatment up until one year, whereupon he shall be classified as disabled and eligible for compensation.

3.8 Training of Saudi Employees (Article 43)

Originally, Article 43 stated that employers who employ fifty or more employees must train annually at least six percent of their Saudi Arabian employees. Article 43 as amended states that employers who employ fifty or more employees must train annually at least twelve percent of their Saudi Arabian employees.

3.9 Wage Protection System (Article 90.2)

Saudi Arabia is currently implementing a Wage Protection System (WPS) whereby businesses are required to deposit salaries into an in-Kingdom bank account for each employee. The WPS has been implemented in phases, beginning with the largest firms with 3,000 employees or more. Currently, the WPS is in its eighth stage and applies to firms with 130 or more employees. Article 90.2 as amended encapsulates the WPS requirements.

3.10 Liability Related to Sale or Transfer of Business (Article 11)

Before its amendment, Article 11 provided that where all or part of a business was sold or otherwise transferred in Saudi Arabia, both the previous employer and the successor were jointly liable for the statutory and contractual entitlements of the affected employees of the business. Article 11 as amended removes the joint liability for statutory and contractual
entitlements of affected employees of a sold or otherwise transferred business and places liability solely with the successor.

4. **Draft Bankruptcy and Insolvency Law**

In early 2015, the Saudi Arabian Ministry of Commerce and Industry (MoCI) announced plans to adopt a new bankruptcy and insolvency law (the **B&I Law**) to govern the substantive and procedural rules regulating the bankruptcy process for individuals and businesses in Saudi Arabia. In expectation of the envisaged B&I Law, the MoCI issued a policy paper in March of 2015, entitled the “General Policies of Bankruptcy,” that purports to provide a substantive and procedural framework for creation and adoption of a new B&I Law (the **GPB**).

In addition to making the GPB publicly available, the MoCI invited and requested comments on the policy paper from interested parties and Saudi Arabian citizens. In doing so, the MoCI stressed primarily the importance of supporting the Saudi Arabian economy and Saudi Arabian citizens through a new B&I Law, with special emphasis on small and medium sized enterprises, be they creditors or debtors, as well as compliance with **Shari’ah** (Islamic law) principles. In addition, the MoCI stated that consideration should be given to internationally recognized universal practices in the realm of bankruptcy and insolvency regulations. The period for public commenting on the GPB ended on 5 April 2015. Since then, there has been little public dialogue on the issue generally via media channels and sparse follow up by the MoCI and other Saudi authorities.

4.1 **Overview of Existing Codified B&I Law Regime**

At present, there is little codified Saudi Arabian law that governs the process of declaring bankruptcy, the treatment of creditors and their claims, the rights and obligations of insolvent parties, and the like. Further, the codified law governing bankruptcy and insolvency that does exist is highly reflective of traditional Islamic principles and cultural issues unique to the Arabian Gulf region, which largely seek to bring disputing parties together in amicable agreement in the spirit of brotherhood and good relations, without forcing a judicially-imposed settlement according to a clearly defined set of rules on any party. Thus, formal judicial insolvency and bankruptcy proceedings are fairly uncommon in Saudi Arabia, and financially distressed parties and their creditors generally seek to work out their disputes and settlements on a private, one-to-one basis.
Nonetheless, there are two laws that specifically regulate bankruptcy and insolvency in Saudi Arabia: (1) the bankruptcy related portions of the Commercial Court Law (CCL) and (2) the Bankruptcy Preventive Settlement Law (BPSL) (including the Implementing Regulations).

(a) The Commercial Court Law

Articles 103 through 135 of the CCL provide a very basic foundation of the bankruptcy process in Saudi Arabia. However, these Articles do not lay out a strict framework providing for specific rights of the creditors of bankrupt individuals in Saudi Arabia. These Articles only state generally that the bankrupt party must disclose his assets and liabilities, the creditors must file their claims against the bankrupt party, and the judge must facilitate the settlement of the bankrupt party’s outstanding debt using the proceeds of the bankrupt party’s assets to satisfy creditor claims. However, any creditor of the bankrupt party is free to refuse a settlement of the outstanding debt owed to him and may continue to hold the bankrupt party to the original underlying contractual terms giving rise to the debt.

(b) Bankruptcy Preventive Settlement Law

Similarly, the BPSL and its implementing regulations provide a very basic method whereby a financially distressed person or entity may petition a Saudi Arabian adjudicative body to facilitate an amicable settlement of outstanding debt. In this case, the BPSL similarly provides in a general manner that the debtor must disclose all of his assets and liabilities. The provisions of the BPSL do not provide a framework regarding the specific rights of the creditors of bankrupt individuals in Saudi Arabia.

While avoidance of a judicial bankruptcy process appears to be the aim of the BPSL, there is generally no material difference between the procedures outlined in the CCL and those outlined in the BPSL. Both laws provide for what can be described as a basic, ill-defined, and “toothless” bankruptcy process.

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7 Issued on June 1, 1930 and amended by Royal Decree No. M/2 dated 15/1/1390H, corresponding to 23/3/1970G.

8 Issued on January 24, 1996 and amended by Royal Decree No. M/16 dated 4/9/1416H, corresponding to 25/1/1996G.
4.2 Overview of the General Policies of Bankruptcy Policy Paper (GPB)

In contrast to the existing bankruptcy and insolvency regime in Saudi Arabia, the GPB appears to enthusiastically lay out a vision for a new process in Saudi Arabia with clearly defined rules and predictable outcomes based on an analysis of internationally recognized customs and practices.

4.2.1 Process

The GPB begins with a high level explanation of the process that will be undertaken for adoption of the new B&I Law from start to finish, with publication and public comment on the GPB itself described as Phase 1 of the process. Next, the GPB describes Phase 2 as involving an analysis of the results and public comments obtained in Phase 1 of the process and creation of a more detailed framework of the general policies and principles that should form the basis of the new B&I Law based on such analysis. Ostensibly, the MoCI and the Saudi authorities are currently undertaking Phase 2 of the process. In Phase 3, the B&I Law itself will be drafted in full. Unmentioned in the GPB but equally important is the final phase for enactment of the B&I Law, which will likely occur without any significant delay by means of a Royal Decree.

<table>
<thead>
<tr>
<th>Phase</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Phase 1</td>
<td>Publication of GPB and public commenting period</td>
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<tr>
<td>Phase 2</td>
<td>Review of public comments and revision of GPB</td>
</tr>
<tr>
<td>Phase 3</td>
<td>Draft of B&amp;I Law in full</td>
</tr>
<tr>
<td>Phase 4</td>
<td>Enactment of the B&amp;I Law via Royal Decree</td>
</tr>
</tbody>
</table>

As a detailed timeframe of the process for adoption of the new B&I Law was not included with the GPB, it is not currently known when Phase 2, Phase 3, and final enactment of the B&I Law will occur.

4.2.2 Analysis of the GPB’s suggestions and findings

In addition to the process for producing a final draft of a new B&I Law as mentioned above, the GPB lays out a general framework of the policies and principles that should influence and form the basis of the new B&I Law, which are derived from an analysis of the bankruptcy and
insolvency regimes that apply in the Czech Republic, England and Wales, France, Germany, Japan, Singapore, and the United States of America.

While the GPB itself provides a fairly comprehensive, albeit general, overview of the policies and principles that should form the basis of the new B&I Law, the GPB contains some noteworthy recommendations, some of which are in stark contrast to the existing bankruptcy and insolvency regime in Saudi Arabia.

(a) **Specialized Bodies, Tribunals, and Professionals**

The GPB recommends creation of a specialized circuit of bankruptcy courts to oversee bankruptcy adjudications in Saudi Arabia. Currently, the bankruptcy process is subject to the exclusive jurisdiction of the Board of Grievances, which is also the court of original jurisdiction in commercial matters involving traders and claims involving the Saudi Arabian government.

Further, the GPB recommends the creation of a Bankruptcy Commission as a regulatory body responsible for the oversight of “Officeholders,” on-going review of the B&I Law (and presumably recommending changes as needed), appointing liquidators, conducting administrative liquidations for low-value bankruptcy estates under a certain threshold, investigating potential dishonest and/or fraudulent conduct in the bankruptcy process and events leading up to the process, and prohibiting corporate managers and directors guilty of engaging in dishonest and/or fraudulent conduct in the bankruptcy context from serving in such a role in the future by enforcing a disqualification regime.

(b) **Jurisdiction**

The GPB recommends limiting the jurisdiction of the B&I Law, the bankruptcy courts, and the Bankruptcy Commission to bankrupt and insolvent individuals and entities with a “significant geographical connection” to Saudi Arabia. Jurisdiction would apply to:

(a) individual citizens and foreign residents of Saudi Arabia;

(b) registered entities in Saudi Arabia; and

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9 The GPB recommends the licensing and appointment of bankruptcy and insolvency professionals called “Officeholders” who would ostensibly act as trustees on behalf creditors.
(c) foreign entities with operations in Saudi Arabia (with jurisdiction and application of the law limited solely to the entity’s assets and dealings within Saudi Arabia).

In addition, the GPB recommends recognition of the corporate law principle of distinction between legal entities, so long as the corporate form is not abused or intertwined inextricably with other common enterprises. Thus, a bankrupt or insolvent corporate entity’s debt should only be satisfied with the assets that that entity owns in Saudi Arabia, and not the assets of related corporate entities inside or outside of the Kingdom.

(c) Prioritization of Claims and Classes of Creditors

The GPB recommends dividing creditors into classes and recognizing and limiting creditors’ rights based on the class to which they belong (see table below). First, secured creditors would receive the highest protection with respect to the collateral held by the debtor securing the debt.

Among unsecured creditors, claims of the Saudi Arabian government would receive highest priority in the payout of claims in accordance with the State Revenue Law.\(^\text{10}\) Then, claims related to the costs and expenses of administering the bankruptcy estate (e.g., attorney’s fees) would receive secondary priority. Next, miscellaneous claims would receive statutory preference in the bankruptcy estate as a matter of public policy (e.g., claims for unpaid salaries by employees of the debtor). Following in priority the above classes of unsecured creditors, any unsecured debt incurred by the debtor after commencement of the bankruptcy process would receive priority treatment. However, it is envisaged that any such post-commencement financing will be subject to the approval of the bankruptcy court after the court has determined that the financing is necessary to rehabilitate the debtor’s business. All other claims would rank pari passu as unsecured and unpreferred obligations.

\(^{10}\) Enacted by Royal Decree No. M/68, dated 18/11/1431H, corresponding to 26/10/2010G.
### GPB – Prioritization of Claims

<table>
<thead>
<tr>
<th>Types of Claims</th>
<th>Priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secured claims</td>
<td>First priority with respect to the collateral held by the debtor securing the debt</td>
</tr>
<tr>
<td>Claims of the Saudi Arabian government</td>
<td>First priority amongst unsecured claims</td>
</tr>
<tr>
<td>Claims related to the costs and expenses of administering the bankruptcy estate</td>
<td>Second priority amongst unsecured claims</td>
</tr>
<tr>
<td>Claims made pursuant to statute and/or public policy</td>
<td>Third priority amongst unsecured claims</td>
</tr>
<tr>
<td>Debt incurred by the debtor (subject to bankruptcy court approval) after commencement of the bankruptcy process</td>
<td>Fourth priority amongst unsecured claims</td>
</tr>
<tr>
<td>All other unsecured debts</td>
<td>None; all claims rank <em>pari passu</em> together in the payout of claims</td>
</tr>
</tbody>
</table>

### (d) Types of Bankruptcies

The GPB recommends separating debtors into three separate categories, with each category having a separate type and process of bankruptcy adjudication.

First, debtors whose bankruptcy estates are beneath a certain threshold (*e.g.*, consumer debtors) would be permitted to undergo a fast-track process involving little to no court involvement, while debtors whose bankruptcy estates are above the threshold (*e.g.*, businesses and high net worth individuals) would be subject to more complex, potentially protracted proceedings with significantly more court involvement.

Secondly, the GPB notes that certain debtors who operate in unique, important industries (such as banks, public utilities providers, insurance companies, and the like) would require special protections and proceedings to ensure that their customers and the public are protected throughout the bankruptcy process.
(e) Process

The GPB recommends that all bankruptcy and insolvency procedures begin primarily with a debtor-initiated conciliation stage, wherein the debtor and creditors engage in a negotiation process with little to no judicial involvement. Thereafter, if an amicable solution is not reached between the parties during the conciliation stage, the procedure would escalate to a rehabilitation process, which would require court involvement. In the rehabilitation stage, creditors would be permitted to vote within their priority class on a reorganization and repayment plan for the debtor.

Both the conciliation and the rehabilitation stages provide for a “cram-down” mechanism whereby a reorganization and repayment plan can be judicially imposed on dissenting creditors. The GPB recommends that a cram-down procedure be made available when creditors within a priority class representing two-thirds of the total value of the claims within that class have agreed on a settlement. Thus, the cram-down would be imposed on the remaining one-third dissenting creditors within the priority class. Notably, this recommendation represents a dramatic difference from the existing bankruptcy and insolvency regime in Saudi Arabia, which allows creditors to wholly refuse any settlement and hold a debtor to his contractual obligations in full.

Next, if it is determined that the debtor’s ability to reorganize and repay its debts is significantly impracticable, the procedures would escalate to a liquidation process, whereby the debtor’s assets are ascertained, liquidated, and distributed to creditors.

(f) Stay on enforcement

The GPB recommends the availability of both an automatic and a non-automatic stay prohibiting the enforcement of security interests and contractual obligations owed by the debtor. The non-automatic stay would be available for a fixed term of three months upon application by the debtor upon initiation of the conciliation stage. The automatic stay would be available immediately upon initiation of the rehabilitation stage and would last indefinitely throughout the debtor’s bankruptcy.
(g) **Personal Liability on Managers, Officers, and Directors**

The GPB notes that the jurisdictions surveyed generally impose civil and/or criminal sanctions on debtors, as well as the managers, directors, and officers of corporate debtors, for negligent and/or fraudulent conduct in the bankruptcy context as a means of deterring abuse of bankruptcy protections and the corporate form.

The GPB recommends including similar sanctions within the B&I Law whereby debtors, as well as their managers, directors, and officers, who engage in negligent or fraudulent commercial practices risk civil or criminal penalties, as well as potential disqualification from holding management or executive positions in the future.

(h) **Statutory Nullification of Ipso Facto Clauses**

*Ipso facto* clauses are contractual provisions that allow a contracting party to terminate the contract on the basis of the other party’s insolvency or bankruptcy alone, which are heavily used in practice in Saudi Arabia and are enforceable under the existing bankruptcy and insolvency regime.

The GPB recommends that the new B&I Law include laws providing for the statutory nullification of *ipso facto* clauses in the contracts of debtors as a means of supporting the successful rehabilitation of the debtor, while also noting that, in some cases, consideration should be given to the debtor’s desire and ability to continue the contract. In all cases, the GPB notes that claims related to ongoing contracts would receive a certain degree of priority to provide assurance to the debtor’s existing contractual counterparties of the debtor’s performance.

5. **Conclusion**

In conclusion, Saudi Arabian regulations and legal policies and procedures continue to evolve. It is important to remain abreast of the various developments.
SAUDI ARABIA

New Companies Law
Abdulaziz M. Al Hussan*

The Council of Ministers of Saudi Arabia approved the new Companies Law on November 9, 2015.1 The new law will take effect 150 days after its publication in the Saudi Official Gazette.2 This law is timely, and follows high demand from the legal community for updates to the old companies law issued in 1965. The law has 227 articles and makes substantial changes to the existing framework. This law is the result of the recent efforts of the Ministry of Commerce and Industry (MOCI).

Among several significant changes, the most notable is the establishment of holding companies in Limited Liability Company (LLC) and Joint Stock Company (JSC) forms.3 Additionally, several provisions allow for greater flexibility for companies. In addition, the new companies law facilitates coordination between the Capital Market Authority (CMA), Saudi Arabian General Investment Authority (SAGIA) and MOCI. These governmental entities’ jurisdiction previously overlapped in some areas. This new law makes the coordination between the three entities transparent and workable.4

At the entity level, a single shareholder may now establish an LLC whereas the old law required a minimum of two shareholders to establish an LLC.5 Revisions to debt allowance, statutory reserve and confidentiality are provided for in the new law.6 For the JSC, two

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3 Id. art. 62, 69, 70, 91,126, 195,219,212,224,225.
4 Id. art. 182.
5 Id. art. 145.
6 Id. art. 176.
shareholders are now permitted to establish a company, while in the past five shareholders were required. The minimum capital of the stock company now has been changed from 2 million SAR to 500,000 SAR. In addition, the law allows the establishment of a JSC with one shareholder for government entities or private parties having minimum capital of 5,000,000 SAR. Finally, the new law provides for JSC issuances of sukuk (Islamic bonds) and debt instruments, and allows JSCs to repurchase or mortgage their shares.

The one shareholder company—whether the JSC or the LLC—will provide a significant advantage for foreign companies, especially with the recent opening the wholesale and retail sectors for 100% foreign ownership. The new companies law also addresses corporate governance. For example, the law forbids one person to serve concurrently as chairman of the board of directors and CEO. There will be few executive regulations for this law that will be issued later by the MOCI and the Board of the CMA.

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7 Id. art. 54.
8 Id. art. 55.
9 Id. art. 121,122,123.
10 Id. art. 112
12 Id. art. 81.
13 Id. art. 125.
TURKEY

The Sledgehammer Case

Zachary J. Walker*

Less than two weeks after Turkey’s Justice and Development party scored a major election victory, a European Commission (EC) report noted how strong political pressure continues to undermine the independence of the country’s judiciary and the principle of separation of powers.¹

Perhaps the strongest example of this pressure was the much-maligned trial of high-ranking military officials for an alleged 2003 plot to overthrow then Prime Minister Tayyip Erdoğan’s government. The alleged coup, referred to as the “Sledgehammer” plot, centered on retired four-star General Çetin Doğan.² More than 330 individuals were convicted for their “roles” in planning the coup.

On March 31, 2015, a retrial of 236 military suspects resulted in their acquittal. The underlying investigation, arrests and trial in the Sledgehammer plot highlights the ongoing problems with Turkey’s judiciary discussed in the EC report.

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¹ On November 1, 2015, Turkey’s ruling AK party secured a majority of parliamentary seats. See, e.g., Mehul Srivastava & Funja Guler, Turkey Election: Resurgent Erdogan Sweeps to Victory, FINANCIAL TIMES (Nov. 2, 2015), http://www.ft.com/intl/cms/s/0/ff5c8e3a-8078-11e5-8095-ed1a37d1e096.html#axzz3rDT2J64x. On November 10, 2015, the EC released its 2015 Turkey Report. See European Commission, Turkey 2015 Report (Nov. 10, 2015) (noting that “no progress has been achieved in the past year” in combatting corruption and that the “separation of powers has been undermined”). The EC Report’s release was delayed until after the November 1, 2015 elections.

² Çetin Doğan’s daughter, Pinar Dogan, is a lecturer in Public Policy at the Harvard Kennedy School. Çetin Doğan’s son-in-law, Dani Rodrik, is the Ford Foundation Professor of International Political Economy at the Harvard Kennedy School. Pinar Dogan and Dani Rodrik wrote extensively throughout the course of Çetin Doğan’s trial, retrial and eventual acquittal. Their writings were published in outlets such as The Washington Post, Foreign Policy, New Republic and Project Syndicate. They also maintained a Turkish language blog. See BÂLÇOZ DAVASI VE GERÇEKLER, http://balyozdavasivegercekler.com/ (last visited Nov. 11, 2015).
The Sledgehammer plot was made public in January 2010 by a Turkish newspaper. The paper described an alleged coup that contemplated, amongst other actions, the bombing of mosques and the downing of a Turkish military jet in a false flag operation. The documents, which were mostly digital files, were then turned over to prosecutors who charged 365 individuals in a series of three indictments.

Throughout the trial, it was alleged that the defendants lacked access to many of the documents relied on by the prosecution. These documents allegedly implicated the defendants for their roles in the plot. In the midst of the trial, defense attorneys staged a walkout due to the unfairness of the proceedings.

Evidence relied on by the prosecution to secure convictions was seriously flawed and, by most accounts, fabricated. For example, some of the documents allegedly created in 2002 to 2003 “planning” the coup used fonts that were not available until Microsoft Office 2007 was released in mid-2006. Furthermore, other documents listed entities by names that were acquired years later. In one example, a document that was supposed to have been burned onto a CD in 2003, referred to the pharmaceutical company Yeni Recordati, a company that was formed by merger in 2008.

Despite these “inconsistencies,” the Turkish court found all but 34 of the 365 defendants guilty of plotting to overthrow the elected government. Doğan and others were given prison terms of twenty years. The convictions and sentences were affirmed in October 2013. However, on June 19, 2014, the Constitutional Court of Turkey ordered the release and retrial of the military officers after a unanimous ruling that the defendants’ rights had been violated.

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4 See Ceylan Yeginsu, *Turkish Officers Convicted in 2012 Coup Case are Released*, NY TIMES (June 19, 2014) (Quoting General Doğan’s son-in-law Dani Rodrik who, declared that “the due-process violations in the trial were evident from Day 1” and that the next step is discovering and prosecuting “those who perpetrate[d] the forgery and staged a sham trial”).
This year’s retrial resulted in an acquittal, a result that many thought was long overdue. Indeed, by the time the retrial ended, most observers recognized the grave issues that flooded the original proceedings. Even before the retrial commenced, the Sledgehammer case had been under increased scrutiny and criticism. In July 2013, the United Nations Human Rights Council declared that the Sledgehammer defendants were arbitrarily deprived of their liberty in violation of various aspects of international law.⁵

The Sledgehammer saga shows that justice remains an intrinsically political process in Turkey. Turkey has now done away with the special courts used to initially secure the Sledgehammer convictions. Overall, the handling of the Sledgehammer prosecution demonstrates the EC’s continued concern over Turkey’s judiciary and the principle of separation of powers.

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The new UAE Commercial Companies Law (CCL)\(^1\) came into force on July 1, 2015 after years of development in consultation with business.\(^2\) The CCL furthers the UAE’s vision of a more developed economy aspiring to global standards with enhanced corporate governance requirements, shareholder protection, and social responsibility commitments.\(^3\) Despite the absence of structural changes of particular interest to the UAE’s substantial foreign corporate constituency,\(^4\) the overhaul of the existing regime through the CCL is clear and it introduces new concepts, such as:

- Creating sole shareholder companies (either limited liability companies (LLCs) or private joint stock companies);
- Allowing LLCs and joint stock companies to be established as holding companies;
- The establishment of a Companies Registrar;
- Allowing share pledges in LLCs; and
- The ability of public joint stock company shareholders to sell their preemption rights.

\(^1\) UAE Federal Law No. 2 of 2015, UAE Official Gazette No. 577 (Mar. 31, 2015). The law comes into effect on 1 July 2015.

\(^2\) Editor’s Note: For an introductory discussion of the UAE’s legal framework at the federal, emirate, and free zone levels, see the immediately following article, *Choices of Courts and Law in the UAE*.

\(^3\) Wider changes, and particularly changes to foreign ownership restrictions for onshore companies (i.e., not in various free zones), that were anticipated are not addressed by the CCL.

\(^4\) There was considerable interest during the drafting stages of the CCL in seeing the foreign ownership restriction, known as the 51-49 percent rule (local to foreign ownership ratio for onshore entities). However, this did not materialize in the CCL, as article 10 has continued this restriction. There is expectation of change in the form of a relaxed restriction, via the CCL’s implementing regulations, or through a new foreign direct investments law.
The implementation of the changes remains ambiguous in some areas, especially for the new concepts on which the market requires additional guidance. The introduction of holding companies aligns the UAE market with other competitive global markets, and raises the appeal of the UAE regionally. This is of particular importance to large corporations looking to enter the regional market, with the UAE as a hub, or entities looking to restructure their organization to reap the benefits of tax synergies with other regions or corporate alignment.

Another example of the transition towards a global standard is the CCL’s mandated establishment of a Companies Registrar. The introduction of a Companies Registrar will centralize the registration of companies and streamline the formation and liquidation process of companies to minimize the multiple layers of administrative approvals required under the old system. This would also improve access to company records and avoid issues of multiple registrations per trade name. The transition, once initiated by the Ministry of Economy, will be extensive, and will increase the accessibility of the UAE market.

To further emphasize the CCL’s focus on enhanced corporate governance, companies are required to retain accounting records for a minimum period of five years. Additionally, companies will be required to adhere to international accounting standards and best practices when preparing their financial statements. While this may be a normal internal requirement for larger multinational enterprises, this is of particular significance both to regional corporations now required to meet heightened requirements and existing or prospective foreign or local investors that will benefit from enhanced transparency.

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5 The CCL expressly sets out the structural changes and promises additional details at implementation through cabinet resolutions and specialized committee decisions.

6 Conducting business through their subsidiaries, LLCs and JSCs can act as holding companies under article 266 of the CCL.

7 This may be a stepping stone benefit towards the widely anticipated introduction of corporate taxes in the UAE and the region.

8 The CCL authorizes the Ministry of Economy to create the Companies Registrar by regulations (Articles 33-38).

9 The document retention period of accounting records is set at 5 years under Article 26, and electronic records will be accepted subject to instructions.
UNITED ARAB EMIRATES

Choices of Courts and Laws in the UAE

S. Elisa Kim*

The United Arab Emirates is comprised of seven emirates.1 While the seven emirates work together in furtherance the national agenda, the larger emirates (Abu Dhabi, Dubai and Sharjah) largely pursue their own economic policies.2 The core principles of UAE law are drawn from Islamic law and its judicial systems operate on a civil law system with roots in the Napoleonic Codes.3 Some of the emirates—most notably in Dubai at the Dubai International Financial Centre (DIFC) and the DIFC Courts—operate a judicial system distinct from the federal judicial system.4 This article discusses the jurisdiction of the DIFC Courts and the recently established Abu Dhabi Global Markets (ADGM) and the ADGM Courts.

The DIFC Courts and Opt-in Jurisdiction

As part of an effort to diversify its economy and revenue base, in 2004 Dubai created the UAE’s first financial free zone, the DIFC.5 In contrast to the surrounding civil law regime, the DIFC was established as a common law jurisdiction.6 Initially, the DIFC Courts’ jurisdiction

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1 Abu Dhabi, Dubai, Sharjah, Umm al-Qaiwain, Fujairah, Ajman and Ra’s al-Khaimah.

2 Bashir Ahmed, United Arab Emirates, in THE DISPUTE RESOLUTION REVIEW 835 (Richard Clark, ed., 3d ed. 2011) [hereinafter Dispute Resolution].


5 See generally Horrigan, supra note 4.

6 Id.
extended only to entities with a nexus to the DIFC.\(^7\) In 2011, the DIFC Courts’ jurisdiction was expanded by a law that allowed parties with no nexus to the DIFC to opt-in to its jurisdiction, including by contractual selection of the DIFC Courts.\(^8\)

Since the 2011 law took effect, the number of cases filed at the DIFC has surged.\(^9\) Additional measures have contributed to the increase. For example, a new DIFC Courts process allowed the conversion of DIFC judgments into arbitral awards, enabling enforcement in 152 nations under the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).\(^10\) The DIFC Courts’ entry into numerous memoranda of enforcement with diverse jurisdictions, including with the United States District Court for the Southern District of New York, has also raised the appeal of the DIFC.\(^11\)

**Creation of the ADGM and ADGM Courts**

On October 14, 2015, the Abu Dhabi Global Market’s (ADGM) Board of Directors (ADGM Board) issued a consultation paper regarding proposed regulations governing the scope of

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\(^7\) See, \textit{e.g.}, CA 001/2011 National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC (May 11, 2011) (Court of Appeal). \url{http://difccourts.ae/ca-0012011-national-bonds-corporation-pjsc-v-1-taaleem-pjsc-and-2-deyar-development-pjsc/} (concluding that the DIFC Courts had jurisdiction because the claim is a commercial case and dispute “arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the [DIFC]”). Dubai Law No. 12 of 2004, Article 5(A)(1)(b).

\(^8\) Dubai Law No. 16 of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts, Article 5(A)(2). \textit{Extension of Jurisdiction of DIFC Courts, UPDATE} (Baker Botts LLP), 3 Nov. 2011, available at \url{http://documents.lexology.com/288d46a8-7735-49c3-abc8-24113a5869a3.pdf}; see also Stothard, \textit{supra} note 8. Notably, a legal opinion issued by the General Secretary of the Supreme Legislation Committee of the Emirate of Dubai at the request of the DIFC confirmed that the DIFC Courts have jurisdiction to hear and determine any claim where a government entity is a party so long as the that government entity agrees to submit the claim to the DIFC Courts’ jurisdiction. \textit{See Press Release. SLC Legal Opinion on Dubai Government Entities Opting in to DIFC Courts Jurisdiction (Sept. 21, 2015) available at \url{http://difccourts.ae/10934-2/}.}


\(^11\) \textit{Id. See also Cases Surge, supra} note 9.
the ADGM Courts. The proposed ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations (ADGM Court Regulations) was open for consultation over a six-week period that ended November 13, 2015.  

After much speculation regarding the scope of the ADGM Courts’ jurisdiction, the initial rule proposed by the ADGM Board provided, similarly to the DIFC Courts, opt-in jurisdiction. The scope of jurisdiction proposed by the ADGM Courts is apparently wider than that of the DIFC Courts as the language of the proposed ADGM Court Regulations states, inter alia, that the ADGM’s Court of First Instance shall have jurisdiction “as conferred on it by . . . any agreement, whether or not in writing, where the parties have agreed to submit to the jurisdiction of the [ADGM] Courts.” In contrast, the language of Article 5(2) of the relevant DIFC Law states that “[a]t the time of entering into an agreement, parties may expressly agree in writing to submit to the jurisdiction of the DIFC Court of First Instance” and “[f]or disputes that have already arisen, parties may expressly agree in writing to have such disputes determined by the DIFC Court of First Instance.” Thus, parties must expressly agree to the DIFC Courts’ jurisdiction in writing, while the ADGM Courts imposes no such requirement.

**Key Differences between the DIFC and ADGM**

Although, on the surface, both are common law jurisdictions, there are a few key differences worth noting here. The ADGM’s body of law directly incorporates the direct
application of English law, including the precedents of English courts. The DIFC, in contrast, does not directly apply English law or English precedent. However, a DIFC court may find English law to be persuasive, especially if no precedent exists within the body of DIFC law.

This might be reassuring for some who are familiar with English law; however, if an ADGM court disagrees with established English law, the “ADGM Courts will have the flexibility to pass judgments as they deem appropriate.” Thus, there is uncertainty as to the how English law will be incorporated by ADGM Courts. Given their deeper body of case law, the DIFC Courts may offer greater predictability.

Nevertheless, there is one area of law where businesses may choose ADGM Courts: insolvency & restructuring. Recently, the UAE has been criticized—especially by small and medium size enterprises—for lacking effective insolvency and restructuring regimes for businesses. While the DIFC has insolvency legislation based on UK laws, the legislation does not provide many avenues for restructuring, such as for administration, which is provided for under ADGM laws. Furthermore, the application of UNCITRAL Model Law on Cross-Border Insolvencies has been incorporated into ADGM regulations, providing additional guidance for parties.


18 *Id.*


22 *Id.*
Conclusion

“[T]he DIFC Courts are a strange phenomenon: an island of British and American style common law inside an Islamic monarchy.” With the arrival of the ADGM Courts, another island of British common law has emerged. It remains to be seen whether these two islands will operate entirely separately or if an isthmus will materialize to connect these two UAE pioneers as they pursue parallel tracks toward greater access to justice and responsible business. The evolution of the legal and business landscape will likely determine whether the ADGM will succeed or fail. However, despite the criticism of skeptics, “the UAE has often surprised its critics and naysayers.” Time will tell if that will be true again.


24 Horrigan, supra note 4.
-END ARTICLES ADVANCE COPY-
My voice rings out, this time, from Damascus
It rings out from the house of my mother and father
In Sham. The geography of my body changes.
    The cells of my blood become green.
    My alphabet is green.
In Sham. A new mouth emerges for my mouth
    A new voice emerges for my voice
    And my fingers
    Become a tribe

    .  .  .

Returning to you
Stained by the rains of my longing
Returning to fill my pockets
With nuts, green plums, and green almonds
    Returning to my oyster shell
    Returning to my birth bed
    For the fountains of Versailles
Are no compensation for the Fountain Café
    And Les Halles in Paris
Is no compensation for the Friday market
    And Buckingham Palace in London
Is no compensation for Azem Palace
    And the pigeons of San Marco in Venice
Are no more blessed than the doves in the Umayyad Mosque
    And Napoleon’s tomb in Les Invalides
Is no more glorious than the tomb of Salah al-Din Al-Ayyubi . . .

Nizar Qabbani,

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