

## Welcome to our Newsletter

Good morning and welcome to the third edition of our revitalised Middle East Newsletter. Please take the time to scan, or better still, dip in and out of it. The intention is that all readers should find something of use within. In this edition, Jenny Grainger writes about the UK Bribery Act, and the draconian penalties that may be incurred by any entity having a presence in the United Kingdom. Yasmin Khayal tells us about Reed Smith's new pro bono initiative in the Middle East. Raya Abu Gulal's piece concerns our Women's Initiative Group, which comes out of Reed Smith's Women's Initiative Network (or "WINRS"), dedicated to more effectively attracting, engaging, developing and rewarding our women lawyers. Tim Gordon writes about the current situation involving Middle East IWPPs.

It is a reflection of the recent downturn that the disputes side of Reed Smith's Middle East practice finds itself extremely busy, especially in the construction area. It therefore comes as no surprise that our most recent recruits, Tamra Ferguson (on secondment from our Falls Church office), Roberta Wertman (on a short term contract) and Alison Eslick work in that space. All of them are most welcome. That said, it is clear that matters are at least stabilising in Dubai, while Abu Dhabi pushes forward inexorably. As a result, there are a number of other recruits "in the pipeline" not only in the disputes, but also in the non-contentious areas of our practice. Watch this space.

If you have any comments or questions arising out of this Newsletter, we would be very glad to hear them. Please contact myself (amorgan@reedsmith.com) or our Editor, Tim Watkins (twatkins@reedsmith.com).

Many thanks, Tim for putting this Newsletter together.



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## Independent Water and Power Projects in the GCC

Independent water and power projects (IWPPs) continue to increase in prevalence and importance in the GCC water and electricity sectors.

Until the mid-1990s, all power plants in the GCC were 100% funded and developed by governments or government-owned companies. The first IWPPs were in Oman and then Abu Dhabi. Now, IWPPs are to be found in Bahrain, Qatar, Saudi Arabia and Kuwait.

Under the typical IWPP structure, the relevant government identifies the need for a new plant, and invites tenders to develop the project, generally on a build, own and operate basis. The successful bidder is usually a consortium of local and international companies with the amount of foreign ownership varying – from 100% in Oman to 40% in Abu Dhabi.

IWPPs then typically sell their capacity and output to a government owned single buyer under Power and Water Purchase Agreements (PWPAs), ranging from 15 to 25 years in duration.

The main benefits to developers of the IWPP structure are that the amount of power/water to be sold is stipulated in the PWPA, including the price, and the PWPA is guaranteed by a government backed entity. This provides lenders with the assurance that there will be a sufficient revenue flow to service debt obligations. Further incentives offered to developers in the region have included leasing project sites at nominal rents and giving bidders the option to conduct an IPO of up to 49% of its shareholding.

The main risks for IWPPs relate to finding appropriate financing and managing EPC costs. Project costs are typically funded through a combination of shareholder equity, debt, and revenue generated by the IWPP. The debt may be raised in international, regional, Islamic or local markets, and a recent development has been the increased involvement of credit agencies. The modest risks associated with IWPPs has allowed developers access to finance, even despite the financial crisis.

### Going forward

Progress is being made on Dubai's first IWPP to be located at Hassyan on the border with Abu Dhabi. It has been reported that a new public private partnership law has been drafted which will facilitate the project. Furthermore, the UAE Government has stated that it expects to establish international partnerships when developing its nuclear energy projects similar to those currently employed for IWPPs.

The experience of IWPPs in the GCC has been successful due to its optimal risk allocation between public and private parties. This balancing of risk will continue to remain key as new IWPPs come online to service the GCC's growing energy needs.

*Tim Gordon is a Reed Smith associate currently on full-time secondment to the Abu Dhabi power and water sector regulator, the Regulation and Supervision Bureau.*



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# ANGLE'S ANGLE



## Questioning Administrative Decisions: Oman was ahead of the game 10 years ago.

One of the most frequently asked questions of me over the 20 years that I have been practising law in this region has been whether or not the actions of government officials and departments can be reviewed and questioned.

In Oman the ability of anyone (Omani or foreigner alike) to question and have the actions of government departments reviewed has existed since the late 1990s.

The Administrative Court was established, in 1999, specifically for this purpose and its jurisdiction is far reaching.

If a government official or department operates in any way outside of the powers given to it by the legislation setting it up, anyone can commence an action in the Administrative Court to have that action reviewed, overturned and (where appropriate) have compensation awarded should loss be suffered.

Interestingly even where there has been an inordinate delay on the part of the government official or department in making a

decision or undertaking one of its duties, this delay can itself be the subject of an action before the Administrative Court with the remedies referred to above being available.

Many years ago I sat with a very high ranking official from the Ministry of Justice discussing this then new legislation. What struck me more than anything was the obvious pride taken by the official in setting up a legislative regime under which the Omani Government could be held accountable for its actions. This is yet another example of the sophisticated legal system that has existed in Oman almost from the beginning of His Majesty Sultan Qaboos' reign and demonstrates how, particularly in comparison with its other GCC neighbours, Oman has for some time been way ahead of the game.

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## Charity Event

Reed Smith will be hosting a ladies breakfast charity event on 5 March from 11am-2pm at the Beach Rotana Hotel in Abu Dhabi. This event will be sponsored and supported by the Reed Smith Women's Initiative ("WINRS") team.

The purpose of this event will be to promote and raise funds for an Iraqi non-profit organization named the Iraqi Health Aid Organization. This organization is a well-established organization in Iraq and is being supported and funded by organizations such as US AID, Sabre Foundation, Taking IT Global, IOM and the United States Institute of Peace.

One of the Iraqi Health Aid Organization's current projects is to educate and train Iraqi widows in order for them to return to the job market and support their families. Reed Smith's support for this organization derives not only from it being an obviously good cause, but also (for our Women's Initiative team) because of its focus on the regional empowerment of women. Furthermore, we hope that the Iraqi community will perceive our support of the charity as a continuing investment and contribution to the Iraqi society.

Reed Smith's Women's Initiative team is hoping to raise funds by selling tickets for AED 150 for the attendees and holding a Bazaar at the event. The Bazaar will involve ladies from the fashion/jewelry/art industry in the UAE, and proceeds from that day will be contributed towards the proposed charity.

The event will be open to all ladies in the UAE and tickets may be purchased at the door if readers are, or know of anyone who is interested in attending. If you require any further information please do not hesitate to contact us on +971 2 622 2636.



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## Pro Bono Initiative

Pro Bono, derived from the Latin "pro bono publico", or "for the public good" describes an effort by professionals to use their skills to provide services to those that are not able to afford them. Pro bono efforts are widespread in the legal profession, with many lawyers devoting a certain number of their working hours to organizations dedicated to assisting those with limited means.

As a global law firm, Reed Smith has been heavily involved in large pro bono initiatives in many jurisdictions, including the United States and the United Kingdom. For example, Reed Smith lawyers in the United States and other offices were involved in a very successful effort to improve the lives of dispossessed Haitian women and children.

Traditionally, however, pro bono initiatives are aimed at contentious matters. In the UAE, this can present a problem for the larger international law firms, such as Reed Smith, who are precluded by law from having rights of audience before the UAE courts.

Nevertheless, Reed Smith is dedicated to assisting those in need, and this can be in the form of providing legal advice on UAE and foreign laws to charities and foundations. Reed Smith, from both of its UAE offices, is currently in discussions with a Jordanian foundation interested in producing a report on the accessibility of courts in various jurisdictions in Europe and the Middle East, such as the UAE, United Kingdom and Jordan, among many others. Other efforts may involve providing legal advice to other charitable organizations or assisting the UAE community in non-legal efforts.

Reed Smith is dedicated to giving back to the community and shall continue to do so by tapping into its strong firm-wide pro bono culture and its reputation in the marketplace as a law firm dedicated to the growth of Middle East and its inhabitants.



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## The Bribery Act 2010: Its relevance to businesses in the Middle East?

The UK Bribery Act 2010 ("Act") is expected to come into force in April 2011 following the publication of guidelines.

The Act, which is thought by many to be tougher than the US Foreign Corrupt Practices Act ("FCPA"), applies to corporates and individuals and includes the following offences:

- the 'new corporate offence' making it an offence for corporates to fail to take adequate measures to prevent bribery;
- offences committed by the payee of a bribe;
- offences committed by the payer of a bribe; and
- offences relating to the bribery of foreign public officials.

The Act is far reaching and therefore has implications for:

- all persons and entities if the offence takes place in the UK;
- individuals who are UK citizens or nationals or otherwise ordinarily resident in the UK wherever they may be;
- businesses incorporated in the UK, even if headquartered elsewhere;
- for the new corporate offence, regardless of where committed, companies incorporated or partnerships established anywhere else in the world if their business, or part of their business, is carried on in the UK;
- for all offences (excepting the new corporate offence) committed in the UK, UK directors or other senior officers (whether a UK citizen or otherwise) of companies incorporated anywhere in the world who have consented to, or connived with, the company to commit a primary offence of bribery under the Act; and
- for all offences (excepting the new corporate offence) regardless of where committed, British senior officers of companies incorporated in the UK who have consented to, or connived with, the company to commit a primary offence of bribery under the Act.

Consequently, the Act should not be ignored by UK businesses operating in the Middle East nor by businesses established in the Middle East but carrying on any part of their business in any part of the UK.

### What would constitute a bribe under the new corporate offence?

The Act sets out in considerable detail what type of conduct will be deemed to be a bribe. Briefly, an offer, promise or gift of a financial or other advantage will be deemed a bribe where the person making such offer, promise or gift intends to reward/ induce improper performance (which the Act defines) or the acceptance of such offer, promise or gift in itself constitutes improper performance. Note that it does not matter whether any such offer, promise or gift is made directly or indirectly. It is also no defence that the conduct of a recipient of a bribe is not that which is intended by the briber.

### Is there a defence to the new corporate offence?

It will be a defence for a business to demonstrate that it had in place adequate procedures to prevent bribery. The procedures are not specified in the Act and are a matter for each business to determine. Prior to the Act coming into force, guidance will be issued as to what will constitute 'adequate procedures to prevent bribery'. It is expected that businesses will need to:

- assess the risk of bribery within the business and the adequacy of internal procedures to minimise such risk;
- carry out staff training and ensure that procedures for staff are clear, accessible and practical;
- continue to monitor and review the adequacy of procedures;
- complete due diligence before entering into arrangements with other parties; and

- consider including standard clauses in commercial contracts that prohibit bribery and corruption.

In addition to the aforementioned, businesses will also need to consider those laws applicable to the jurisdictions in which they do business.

### Facilitation payments

Under the FCPA, which makes exception of facilitation payments and "bona fide" expenses, the UK Bribery Act applies to all payments, financial advantage or any other advantage, no matter how small or whether considered routine, or indeed expected by local custom and practice. Effectively, anything which could be perceived to be of value to the intended recipient.

Facilitation payments in order to get things done and usual business processes (i.e., extravagant dinners, reciprocal favours, excessive hospitality) will be subject to scrutiny.

If an alleged bribe takes place outside of the UK, it may be a defence that such conduct was expressly permitted under local law. However, the fact that such conduct is not considered criminal under local law will not suffice as a defence.

### Local law

Businesses 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.

Furthermore, it should not be forgotten that bribery will also give rise to potential civil claims under the laws of, inter alia, England and the UAE.

### Bribery of Foreign Public 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. 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.

### Penalties

The penalties for committing an offence under the Act are severe; the maximum punishment for a company being an unlimited fine.

### Conclusion

As mentioned above, guidelines will be published to further clarify what will in fact constitute 'adequate procedures to prevent bribery' by a business. However, it is already apparent that a business falling within the ambit of the Act will need to ensure the implementation of a comprehensive anti-bribery policy to minimise the risks of bribery. This policy will need to be actively promoted within the organisation and staff must be fully appraised in relation thereto.

### Personal repercussions

Although not considered in this article, UK citizens and residents living and/or working in the Middle East should be aware of the personal repercussions of the Act. Individuals who commit an offence thereunder may be imprisoned for a maximum period of 10 years and/or subjected to a fine.



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