

Introduction

Welcome to the latest edition of our newsletter from the Middle East. I commend it to you and believe that its articles will be of interest to all. I have recently returned from meetings in both Europe and East Africa where it has been interesting to view the Middle East in the way that others see us. The picture is an optimistic one, borne out by our own experience.

There is much focus on the United Arab Emirates and the beneficial consequences of the Arab Spring. Interest and investment in Abu Dhabi and Dubai are increasing as we are rightly perceived to be an oasis of stability. Business opportunities abound as domestic expenditure in the region as a whole increases to meet social demands. This applies to the UAE and other Gulf states, including Oman and Bahrain, and to the wider Middle East. Egypt and Tunisia are now focussing on attracting the investment necessary to meet economic discontent.

All of that is our region. We are at the centre of it and we are delighted to promote the immense opportunities which it offers and, of course, the fact that the UAE in particular is well and truly open for business, as well as being your window on a wider market of a billion plus people.

A reminder that the UK Bribery Act is effective as of 1st July, bringing with it possible criminal sanctions for non-compliance. We have assisted a number of clients on risk management procedures and assisted in training employees on anti-bribery policies and corporate rules concerning gifts and hospitality. It is important to be able to show that those frameworks are in place. So, for British companies amongst you who are working overseas, as well as non-British companies with interests in the UK, if you have not heard from base on this subject, then we suggest that you ask them for guidance and, needless to say, we can help.



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New Maritime Law Awaited

At the end of January this year, the UAE Federal National Council approved a draft Federal Maritime Law which we understand has now been approved by the Cabinet and awaits final approval by His Highness the President of the UAE.

There has long since been a desire to modernise the existing Maritime Law, which is based upon the Egyptian Maritime Law of 1930s. International trade and the maritime world have moved a long way since, and the UAE has for some time seen the need to update its legislation. The desire to attract shipping and super yachts to the UAE has not been matched by current legislation, which makes movement within UAE waters difficult. Further, the UAE flag has not been attractive to financiers for a number of reasons, including the requirement that on enforcement of a mortgage over a ship, it must first be offered for sale to UAE nationals before it can be auctioned.

Details of the new law are not yet publicly available, although those responsible for its drafting have made some of its provisions known. First, and most importantly, responsibility for administering the workings of the new Law, regulations to be made thereunder and fees for navigation have all been placed under one roof, with the National Traffic Authority, rather than divided among a number of Federal and Emirate institutions. Restrictions on non-national ships have been relaxed, so that they will now be allowed to cruise and fish in UAE territorial waters. Foreign-owned vessels will now be able to fly the UAE flag, with permission. It would seem that the rules relating to arrest and sale of vessels have been simplified and made commercially more straightforward. Thus charterers' claims and unpaid insurance premiums no longer fall within the category of priority claims, reflecting practice in many other jurisdictions. Those wishing to arrest will be allowed to provide a bank guarantee to the Court as security, rather than cash as at present. It will

no longer be necessary to serve a demand through a court bailiff 24 hours before arresting a ship. The requirement that a vessel auction be held in three sessions will be dispensed with, while a successful bidder will no longer be required to pay the purchase price in full the day after the auction. One-third of the price bid will suffice, so long as the remainder is paid within three days. In terms of obtaining release from arrest, the legislation has been clarified to provide that a guarantee from a bank having a branch in the UAE must be accepted, rather than leaving the matter at the discretion of the Court. On a very different topic, seafarers will be glad to hear that the moral obligation to help others in distress has now been made mandatory.

Those involved in the shipping industry will no doubt pore over the new law as and when it is promulgated. All that can be said at this stage is that there appears to have been a genuine attempt to reflect modern maritime practice in the legislation, which is likely to make the UAE a more attractive destination for commercial and leisure shipowners alike.



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Increased Private Sector Involvement in Dubai Water and Electricity Sector

A new law in Dubai is paving the way for private sector participation in power and water projects in the Emirate.

Law No.6 of 2011 has many similarities with legislation governing the water and electricity in Abu Dhabi, which has provided a stable framework for significant private sector investment over the last decade. The new Dubai law also sets out the duties and powers of the new regulator for water and electricity in Dubai which, like its Abu Dhabi counterpart, is called the Regulation and Supervision Bureau (RSB).

The main elements of the new Dubai Law are as follows:

- The law makes it possible for public and private entities to undertake power generation and water desalination, provided they have obtained a licence from the Dubai RSB. Only the Dubai Water and Electricity Authority (DEWA) is exempt from this licensing requirement.
- The law applies throughout the whole of Dubai, including its free zones.
- The Dubai RSB will have power to set criteria and standards relating to power generation and water desalination, after obtaining approval from the Supreme Council of Energy. In particular, the Dubai RSB shall grant licences in accordance with technical, financial and regulatory criteria approved by the Council.
- DEWA may establish joint ventures with non-UAE companies.
- Licensees may not sell, supply or provide any entity other than DEWA with any electricity generated or water produced by the licensee.

- The Dubai RSB will have the authority to issue compliance notices in the event of a breach of licence or exemption condition. Failure to comply with such a notice carries a financial fine and, subject to the consent of the Council, possible suspension of the licence.
- The Supreme Energy Council shall issue further regulations to implement the new law.

The first power project that will benefit from the new law is the 1,500MW Al Hassyan 1 Independent Power Project. DEWA issued a request for proposals to developers for that project in May 2011. It is proposed that the successful developer will own 49% of the special purpose company set up for the project, with the remaining 51% to be owned directly or indirectly by DEWA. By comparison, Abu Dhabi has typically allowed up to 40% private ownership in its independent power and water projects.

An immediate challenge under the new law will be setting in place procedures to govern the relationship between the Dubai RSB, Supreme Energy Council and DEWA. We await further regulations in this regard. However, in the long run the new law would seem to be a positive development for the energy sector in Dubai and could set an example for greater private sector investment in other utilities.



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Pro Bono initiative: Women's Rights and the Convention on the Elimination of All Forms of Discrimination against Women

Reed Smith across all its offices, including the Middle East, is heavily involved in various pro bono initiatives. One such initiative is in association with Kapal Perempuan Association ("Kapal") an NGO that, amongst other things, endeavours to promote women's rights in Indonesian communities subject to Shari'ah law.

By way of background, Indonesia is the world's fourth most populous country and is home to the largest Muslim population. Following the implementation of new legislation in 2004, ceding power from the Central Government of Indonesia to local governments, a significant amount of customary, religious-based (*i.e.*, Shari'ah), and ethnicity-based legislation has been implemented. It is this local legislation that has the most impact on the daily lives of Indonesian citizens. Kapal is considering the extent to which such local legislation may contravene or violate human rights norms having particular regard to the rights of women.

To assist Kapal in this task, Reed Smith has been asked to examine the regulation of women's rights as regards clothing and ability to travel in public in countries

functioning under varying degrees of Shari'ah law; namely, the United Arab Emirates, the Kingdom of Saudi Arabia and the Republic of Sudan. Also to be investigated is the extent to which such countries have implemented, if at all, the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

It is hoped that the provision of this information will assist Kapal in lobbying local authorities in Indonesia to further strengthen women's rights and achieve the successful implementation of CEDAW.



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Why Arbitration?

The majority of contracts in the UAE provide for arbitration to be the method by which disputes arising under or in connection with the agreement will be resolved. Whilst some of our readers will be very familiar with arbitration, I'm sure there are a lot of you out there to whom it is a bit of a mystery!

So why is it the dispute resolution method of choice in the UAE and what does undertaking an arbitration actually entail? By the time you have read the series of articles on arbitration to be published in our next few newsletters these questions and more will have been answered!

This first article provides some background a brief history of arbitration and some hints as to why it is so popular not only in the UAE but across the world for resolving international disputes.

A brief history of arbitration

Arbitration is nothing new; it has been around as a method of resolving disputes for centuries. Arbitration is likely to have originated in the MENA region with records from ancient Egypt attesting to its use by high priests in their interactions with the public. It can most certainly be traced back to the Roman Empire circa BC 280.

Moving through to Europe and 15th century Britain, the person you bought something off of in the local market was quite likely to be an international merchant who travelled around the market places of Europe pedalling his wares. There wasn't time to resort to time consuming formal court procedures to resolve any disputes that arose between you and the trader; they would be in the next town (or country) by the time the court scheduled the case to be heard. Thus informal "courts" presided over by a local dignitary (often the mayor) were set up in the local market place to resolve disputes there and then. Known as "Piepowder Courts", from the French *pieds poudres* – meaning dusty feet – because it was said that disputes were sorted out before the merchants had time to dust off their shoes. These informal forums were in effect an early form of international arbitration set up to resolve international trade disputes.

Why is arbitration so popular in the UAE?

As anyone who has been involved in a court dispute knows, it is still a time consuming and inflexible process. Hearings are very formal and you have no say when or where they will take place. Procedural rules are complex and differ from country to country. In the UAE courts, hearings are conducted in Arabic and all documents presented to the court, including that lengthy contract that took you months to negotiate, must be translated to Arabic. International commercial disputes often involve

mountains of documents written in English that also have to be translated, which can become very costly. Furthermore, unless you speak Arabic, you will generally have great difficulty understanding the court process and what is actually going on in your case.

Another problem faced in courts in the UAE and across the world is that generally the judge selected to hear your case will have little or no expertise in the subject area of your dispute, which may be of a highly technical nature.

Also how can the judgment you received from a UAE court be enforced in the home country of the foreign contractor who you find has no assets in the UAE? The answer is unless the contractor's home country has a bilateral treaty for enforcing UAE judgments it is virtually impossible.

So how does arbitration resolve these problems?

The process of resolving disputes through arbitration is not dissimilar to those of a commercial court. A Tribunal is appointed (generally either a single arbitrator or a panel of three) to adjudicate the dispute and make a final decision on who is right and who is wrong or a mixture of both. The parties present their cases in writing through a series of submissions and provide evidence to support that case. Evidence may take the form of documents, statements from witnesses and/or expert reports.

However, the parties have a great deal of autonomy and flexibility as to how the arbitration proceeds. They are pretty much free to decide how, when and where the arbitration will be conducted. They can choose who will adjudicate the dispute and the expertise that person or persons will require. They can decide the timetable for the various stages of the dispute. They can choose whether or not a hearing is required. They can choose where any such hearing will be held. They can choose the procedural law that will oversee the proceeding.

Another advantage to arbitration is that the UAE is a signatory to what is known as the New York Convention. This generally means that an arbitral award handed down in the UAE can be enforced in any of the more than 140 New York Convention signatory countries.

Reed Smith's lawyers have a wealth of arbitration experience in both the UAE and globally. If you are considering commencing an arbitration or alternatively receive a request for arbitration from another party we would be more than happy to advise you on how to proceed.



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The Bribery Act 2010: Its Relevance in the Middle East, update

The Bribery Act 2010 (the "Act"), effective as of 1 July 2011 and supporting guidance (the "guidance") was published by the UK Ministry of Justice on 30 March 2011. The Act which is thought to be tougher than US Foreign Corrupt Practices Act ("FCPA") creates four distinct criminal offences that apply to commercial organisations

and individuals who conduct business in the UK, they are:

- bribing another;
- being bribed;
- bribing a foreign official; and
- for commercial organisations, failing to prevent bribery.

When it comes into force, the Act will replace the much criticised English law of bribery and corruption. Although this enactment is welcomed, its far reaching implications (and the inevitable uncertainty that will ensue as a result) may impose on commercial organisations even further obligations as the law develops. However, the guidance outlines procedures which commercial organisations can put in place to prevent being found liable under the Act.

What is a bribe?

The Act, together with the guidance, sets out detail as to what constitutes a bribe. An offer, promise or gift of a financial or other advantage will be deemed to be a bribe where either the person making such offer, promise or gift intends to reward/ induce improper performance or the acceptance of such offer, promise or gift itself constitutes improper performance. All payments, regardless of how small or routine, paid directly or indirectly, will be deemed illegal.

The guidance states that the Act is not intended to criminalise bona fide, proportionate and reasonable hospitality or gifts which are aimed at building public relations. It will only be deemed to be a bribe if it can be shown that there was an intention to influence and secure the business advantage. One factor to be considered, but not necessarily a determining factor, is whether the offer, promise or gift is deemed to be lavish.

Offering/ receiving bribes

It will be an offence to:

- offer or give a financial or other advantage with the intention of inducing or rewarding that person in relation to performing a “relevant function or activity” “improperly”; and
- receive a financial or other advantage intending that, in consequence, a “relevant function or activity” should be performed “improperly”.

“Improper performance” is performance which amounts to a breach of an expectation that the person will act in good faith, impartially, or in accordance with a position of trust. The test of reasonableness imposed by the Act is based on what is considered to be reasonable in the UK. Where the function is not subject to UK law, local custom or practice shall not be applied unless permitted or required by local written law.

Bribery of foreign officials

The Act also introduces an offence of promising, offering or giving a financial or other advantage to a foreign public official in his/her capacity as such (rather than in the foreign public official’s private capacity) (whether directly or indirectly) in order to obtain or retain business or a business advantage and where such an advantage is not legitimately due. A foreign public official includes elected and non-elected officials holding a legislative, administrative or judicial position in any country of territory outside the UK, including those performing public functions in national, local or municipal government or for any public agency or enterprise.

In contrast to the general bribery offences, there is no requirement to show that the foreign public official acted improperly as a result of the bribe. Also, note that this offence applies only to the briber, and not to the foreign public official who receives or agrees to receive the bribe.

New corporate offence: failure to prevent bribery

(a) The broad jurisdictional scope

The new corporate offence of failing to prevent bribery applies to any company or partnership established anywhere in the world provided that their business, or part of their business, is carried on in the UK. It is not even necessary for the act constituting bribery to take place in the UK. Therefore, this Act applies to every UK commercial organisation in the Middle East and any commercial organisation established in the Middle East which carries on business in any part of the UK to any extent.

(b) The defence

It is a defence for the organisation to demonstrate that it had adequate procedures in place designed to prevent bribery. The Act does not define what is meant by “adequate procedures” however the guidance sets out six principles for commercial organisations to consider in ascertaining what procedures to put in place.

- Proportionate procedures: the commercial organisation’s procedures to prevent bribery by persons associated with it must be proportionate to the bribery risk it faces and to the nature, scale and complexity of the commercial organisation’s activities.
- Top-level commitment: the top-level management of a commercial organisation must be committed to preventing bribery by persons associated with it. The commercial organisation must foster a culture within the organisation in which bribery is never acceptable. This will involve internal and external communication of the commitment to zero tolerance to bribery.
- Risk assessment: the commercial organisation must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment must be conducted periodically.
- Due diligence: the commercial organisation must apply due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks. The due diligence procedures must be proportionate to the likelihood of risk.
- Communication (including training): the commercial organisation must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, in a manner which is proportionate to the risks.
- Monitoring and review: the commercial organisation must monitor and review procedures designed to

prevent bribes by persons associated with it and make improvements where necessary.

(c) Associated persons

Commercial organisations can be guilty of a failure to prevent bribery offences if an “associated person” carries out an act of bribery of their behalf. An associated person is one who performs services on behalf of the principal.

This broad definition means that contractors and suppliers who perform services could also be covered. This is of particular relevance to the Middle East as within this area, it is common to act wholly or partly through agents, or local businessmen or joint venture partners. Under the Act, the commercial organisation will need to ensure that a system is set up which requires third parties to commit to anti-bribery policies and is made aware of the zero tolerance culture within the organisation.

(d) Facilitation payments

Facilitation payments, which are small bribes paid to facilitate action, regardless of whether required by routine or local custom or practice, will be illegal under the Act. Therefore, facilitation payments will be subject to scrutiny. This is contrary to the FCPA which makes an exception of facilitation payments and “bona fide” expenses.

However, it is recognised that if there is no alternative but to make a payment in order to protect “life limb or liberty” the English common law defence of duress will probably be available. If the alleged bribe is paid or received outside the UK, a defence may be available if the conduct was legitimate under local law. However, the mere fact that such conduct is not considered criminal under the local law is not likely to be sufficient to demonstrate that such conduct is common practice. It is likely that only evidence of the written law which expressly permits the conduct complained of will be sufficient.

Penalties

The penalties for committing an offence under the Act are:

- for a commercial organisation, unlimited fines; and
- for individuals who are UK citizens and residents and/ or working in the Middle East, imprisonment for a maximum period of 10 years and/ or fine.

Local law

Commercial organisations operating in the Middle East should also ensure that they do not commit offences under local anti-bribery laws. For example, the UAE Federal Penal Code prohibits, inter alia, bribery of a public official to procure the breach of his/her duties and receipt by an employee or executive of a bribe to breach his/ her duties.

In addition to bribery constituting a criminal offence, bribery will also give rise to potential civil claims.

Conclusion

It is apparent that a relevant commercial organisation falling within the ambit of the Act will need to ensure that comprehensive anti-bribery procedures and policies are implemented in accordance with the guidelines to minimise, firstly, the risk of bribery, and secondly, the likelihood of the commercial organisation being liable under the Act. Notwithstanding the guidelines, there will still be some uncertainty as to what procedures are adequate to protect commercial organisations from liability under the Act while meeting their business needs, and much will be left to the discretion of the prosecuting authorities.



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Corruption and Anti-Corruption Initiatives

The prevalence of corruption and efforts to combat it have been the target of near-constant government and media attention throughout the MENA region, prompted first by the global financial crisis and more recently by the Arab Spring. Any entity—whether foreign or domestic—doing business in the region must be aware of both the anti-corruption laws of their home country and those of the country in which they are acting.

In this issue and previous issues, we have provided details of the UK’s Bribery Act 2010 and touched on the long-standing US Foreign Corrupt Practices Act. Here we take a closer look at anti-corruption legal frameworks trends in the UAE.

What is Corruption?

While each anti-corruption framework in different countries has its own definition, business entities seeking to comply may be best-served by giving their employees a broad definition that will trigger recognition and the need for further investigation. “Corruption is recognized as injustice,

lack of integrity, and wrongful conduct. It is identified as bribery, partiality, and lying. It substitutes self-interest for justice and independent judgment.” – Naomi Caiden, What is Corruption?

Corruption and the Arab Spring

The day-to-day consequences of corruption’s prevalence in the MENA region have become dramatically evident as the protests that began in Tunisia in December of 2010 spread to Egypt, Libya, Yemen, and Syria and turned into revolutions. In each, citizens have cited corruption as one of their chief grievances. On a smaller scale, Oman, Bahrain, Jordan, Morocco, and Algeria have all seen repeated anti-corruption protests.

Revolution and protest have put renewed focus on anti-corruption efforts in a number of MENA countries, for different reasons. Egypt and Tunisia appear to be using anti-corruption initiatives to distance themselves from their prior regimes, whereas countries such as Saudi Arabia, Jordan and Morocco are using such initiatives to cement

the legitimacy of the existing regimes. With the rapidly changing anti-corruption landscape in the region, it is difficult to forecast precisely what measures will be taken in each country. The best, and perhaps only, predictors will be the motivations for any measures that are taken.

Global Financial Crisis

In the context of revolutions and protests, it is easy to lose sight of the other, critical impetus for focus on anti-corruption: the global financial crisis. The crisis exposed the weakness caused by corruption, particularly in the real estate and financial sectors in the UAE. As a consequence, corruption-based prosecutions have been on the rise in the UAE for the last several years.

Legal Framework

The UAE has a well-developed general and sector-specific anti-bribery legal framework. In addition, emirate-specific laws and regulations may apply. Bribery is criminalised in Federal Law No. 3 of 1987, amended by Federal Law No. 34 of 2005, Articles 234-239. The code distinguishes between public sector bribery and private sector bribery.

With respect to public sector bribery, it is illegal for a public official or person assigned to public service to solicit or accept a bribe, whether or not it is related to public duties. “Bribe” means “a donation or advantage of any kind or promise of anything of the like in order to commit or omit an act.” The definition of public actor has, in the past, been found to extend to employees of state-owned or semi-state owned private sector entities. The public actor will face criminal liability whether or not he/she intended to fulfill the bribe payer’s wishes. The penalties include imprisonment up to 10 years, if the bribe is related to public duties, and five years, if the bribe is unrelated to public duties. The public actor may be fined the equivalent of what was solicited or accepted, but not less than AED 1,000.

It is illegal for certain private economic actors to solicit or accept a bribe, where the bribe relates to their contractual obligations. Such private economic actors include: “any member of the board of directors of a company, private institution, cooperative society or a society of a public utility, and any manager or employee in any of these...” A “bribe” includes “a promise or donation to do or abstain from doing any of his job tasks or breach its duties.” The penalties include imprisonment up to five years and a fine equivalent to what was solicited or accepted, but not less than AED 1,000.

The Penal Code imposes penalties on offering a bribe to any public official or person assigned to a public service, where the bribe related to their public duties—whether or not the public actors accepts the bribe. Oddly, the Penal Code does not appear to criminalise offering a bribe to a private economic actor or offering a bribe to a public actor in order to influence his or her non-official duties.

Third-party facilitation of bribery is also illegal. Penalties for the individual offering a bribe and for a facilitator are imprisonment of a period of not less than one year and a

fine up to AED 10,000. The bribe offered to a public actor shall be confiscated.

Sector-Specific Anti-Bribery Laws and Regulations

The defence sector protects itself from bribery and corruption via the following laws and directives:

- Officers are prohibited from working for third parties and from having interests in works or contracts. *Federal Law No. 6 of 2004, Art. 47–48.*
- Officers are prohibited from accepting gifts of any kind. *Federal law No. 7 of 2004, Art. 47.*
- Foreign defence contractors are prohibited from engaging agents/intermediaries for strategic military procurement contractors with the General headquarters of the UAE Armed Forces. *Directive of HH Sheikh Khalifa bin Zayed Al Nahyan, dated December 9, 1986.*

With respect to tendering, work may be withdrawn in cases of bribery or attempted bribery pursuant to Armed Forces Tender Regulation, Federal Resolution No. 12 of 1986, Art. 83, 85 and Federal Government Tenders and Contracts, Financial Order No. 16 of 1975.

Anti-Corruption Enforcement in the UAE

Following the global financial crisis, Dubai prosecutors announced a zero-tolerance policy. There has been a marked increase in investigations and prosecutions in both the public and private actors. The prosecutions have been long and have gone through all levels of the court system.

In a prominent example, in May of 2009 a former board member of Deyaar Development was charged with accepting bribes to facilitate the sale of property in Dubai Marina and charging usury. The Dubai Court of First Instance sentenced him to 3 years imprisonment and imposed an AED 115 million fine. It is notable that he was charged and convicted as a public actor on the basis that he was the CEO of the Dubai Islamic Bank, a semi-governmental institution, even though the charges related to his position on the wholly-private Deyaar board. Subsequently, in December 2010 his sentence was reduced to 1 year imprisonment and an AED 11.5 million fine. Prosecutors appealed to the Court of Cassation. In February of 2011, the highest court ordered a retrial but did not set a date. In addition, the former Deyaar chief executive and several employees of companies doing business with Deyaar also face bribery and other corruption-related charges.

Further details and information on other MENA countries’ anti-corruption measures will be presented in future issues to come.

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