

An aerial night view of the Dubai skyline, featuring the Burj Khalifa as the central focus. The city is illuminated with various lights, and a complex network of highways with light trails is visible in the foreground. The sky is a deep blue.

LATHAM & WATKINS^{LLP}

DOING BUSINESS IN THE UAE

A Guide to the Financial, Business and Legal
Considerations for Doing Business in the UAE

Third Edition



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

INTRODUCTION

Country Background

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

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

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

Free Zones

The UAE federal constitution, the federal laws relating to free zones and the powers reserved by the individual emirates under the federal structure, permit each emirate to set up economic free trade zones or “free zones” for general or industry-specific commercial activities. The purpose of free zones is to encourage foreign direct investment into the UAE. Free zone entities are generally permitted to have 100 percent foreign ownership. This contrasts with most companies incorporated outside of the free zones, where UAE nationals are typically required to own at least 51 percent of the company.

Free zones are authorized to enact their own laws and regulations in specific areas which may in some cases override federal and emirate level laws on the subject matter. For example, the Dubai International Financial Centre (the DIFC), which is a financial free zone, has its own body of laws, including corporate laws, contract laws and employment laws, as well as its own court system. Unless otherwise stated, references in this guide to matters of law or practice applicable in the UAE generally refer to the wider UAE outside of the free zones.

Status of *Shari’ah* in the UAE

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



ESTABLISHING A LEGAL PRESENCE IN THE UAE

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

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

Incorporating a Local Entity

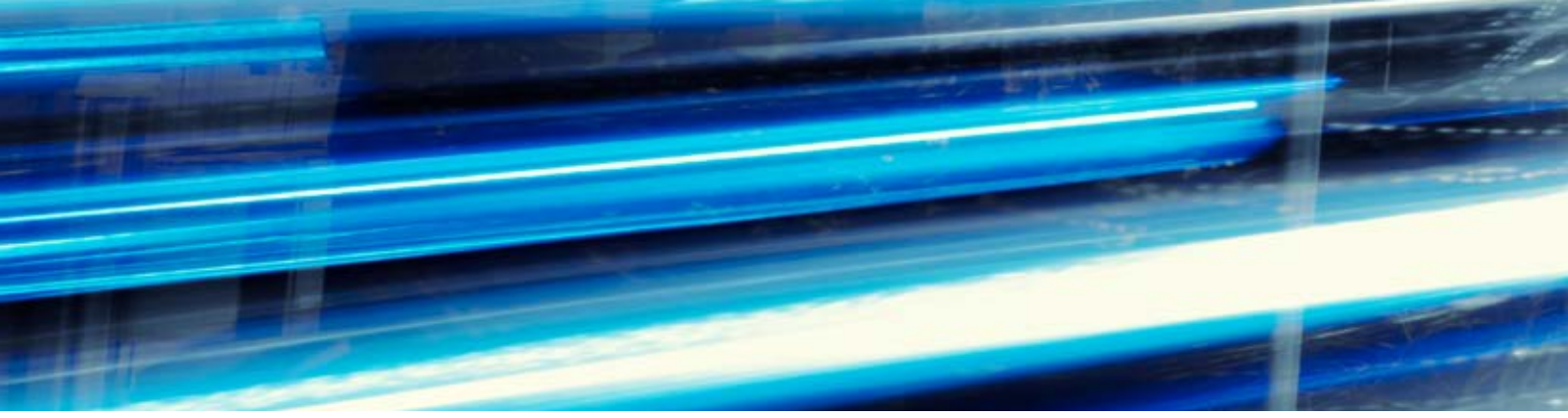
Unlike many other jurisdictions, it is not possible to buy shelf-companies in the UAE. While there is no central public platform in the UAE that compiles company information, the Department of Economic Development does disclose certain basic information on registered companies including company name, commercial registration number, company address, contact details and commercial activities.

As a general requirement, locally incorporated entities must obtain a commercial license from the Department of Economic Development (or similar government agency) and, if necessary, authorization from the relevant ministry or government entity in the relevant emirate or free zone.¹

Locally incorporated entities may be formed as civil companies² or incorporated under Federal Law No. 2 of 2015 Concerning Commercial Companies (the Companies Law).³ All locally incorporated companies must be established in accordance with the Companies Law. The Companies Law requires companies to adopt one of the following legal forms:

- Limited Liability Company;
- Private Joint Stock Company;
- Public Joint Stock Company;
- Limited Partnership (or Simple Commandite Company); and
- General Partnership (or Joint Liability Company).

Of the entities listed above, most foreign investors choose to establish a limited liability company given that foreigners can exert significant control over such legal entities and there are no minimum capital requirements in order to establish a limited liability company. Pursuant to Article 76 of the Companies Law, the shareholders of a limited liability company have the right to determine the share capital of the company provided that such company has sufficient capital to conduct its corporate objects. However, the Companies Law also prohibits limited liability companies from conducting certain commercial activities. Businesses involving banking, insurance or investment activities on behalf of third parties may only be conducted by a public joint stock company. Additionally, limited liability companies may not offer their shares for public subscription, a right reserved only for public joint stock companies. Nevertheless, it is possible for a company to change its legal form in order to qualify for public subscription.



The key consideration in relation to entities incorporated under the Companies Law is that 51 percent of the capital of a company must be owned by a UAE national or a company that is wholly owned by UAE nationals unless 100 percent of the capital of the company is owned by Gulf Cooperation Council (GCC) nationals. In addition, certain services and investment activities are reserved for UAE nationals only. For example, only UAE nationals and companies wholly owned by UAE nationals may supply real estate services, commercial agencies, rental/leasing services relating to cars, services incidental to agriculture, forestry, farming and fishing, placement and supply of personnel, investigation and security services, travel agencies and tour operator services, passenger and freight road transportation, and pharmacies and medical warehouses.

It is possible for the constitutional documents of a limited liability company to allocate up to 80 percent of the profits of the company to the foreign shareholder in Dubai and up to 90 percent in Abu Dhabi. The constitutional documents may also incorporate the following provisions designed to protect the interests of a foreign shareholder:

- the foreign shareholder may appoint all of the company's directors;
- the foreign shareholder may appoint the company's general manager;
- the foreign shareholder may have a veto over major decisions of the company; and
- the foreign shareholder may be entitled to all of the assets of the company on liquidation.

In relation to the remaining 10 to 20 percent of profits of the company, it is possible for additional contractual arrangements to be put in place in order to give the foreign shareholder the right to receive 100 percent of the profits.

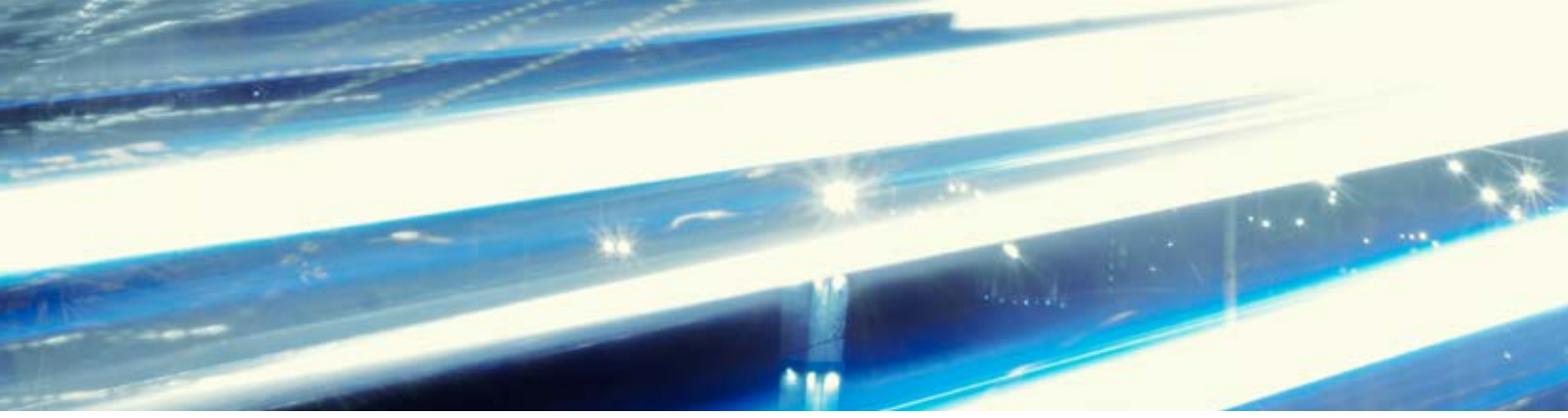
However, there is much debate in the UAE about the enforceability of such contractual side arrangements that purport to confer the full beneficial ownership and profits to a foreign shareholder, when the constitutional documents set out a 49 percent to 51 percent split. It is generally difficult to know how a UAE court would treat such contractual side arrangements if asked to consider them. Furthermore, consideration should be given to the Anti-Fronting Law.⁴

The Anti-Fronting Law was enacted in the UAE in 2004 and was intended to come into force in November 2007. However, a UAE Ministerial Cabinet Resolution deferred such enforcement until 21 December 2009.

In summary, the Anti-Fronting Law is designed to prevent "fronting" being where a foreigner is able to undertake any economic or professional activity, which such foreigner would not be able to carry out under UAE law, whether undertaken on the foreigner's own account or in a venture with others and enabling such foreigner to evade applicable law. As such, it could be argued that the Anti-Fronting Law intended to prevent the use of nominee arrangements or other similar contractual arrangements with UAE nationals.

Although the UAE Ministry of Economy does not appear to have provided further clarification on the implementation date or any scheduled further deferral of this law since the Ministerial Cabinet Resolution, there are differing and conflicting views on its current enforceability. As such, enforcement of the law remains unclear.

Due to the uncertainty over the Anti-Fronting Law, contractual side arrangements remain common in the UAE but their legality and enforceability remains questionable.



Opening a Branch or Representative Office

Articles 327 to 332 of the Companies Law permit foreign companies to open branches or representative offices within the UAE. A branch or a representative office of a foreign company may be wholly owned by foreigners.

A branch of a foreign company may only be registered in the UAE under the sponsorship of a local service agent who must be a UAE national or a company that is wholly owned by UAE nationals. The arrangement between the company wishing to set up the branch and the local service agent will be set out in a local agency agreement in English/Arabic which has to be signed before a UAE notary public. The service agent has neither power nor responsibility with respect to the branch and the foreign company would retain the full control over and benefit of the branch. A local service agent is usually paid an annual fee in the range of US\$20,000 to US\$40,000.

There are no minimum capitalization requirements for a branch although the foreign company is required to provide a standard form bank guarantee from a local bank or an international bank with a branch in the UAE in the amount of AED 50,000 (approximately US\$14,000) and to show details of its own capitalization and good standing, together with its two most recent sets of annual audited accounts.

Generally, the foreign parent company of the branch must have been in existence for more than two years in order to open a branch in the UAE.

The branch must have a commercial activity, which must be approved in advance by the relevant local authorities. The commercial activity of the branch must be the same commercial activity as its foreign parent company. If the foreign parent company is a GCC entity then no local services agent needs to be appointed. With regard to trading activities, branches are not typically permitted to physically deal in or trade in goods within the UAE other than goods manufactured by its foreign parent or its foreign parent's group. A branch is, however, permitted to provide maintenance and repair services to customers of its foreign parent company.

It is important to note that approval for the issuance of a license for a branch depends on the type of activity the proposed branch intends to carry on in the relevant emirate. It is prudent therefore to obtain initial approval from the relevant local authorities for the proposed activities of the branch prior to commencing the incorporation process.

A representative office is more limited than a branch office in the scope of activities that it is permitted to undertake. A representative office may only conduct marketing and administrative functions on behalf of its foreign parent company. A representative office typically gathers information on the local market, establishes relationships and solicits orders to be performed by the foreign parent company. The foreign parent company will generally be required to engage a commercial agent if it wishes to conduct sales activities within the UAE.



Setting Up a Free Zone Entity

A key feature of a free zone entity is that it is not subject to the foreign ownership restrictions imposed by the Companies Law in the wider UAE (although issues of foreign ownership may still be relevant if the free zone entity is used as a holding company for assets outside the relevant free zone). Free zone entities are also typically granted certain ancillary financial benefits.

A free zone entity will generally take one of the following three forms: a branch of a foreign company, a free zone company or a free zone establishment. There are no minimum capital requirements for branches, while in most free zones, a free zone establishment and a free zone company are typically required to have sufficient capital to conduct their licensed activities (e.g., US\$ 50,000 for DIFC Limited Liability Company). A free zone establishment may be owned by a single individual or company, whereas a free zone company typically requires two or more shareholders.

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

Holding Companies

The recent amendments to the Companies Law introduced the concept of holding companies in the UAE. Pursuant to Article 266 of the Companies Law, a holding company may take the form of a limited liability company or joint stock company. The objects of a holding company are limited to (i) holding shares in joint stock companies and limited liability companies; (ii) extending loans, guarantees and other forms of finance to its subsidiaries⁶; (iii) ownership of real estate and moveable assets necessary to achieve its objects; (iv) management of its subsidiaries; and (v) ownership of intellectual property. A holding company may only carry on its objects through its subsidiaries.

In certain circumstances, entities incorporated in free zones may be used as offshore holding companies, meaning that they are used in transactions that do not involve operations physically situated in the relevant free zone. Examples of this practice include the use of companies incorporated under the offshore companies regime of the Jebel Ali Free Zone for use as a regional holding company, or as a holding company for the ownership of real estate assets in Dubai. Additionally, special purpose companies (SPCs) can be incorporated in the DIFC in certain structured finance transactions, and take advantage of the international-standard regulatory environment and court system offered by the DIFC.

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

Commercial Agency Relationships

Foreign companies wishing to import/distribute goods in the UAE but who do not wish to maintain a physical presence in the UAE will generally enter into a commercial agency relationship with a UAE national or a company that is wholly owned by UAE nationals. Commercial agencies enable foreign companies to leverage domestic expertise and to forego the high costs and difficulties in establishing a physical presence in the UAE. Commercial agents are common amongst foreign manufacturers and traders especially in the large-scale importation of goods.

Under a commercial agency, the foreign business and the commercial agent agree to the terms of the sales commission, the territory of the distributorship and the duration of the relationship. If the commercial agent registers the contract with the Ministry of Economy the agent can obtain the various protections afforded to agents under the UAE Commercial Agencies Law (Federal Law No. 18 of 1981, as amended⁷). These protections include:

- **exclusivity** – registered commercial agents have the exclusive right to import the goods which are the subject of the agency;
- **commission** – registered commercial agents are entitled to receive commission on the sales they make as well as commission on sales made in the UAE by the principal or any other party; and
- **termination** – the principal may only terminate a registered commercial agency arrangement unilaterally for “material reasons.” Such reasons must be acceptable to the Commercial Agencies Committee.⁸ In practice, it is very difficult to terminate a registered agency arrangement. Furthermore, a principal may not refuse to renew a registered commercial agency agreement after its expiry date without the payment of compensation to the registered commercial agent.

Unregistered commercial agencies on the other hand are not subject to the above restrictions. There is no formal procedure required for an unregistered commercial agency to be valid other than parties negotiating and agreeing the terms of their arrangement.



GENERAL LEGAL CONSIDERATIONS

Doing Business With the Public Sector

Foreign businesses that do business with the UAE federal government or the government of any emirate or any other governmental body must comply with the public sector procurement rules set forth in Financial Order No. 16 of 1975, the Federal Regulation of Conditions of Purchases, Tenders and Contracts as well as any local procurement rules. With a few exceptions, only UAE nationals, foreign entities with a local agent or foreign entities with local partners may bid for public sector tenders.

Foreign Exchange Controls & Anti-Money Laundering

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

The UAE has recently strengthened its laws relating to the use of criminal proceeds and terrorist financing activities. As a member of the global Financial Action Task Force (the FATF), the UAE has implemented anti-money laundering procedures to meet the standards of the FATF. The various free zones also have rules on preventing money laundering. For example, the DIFC requires companies incorporated in the DIFC to appoint a senior manager as a money laundering reporting officer and to submit an annual report detailing steps that such company has taken to implement its anti-money laundering rules.

Bribery and Anti-Corruption

The UAE has ratified the United Nations Convention Against Corruption and has enacted federal and emirate level legislation that targets bribery and corruption.

Bribery of a UAE public official (which includes all customary government and ministerial positions and also covers employees of state-owned companies or partially state-owned private companies) is a criminal offence in the UAE. This applies equally to the public official and those who offer, accept and facilitate bribes, whether or not they actually benefit from the bribe. Private sector bribery within the UAE is similarly prohibited, however, the legislation only applies to the person accepting the bribe, not the person offering or facilitating the bribe. Penalties for bribery can include forfeiture of the bribe, up to 10 years in prison and fines commensurate with the amount of the bribe.

Taxation

There is no federal corporate or income tax levied in the UAE (except on oil companies and banks). Certain emirates, including Dubai under the Dubai Income Tax Ordinance of 1969, have introduced a local income tax; however, these taxes have not been implemented as of the date of this publication. In addition, free zone entities may be able to benefit from formal tax holidays for periods of up to 50 years (renewable 15 year holidays are common). The UAE also has tax treaties with a number of jurisdictions which UAE nationals and locally incorporated entities can benefit from. Currently, there is ambiguity regarding whether, under the laws of other GCC countries whether, free zone entities should qualify for the favorable tax treatment usually afforded to other GCC nationals/GCC-incorporated entities, particularly where such entities are not majority or wholly owned by UAE nationals.

There is currently no value added tax or sales tax in the UAE, although, in January 2016, the Ministry of Finance confirmed that a value added tax will be introduced across the UAE in 2018. There are also no personal taxes of any kind in the UAE — *i.e.*, no federal income tax, capital gains tax or inheritance tax. Certain municipality taxes are levied at the emirate level on designated services.

Employment Law

Employment in the UAE is governed by the UAE Labour Law, Federal Law No. 8 of 1980, as amended and applies to all staff and employees working in the UAE. Certain categories of individuals are exempted from the law, including federal and emirate level government employees, domestic servants and agricultural workers. In addition to the UAE Labour Law, the Ministry of Human Resources and Emiratization (previously the Ministry of Labour) has issued a number of ministerial resolutions and circulars which supplement certain provisions of the UAE Labour Law and in some instances have been used to clarify the application of certain provisions of the UAE Labour Law.

UAE employment law affords certain protections for employees, including setting minimum standards on employing juveniles, working hours, vacation and public holidays, sick leave, maternity leave, employee records, safety standards, termination of employment and end of service gratuity payments. In January 2011, the Ministry of Human Resources and Emiratization introduced, for the first time, a minimum wage limit for different categories of workers.

Employee grievances are handled by a special programme run by the ministry, and the ministry must also be informed if an employee is subject to the disciplinary code. Pensions and social security schemes in the UAE are governed by the Pensions & Social Securities Law, Federal Law No. 7 of 1999, as amended which apply to UAE and GCC nationals.

Some free zones have their own employment laws and employee grievance procedures although, these generally mirror the provisions of the UAE Labour Law. In some free zones, for example the DIFC, the free zone's laws will take precedence over the federal employment laws.

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

UAE federal law also sets out preferences for hiring UAE nationals and, for some administrative positions, requires that only UAE nationals be employed. If a non-free zone company has more than 50 employees, it must employ a minimum percentage of UAE nationals in accordance with the "Emiratization" policy of the UAE federal government as originally expressed in Council of Ministers Order No. 259/1 of 2004 entitled "Resolutions on Training and Employment of UAE Citizens in the Private Sector." The Emiratization policy applies to both the public and the private sector, and both local and international companies operating in the UAE are subject to the Emiratization policy in the sectors for which such guidelines have been formulated.

A key provision of UAE federal employment law is a requirement to pay a statutory end of service gratuity (ESG) to employees upon termination of their employment subject to satisfying certain requirements under the UAE Labour Law. The ESG regime in the UAE takes the place of a formal pension regime. ESG is calculated at a rate of 21 days of salary per year for the first five years of service and 30 days for each year thereafter, up to a maximum amount of ESG equal to two years of salary. The calculation of ESG is reduced if employment is terminated by the employee. ESG is payable as a lump sum on termination of employment. The DIFC has its own ESG regime, which is broadly similar to that applied in the wider UAE.

Intellectual Property

The UAE is an attractive global business centre and gateway to the wider Middle East region for international companies seeking to commercialize and exploit their brands, products and technologies. However, the UAE is often considered to present risks from an intellectual property (IP) infringement perspective — a perception that potentially can undermine a business's strategy and desire to build strong brand awareness and regional demand. International companies should take comfort that brands, products and technologies can be protected in the UAE and the UAE has an IP framework that is broadly aligned with international standards.

For example, trademarks, designs and logos can all be registered (under Federal Law No. 37 of 1992 in relation to Trademarks);

- enforcement proceedings can be brought against suppliers of counterfeit goods and unauthorized sellers. Various sanctions and remedies are available, including provisional prevention measures, seizures and confiscations, criminal sanctions and damages covering lost profits;
- in relation to patents, wide protection can be obtained under the UAE's local patent regime (under Federal Law No. 44 of 1992 in relation to the Regulation and Protection of Industrial Property for Patents, Industrial Drawings and Designs) or under the GCC patent protection regime, which gives patent holders GCC-wide rights that are enforceable in all GCC member states (including the UAE and other markets such as Saudi Arabia). See the following link for further information: <http://www.gccpo.org/DefaultEn.aspx>;
- copyright can be registered, although not mandatory. The benefit of doing so ensures that there is a verifiable record of the content of work as it existed at that point in time. This can be valuable evidence if a dispute arises and an author needs to prove a copyright claim (e.g., in a case concerning breach of copyright materials in a technology transfer project); and
- third parties can rely on the doctrine of "fair use" in certain circumstances to use copyright work without a licensor's permission. For further information on copyright protection, see Federal Law No. 40 of 1992 in relation to Protection of Intellectual Works and the Author's Rights.

Notwithstanding this, when seeking to protect or exploit IP, it is important to be mindful of a number of unique challenges under UAE laws, which may not be familiar to IP lawyers in other jurisdictions, including the following:

- marks and logos that convey messages and images that conflict with local laws and culture and public order will not be registrable. For example, class 33 under the Nice Classification (10th edition), which is for alcoholic beverages, is not available in the UAE, although it may be possible for a brand-owner to register its brand under other classes of goods and services;
- any disposal by an author of the total body of his or her future intellectual work or more than 5 future copyright works is void;
- licence agreements must be registered to be effective against third parties (although non-registration does not affect the contractual obligations between the original licensor and licensee);
- a trademark licensee has no right to initiate legal proceedings in its own name against infringing entities;
- employers are not automatically deemed to be owners of works created by their employees during the course of employment; and

- moral rights cannot be waived or assigned (including a right to withdraw a work from circulation), even where an author has assigned a work's financial rights.

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

- if the company is licensing its IP, impose responsibilities on the licensee to register any licences in the UAE and notify the company of claims relating to IP infringements, and including a procedure for dealing with such claims;
- if a company is paying for the development of IP, establish contractual (as well as organizational) arrangements whereby employees or contractors are required to assign financial rights in works and execute retrospective assignments when required; and
- when dealing with moral rights, impose clear compensation obligations in the event that an author seeks to withdraw a work from circulation.


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

Data Protection and Security

Data is one of the most valuable assets of a company. The UAE recognizes this, and so there is a complex legal framework that has sought to impose data handling obligations with respect to various forms of data. There are a variety of local laws that contain different forms of protections for individuals (e.g., personnel), businesses and government and their information.

These laws impose data handling obligations or otherwise promote best practice data handling practices, such as the following:

- there is a right to freedom and confidentiality of communications. Individuals have a right to complain about invasions of this right to privacy. This right is limited to the citizens of the UAE;
- it is a criminal offence to publish personal data relating to an individual's life without their consent;
- it is a criminal offence to access or disclose certain communications without consent;
- it is a criminal offence to access IT systems without authorization;
- it is a criminal offence to access an IT system without consent to obtain confidential or government information;
- there is a prohibition on the invasion of an individual's privacy by means of an IT system without the individual's consent and unless otherwise authorized by law; and
- people based in the UAE may be entitled to hold entities in possession of their personal data liable under the principles of the UAE Civil Code for their negligence in not ensuring or implementing proper security measures to prevent the breach, if such breach has resulted in actual losses being suffered by that person.



There are sector specific laws that impose data protection obligations and have an impact on data handling practices. For example:

- onshore financial institutions are under an obligation to implement adequate risk management systems and take reasonable care to secure unauthorized disclosure of customer data and confidential information (e.g., trading information), and are also under a general obligation to notify the UAE Central Bank of matters it expects to be notified of — which we consider to include a cyber-security attack;
- offshore financial entities in the DIFC or the ADGM are subject to a data protection regime and enforcement agency that is modelled on the European Union’s data protection framework. The DIFC and ADGM laws apply to DIFC and ADGM entities and do not impose obligations on entities outside of its jurisdiction (including onshore UAE). However, the laws become relevant to the extent that an entity will be interacting with an entity in the DIFC or ADGM directly;
- healthcare providers are under a general obligation to maintain the confidentiality of patient data and cannot disclose without patient consent whilst entities registered in the Dubai Healthcare City (the DHCC) must comply with certain health data protection principles, including processing data for required purposes (e.g., relating to the provision of services to a patient and an entity’s licensed activities), storing such data in a secure manner and transferring data outside of the DHCC;
- telecommunications operators are under an obligation to ensure that information of their subscribers in the UAE is protected (including personal data, service usage data, voice/data and SMS content and transmissions); and
- government entities are required to comply with certain IT standards to ensure the confidentiality, security, integrity and availability of government information. Entities tasked with implementing and monitoring such standards include the Abu Dhabi Information Security Centre, the National Electronic Security Centre and the Dubai e-Government Department.

Given the complex framework of obligations applicable to processing data in the UAE, it is advisable to always obtain specific advice prior to processing data and organizations that process personal data should adopt and maintain industry standard security measures with respect to physical and logical security, IT systems and electronic communications and where they provide a third party with copies of or access to personal data, negotiate contractual terms that:

- bind a third party to sufficient security and organizational requirements that will enable the business to fulfil local law obligations and mitigate the risk of data breaches;
- ensure there are sufficient data backup and disaster recovery obligations imposed on the third party;
- permit audits to confirm compliance with the organization’s security and related requirements;
- provide the organization with the right to retrieve all of its data in formats that are easily accessible, readable and importable into other applications, with the reasonable assistance of the third party; and
- require the third party to securely delete all data (including duplicates and backups) when requested.

Governing Law

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

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

While it may be helpful as a matter of practice to include such provisions, there can be no assurance that a foreign jurisdiction or arbitration clause would be recognized by the UAE courts in practice. The UAE Civil Code and general law in the UAE gives the UAE courts broad powers to hear and adjudicate matters involving a UAE party, and there is therefore inevitably a risk that a UAE court could purport to take jurisdiction over a matter despite an express provision providing for an alternative jurisdiction. UAE legislation provides that the UAE courts have jurisdiction to hear actions brought against UAE nationals, UAE corporate entities and foreign citizens having an address or place of residence in the UAE, irrespective of any agreement between the parties in respect of jurisdiction and applicable laws.

Dispute Resolution

Arbitration

International arbitration is the preferred method of dispute resolution for cross-border transactions relating to the UAE. The primary reason for that, and one of the key features of international arbitration, is the relative ease with which arbitral awards can be enforced in countries around the world. That is due to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which well over 140 countries are a party. The UAE acceded to the New York Convention in 2006, which means that foreign arbitral awards should be as easily enforced within the UAE as local arbitral awards. As a result, many parties doing business in the UAE (both foreign and locally based) tend to refer any disputes arising out of or in connection with their contracts to final and binding arbitration.

Dispute Resolution Options in the DIFC

Recently, the DIFC Courts' jurisdiction has been significantly expanded to include jurisdiction over matters which are referred to the DIFC Courts by private parties on a consensual basis, whether or not such parties are DIFC-domiciled entities, in addition to jurisdiction over all matters pertaining to the parent companies of DIFC registered branches.⁹ The practical effect of these changes is to enable non-DIFC persons to opt in to the jurisdiction of the DIFC courts, including through the inclusion of forum selection clauses in ordinary commercial contracts and finance documents, irrespective of a nexus to the DIFC.



A common concern that remains with respect to DIFC court judgments is the procedure for enforcement of those judgments. At least within the UAE, however, there are established procedures and codified guidelines which ensure that DIFC court judgments are adequately enforced by the Dubai courts or the other emirates of the UAE. Pursuant to the Protocol of Enforcement between the Dubai Courts and the DIFC Courts (the Protocol of Enforcement), all judgments, orders and awards issued or certified by the DIFC courts (for example, in the instance of the certification of a DIFC-LCIA arbitration award¹⁰) will be enforced by the Dubai Courts provided that the relevant judgment or order has been translated into Arabic and constitutes a final judgment. Crucially, the judge recognizing and executing the judgment at the Dubai Courts has no authority to review the merits of an order or judgment during any enforcement proceeding. The procedure established by the Protocol of Enforcement essentially facilitates the conversion of a DIFC court judgment into an order of the Dubai Courts. Thereafter, automatic enforcement can be achieved not only onshore in Dubai, but in the other emirates of the UAE as well.

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

Competition Law

The UAE competition law came into force on 23 February 2013¹¹ (the Competition Law). Amongst other things, the UAE Competition Law made certain merger transactions involving the UAE subject to the prior approval of the Ministry of Economy. The UAE Competition Law also put in place certain prohibitions on agreements restricting competition and on abuses of dominant market positions. The UAE Competition Law contemplated the subsequent promulgation of implementing regulations and cabinet resolutions defining the limits of economic concentration and the threshold percentages that would, among other things: (i) trigger merger control filing obligations with the Ministry of Economy under Article 9 of the UAE Competition Law (subject to certain other threshold matters being satisfied); (ii) permit a restrictive agreement under the “weak impact” exemption from Article 5 of the UAE Competition Law; or (iii) deem a company's market position as a “Dominant Position” under Article 6 of the UAE Competition Law. On 27 October 2014, the UAE Competition Law implementing regulations (the Implementing Regulations) came into force and provided some clarification on merger control filing requirements and the review process.

On 25 April 2016, the Federal Cabinet of the UAE (the Cabinet) issued Cabinet Resolution No. 13 of 2016 (the Cabinet Resolution), which sets out the percentage and thresholds related to the implementation of the UAE Competition Law and its Implementing Regulations. The Cabinet Resolution has set the concentration threshold at 40 percent of overall transactions in the “relevant market.” The Ministry of Economy currently stands ready to accept merger control filings as contemplated under the Competition Law.

The UAE Competition Law provides an exemption from the entirety of the UAE Competition Law for establishments owned or controlled by the UAE federal government or a local government of an emirate according to the controls specified by the cabinet. The Cabinet Resolution clarifies the scope of this exemption by providing that it applies to all acts carried out by establishments under the control of the UAE federal government or local government of an emirate where: either (i) an establishment is fully owned by the UAE federal government or a local government of an emirate, or (ii) an establishment is no less than 50 percent owned by the UAE federal government or a local government of an emirate.

ENDNOTES

- 1 These business activities and corresponding government agencies include, among others: industrial projects (Ministry of Finance), health services (Ministry of Health/relevant health authority depending on the emirate where such service will be provided), engineering consultants and related technical services (municipality authority of the relevant emirate), law firms (the Ruler's Court of the relevant emirate e.g., Government of Dubai Legal Affairs Department), banking and financial services (UAE Central Bank), recruitment agencies (Ministry of Emiratization and Human Resources), sea cargo, freight forwarding and cargo clearing (Department of Ports and Customs).
- 2 Civil companies may only be established in the emirates of Dubai and Sharjah and are typically established to practice certain types of professions, and are subject to separate rules and regulations.
- 3 There is an exception to this general rule for entities that meet any one of the following criteria: (a) specifically exempted by the UAE Federal Cabinet of Ministers from the requirements set forth in the Companies Law; (b) wholly owned by the federal or relevant emirate government including wholly owned subsidiaries of such companies; (c) operating in any of the four sensitive industries: oil and gas, electricity and gas production, water desalination and transmission, distribution or other related activities thereof; (d) specifically exempted by Federal Law No. 8 of 1984 concerning commercial companies prior to the enactment of the current companies law; (e) exempt by virtue of federal laws which expressly disapply the provisions of the Companies Law; and (f) where the federal government or relevant emirate government owns (directly or through entities wholly owned by it) at least 25 percent of the share capital of such entity
- 4 UAE Ministerial Cabinet Resolution No. 229/12 of 2007.
- 5 The relevant licence will be issued by the free zone authority regulating the free zone in which the company is incorporated. In certain instances, a free zone entity may be able to apply for an additional licence from a UAE authority that has jurisdiction outside of the free zone (for example, the Dubai Department of Economic Development) if it is conducting certain kinds of permissible business in a particular emirate outside of the free zone of incorporation.
- 6 With the introduction of holding companies, the Companies Law also includes a definition for "subsidiaries" in the context of holding companies.
- 7 The 2010 amendments to the UAE Commercial Agencies Law strengthen the protection afforded to UAE nationals agents. The 2010 amendments remove the concept of a principal being able to unilaterally deregister a fixed term agency arrangement upon expiry of the fixed term.
- 8 The Commercial Agencies Committee is a special committee, reintroduced by the 2010 amendments to the UAE Commercial Agencies Law, that is charged with the duty of reviewing terminations of agency arrangements.
- 9 Dubai Law No.12 of 2004 as amended by Dubai Law No.16 of 2011.
- 10 The Protocol of Enforcement extends to arbitral awards issued by the DIFC-LCIA, however, these awards must first be ratified by the DIFC Courts before being enforced by the Dubai Courts.
- 11 Federal Law No. 4 of 2012.

CONTACTS

For more information, please contact one of the Latham representatives listed below.

Christopher Lester

+971.4.704.6369

christopher.lester@lw.com

Eyad Latif

+971.4.704.6318

eyad.latif@lw.com

Omar Maayeh

+971.4.704.6427

omar.maayeh@lw.com

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