

UAE Legal Update

The Clifford Chance UAE Legal Update is a quarterly update on legal developments relevant to companies established or operating in the UAE. Please contact [James McCarthy](#) or your usual Clifford Chance contact for further information in relation to an item or development.

DFSA consults on proposed listing rules for NASDAQ Dubai

- **Background:** With effect from 1 October 2011, responsibility for maintaining the Official List of Securities was transferred from NASDAQ Dubai to the Dubai Financial Services Authority ("DFSA"). It is hoped that the transfer will ensure less regulatory duplication and greater efficiency for users since the prospectus and listing approval processes will now be centralised within the DFSA.
- **New Markets Law Regime:** The transfer paves the way for the DFSA's proposals for wider changes to the Markets Law 2004 and the Offered Securities Rules module of the DFSA Rulebook, each of which will be replaced by the new Markets Law regime. The proposed changes are aimed at bringing the prospectus process on offers of securities within the DIFC into closer alignment with the EU's Prospectus Directive and the Market Abuse Directive. The new regime is expected to come into force in early 2012 and, as part of its new role, the DFSA is

obliged to create rules governing the admission of securities to the Official List ("**DFSA Listing Rules**"). In the interim period, the DFSA will apply the NASDAQ Dubai listing rules with some minor amendments to reflect the transfer of responsibilities.

- **Consultation:** On 6 October 2011, the DFSA published Consultation Paper No.78 attaching the proposed DFSA Listing Rules, with a deadline for comments of 15 November 2011 (the "**Consultation**"). Clifford Chance intends to respond to the Consultation. We understand that the DFSA is intending to ensure that the DFSA Listing Rules are ready for enactment as part of the new Markets Law regime (in the form of a chapter in the Markets Rules module of the DFSA Rulebook) in early 2012.
- **Key Proposals for the DFSA Listing Rules:** The key proposals set out within the draft DFSA Listing Rules are as follows:
 - the introduction of high-level "**Listing Principles**" with which issuers must comply. These aim to provide high level guidance to market participants as to how the DFSA will interpret the new rules;

- changes to eligibility requirements. The eligibility requirements in respect of both issuers and securities have been streamlined to create "**general eligibility requirements**";
- changes to the requirements for a prospectus (including certain exemptions) and responsibility for review and approval by the DFSA;
- changes to the sponsor regime;
- the introduction of new procedural requirements in respect of applications to the Official List;
- changes to the continuing obligations of listed entities;
- guidance in respect of compliance with the proposed rules for applicants seeking a secondary listing; and
- the introduction of a new defence to market abuse.

A full client briefing on the proposed DFSA Listing Rules will be circulated in the near future. Please contact Mike Taylor for further information.

Ministry of Economy review of UAE legislation

- **Draft Commercial Companies Law:** Clifford Chance recently contributed to a review of the draft revised Commercial Companies Law (Federal Law no.8 of 1984 (as amended) ("CCL")) being coordinated by the Dubai Executive Council. Although the content of the draft law remains confidential, further updates will follow in due course.
- **Other draft laws:** The revised CCL is part of a wider legislative review programme and it has been widely reported that the Ministry of Economy is in the process of considering a number of key pieces of UAE legislation. New laws relating to foreign investment, insolvency/bankruptcy, arbitration and competition are expected, although the exact timing for implementation is not currently known.

Please contact Mike Taylor or James McCarthy for further information.

New Commercial Licensing Law for Economic Activities in Dubai

Law No. 13 of 2011 Organising Economic Activities in the Emirate of Dubai ("**Economic Law**") was published in the Dubai Official Gazette on 29 September 2011. The new law formalises the existing commercial licensing regime in Dubai and clarifies how economic activities

are to be undertaken in the Emirate. Some key points are as follows:

- **Single window licensing entity for Dubai:** Pursuant to the Economic Law, any natural person or juristic person may exercise 'economic activities' in Dubai only through an entity that is granted a licence by the Dubai Economic Department ("**DED**"). The DED is therefore now the 'single window licensing entity' for the Emirate, although it can delegate its powers to other bodies where required. We are aware, for example, based on discussions with the DED, that the Dubai Department of Tourism and Commerce Marketing ("**DTCM**") will continue to regulate and approve licences for entities involved in tourism activities and that the existing DTCM procedures will not be affected by the Economic Law.
- **Economic Activities covered by the Economic Law:** The term 'economic activity' is not defined in the Economic Law but licences will continue to be granted for practicing economic activities in fields related to commerce, trade, industry, agriculture, fisheries, mining, services and 'other activities' in accordance with the manual of classifying economic activities in the Emirate of Dubai, which is issued by the DED.
- **Corporate Entities:** The Economic Law clarifies that economic activity in the Emirate should be undertaken through any of the following legal forms:
 - sole proprietorship;
 - civil works company;
 - any form of commercial company; or

- a branch of a national or foreign company or branch of a company in a free zone.

There are separate provisions regarding the licensing of marketing activities in the Economic Law. The law specifies that an entity must not undertake any marketing activity for its products and services unless it obtains a prior commercial licence from the DED.

- **Free Zone Entities:** The DED now has the power to permit licensed entities in free zones (in coordination with the relevant free zone authorities) to exercise their activities in Dubai pursuant to controls and conditions set by the Dubai Executive Council (on the DED's recommendation) provided such entities comply with the laws in Dubai. However, the nature and scope of this exception (including activities that entities established in free zones may carry on outside the relevant free zone and the time frame for the introduction of the relevant rules) is, at present, unclear.
- **Licences for up to four years:** Licences issued by the DED shall be for a term of one year and renewable during the last month of its term, although upon request to and approval by the DED, a licence can be granted for up to four years.
- **Breaches of Economic Law:** The DED can suspend or amend licences in the public interest. Violations of the law will be punishable by a fee of not less than AED 100 and no more than AED 100,000.
- **Time Frame for compliance:** Entities licensed before the law was issued must reconcile their status within no more than one

year from the date the law comes into effect (although the period may be extended).

Please contact James McCarthy for more information.

DIFC jurisdiction to include "opt in" regime

The Dubai International Financial Centre Court ("**DIFC Court**") recently announced that His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and Ruler of Dubai, has signed a law which extends the jurisdiction of the DIFC Court to include all civil and commercial disputes where the parties to the dispute expressly agree. Such agreement can be reached before or after the dispute arises. This is likely to make the DIFC Court even more attractive to international businesses seeking a forum to resolve disputes in the Middle East.

By way of background, and since its establishment in 2008, the jurisdiction of the DIFC Court has been relatively narrow. The key question determining whether a claimant could bring a claim in the DIFC Court has, broadly speaking, been whether there is a connection (or nexus) with the DIFC. It was never an option for parties unconnected with the DIFC to "opt in" to the DIFC Court jurisdiction. The new law provides that option.

The impact of the new law on the appeal of the DIFC Court as a centre for resolving UAE and other regional disputes is therefore likely to be considerable, particularly given the restriction on the ability of the Dubai Courts to review the merits of a final judgement or order of the DIFC Court

(and indeed some 50 such judgements and orders have been enforced by the Dubai Courts).

Further detail on the new law and its impact will be circulated once it becomes available. In the meantime, please contact Graham Lovett or James Abbott with any queries.

Enforcement of arbitral awards in the UAE

- Encouraging recent decisions: In December 2010, it was reported that the Fujairah Court of First Instance had ratified two English arbitration awards. This is believed to be the first time that any UAE court has ratified a foreign award under the New York Convention since it came into force in the UAE in December 2006. This was followed by reports in January 2011 that the Dubai Court of First Instance found in favour of a large international trading company based in London and Dubai and ordered the recognition and enforcement of a London arbitration award under the Convention (despite the enforcement action being contested by a Dubai-based company). Both are encouraging developments for international arbitration in the UAE and point towards a positive approach by the UAE Courts towards enforcement of foreign arbitration awards.

- A word of warning: There is no binding system of precedent in the UAE and both cases were heard at First Instance and remain subject to appeal. It is therefore not guaranteed that the

UAE courts will adopt the same approach in similar proceedings in the future. There have also been recent reports of other UAE courts taking a divergent view in two separate sets of proceedings where the enforcement of foreign arbitration awards (originating from Sweden and Singapore) under the Convention were refused (with both matters remaining subject to appeal).

- Dubai Courts approve execution of DIFC-LCIA arbitration award: The Joint Committee of the Dubai Courts-DIFC Courts has announced that the Dubai Courts have approved the execution of a DIFC-LCIA arbitration award that was recognised and ratified by the DIFC Courts. This is a long-awaited example of a DIFC/LCIA arbitral award being enforced "onshore" in the UAE (i.e. outside of the DIFC) using this procedure, thereby avoiding the Civil Procedure Code ratification procedure (which can delay enforcements of awards from anywhere between six months to several years). Parties to arbitration do not need a "nexus" or connection with the DIFC in order to arbitrate there and, in theory, parties from any jurisdiction should be able to agree to the DIFC as the seat of their arbitration. This recent case therefore reinforces DIFC arbitration as an appealing option for an international dispute, particularly if an award will need to be enforced in Dubai. However, whilst (in theory) such an award should be enforceable throughout the UAE, the position in Emirates outside Dubai is less clear.

Please contact Graham Lovett or James Abbott for further information.

New Corporate Governance Code announced

We understand from local press reports issued last month that a new Federal decree on corporate governance was signed on Saturday (29 October 2011) by His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and Ruler of Dubai. If the reports are accurate, the new code is expected to tighten the regulation and constitution of boards of directors of profit and non-profit institutions in the UAE, as well as corporations owned by the Federal government. This development is likely to have a major impact on certain UAE institutions, as it appears to expand corporate governance and transparency requirements beyond listed companies to family and state owned enterprises.

Further detail on the new code and its impact will be circulated once it becomes available.

English Contract law: "reasonable" / "all reasonable" or "best" endeavours?

Failure to satisfy an absolute obligation under a contract governed by English law will result in a breach of contract. It is, therefore, common for parties to seek to qualify their obligations by only agreeing to use

'reasonable', 'all reasonable' or 'best' endeavours in order to achieve them.

Despite the fact that these terms are widely used, in our experience their meaning is often misunderstood. The English Courts have held that endeavours clauses form a hierarchy of obligations, with 'best endeavours' placing the most stringent burden on the obligor and 'reasonable endeavours' the least. The position under English law regarding the three types of endeavours clause can be summarised in very brief terms, as follows:

- 'reasonable endeavours': the obliged party should adopt and pursue one reasonable course of action in order to achieve the result, bearing in mind its own commercial interests and the likelihood of success, and which need not be exhaustive of every course available to it.
- 'all reasonable endeavours': the obliged party should explore all avenues reasonably open to it, and explore them all to the extent reasonable, but the party is neither obliged to disregard its own commercial interests, nor required to continue trying to comply if it is clear that all further efforts would be futile.
- 'best endeavours': the obliged party should take steps which a prudent, determined and reasonable obligee, acting in its own interests and desiring to achieve that result, would take. This does not include actions which would lead to its financial ruin, undermine its commercial standing or goodwill, or have no likelihood of being successful.

What English case law (such as the recent High Court decision in *Jet2.Com Ltd v Blackpool Airport Ltd*)

also highlights is the risk to a party in accepting a 'best endeavours' obligation and the uncertainty as to what this may require. In particular it is important to note that the interpretation of such clauses may be very fact specific and that the same clauses in an agreement could be interpreted in different ways depending on the facts existing at the relevant time.

Our full client briefing, setting out a summary of some recent English case law on endeavours clauses and some practical drafting tips, can be found here. Contact Rupert Harper or Graham Watt for further information.

Recent developments in UAE real estate law

- Registration of property rights in Abu Dhabi: A framework for the eventual registration of all ownership interests in and mortgages over property in Abu Dhabi was introduced in December 2010 (pursuant to Resolution No. 64 of 2010). Until further implementing regulations are passed, it is still not possible to register property interests with the Abu Dhabi Land Registration Department, other than on a transfer of freehold title. However, the Resolution contemplates that:
 - the registration of all interests in land, including rights of musataha, usufruct rights and long term leases (leases with a term of more than 25 years, including any renewal rights), both inside and outside the Investment

Areas, will be required once fully implemented; and

- property mortgages will be void unless signed by the contracting parties (or a representative authorised by power of attorney) in the presence of a registrar (or his representative) and registered in the real estate register.

- Registration requirements for short-term leases in Abu Dhabi: A new lease registration system called 'Tawtheeq' was introduced in Abu Dhabi in January 2011 (pursuant to Executive Council Resolution No.(4) 2011). In summary, the new system means that short-term leases must now be registered with the relevant Municipality, together with any ancillary documents (such as amendments and renewals) and details of any tenancies (which must be registered by landlords or management companies in the case of managed properties).
- Registration of freehold properties in Dubai for "offshore" companies: The Dubai Land Department ("DLD") has implemented a new policy that came into effect from 1 January 2011 and requires any entity seeking to own real estate in

Dubai through an offshore company to establish a Jebel Ali Free Zone entity through which to own the real estate interest. The DLD has not explicitly set out what it considers to constitute "offshore" but companies from traditional offshore jurisdictions such as the BVI, the Cayman Islands, Jersey and Guernsey will be regarded as "offshore" for this purpose. The DLD have confirmed to Clifford Chance that the new policy does not apply to foreign entities established in jurisdictions such as England and the US, nor to DIFC special purpose vehicles or TECOM entities, which are able to own properties directly (even if they in turn are owned by an offshore entity). Recent reports have suggested that this policy may be extended to include other free zones in Dubai. The policy is not retrospective, so any property interest that is already registered in the in the name of an offshore company will not need to be transferred.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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