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REDOMICILIATION TO THE DIFC - KEY REGULATORY AND PROCESS CONSIDERATIONS

On 30 June, HSBC Bank Middle East Limited transferred its place of incorporation to the DIFC, making the DFSA the lead regulator of its banking activities across the Middle East.

We set out below some of the key process considerations for any company seeking to move its head office to the DIFC for the purpose of centralising management and/or making the DFSA its lead regulator.

CORPORATE STRUCTURE AND PROCESS

- The DIFC companies law is well suited for the re-domiciliation process. Established options are:
- the existing ultimate holding company ("topco") transfers its incorporation from its original jurisdiction into the DIFC (a "migration"); or
- a new topco to be incorporated in the DIFC.
- More exotic approaches include designating a DIFC branch to act as the head office. However, home state regulation may not permit such a structure.
- When migrating to the DIFC, the topco's existing incorporation would simply transfer over to the DIFC from the date of migration. However, the ability to do this may depend on whether the existing jurisdiction permits the company to transfer out – which most off-shore jurisdictions around the world do.
- When incorporating a new company in the DIFC, the issues will be largely driven by the ability to exchange the current company's shares for those of the new company (see further "contracts and recognition" below).
- Whichever redomiciliation option is adopted, the DIFC Authority's registrar of companies and business development teams are very helpful and well appointed to efficiently assist firms in establishing in the DIFC. The DIFC process also largely relies on electronic filings. Therefore, the process for either option is generally quick and smooth.

ACTIVITIES TO BE CONDUCTED IN OR FROM THE DIFC

- As firms acting in the DIFC will be aware, when conducting banking services in the DIFC it is not possible to accept deposits from the UAE's markets or deal in the UAE Dirham. On the other hand, firms established in the DIFC are not subject to the UAE's Federal commercial or civil laws and

Key issues

- The DFSA is willing to act as a lead regulator for a financial services group, applying a prudential oversight based on a rulebook derived from internationally recognised regulatory principles.
- DIFC laws and its court/arbitration system are based on English law, providing a stable and predictable base and a highly flexible corporate regime designed to accommodate commercial structures and practices.
- DIFC laws closely follow English law principles and practices.
- DIFC Insolvency and netting laws are adapted to recognise and enforce cross border financial contracts.
- MENA Firms can demonstrate to investors and counterparties:
  - a reliable and comparatively certain legal jurisdiction which has robust regulatory and corporate governance regimes;
  - proximity to the lead regulator, both geographically and culturally.
- DIFC's handling of a recent bank insolvency set a positive precedent for the recovery and resolution of financial institutions which provides additional certainty to markets and counterparties.
- DIFC guarantees 40 years of zero taxes on corporate income and profits, enhanced by the UAE's extensive array of double taxation treaties.
- DIFC allows 100% foreign ownership of companies and there are no restrictions on capital repatriations abroad.

most Dubai laws (however criminal laws still apply - see DIFC vs UAE laws below).

- If a DIFC entity is not regulated to conduct banking activities in the DIFC, the DFSA licence will include a condition such that to the extent the applicant carries on banking activities through its branches located outside the DIFC, it must take reasonable steps to ensure that:
  - those banking activities are not carried on in or from the DIFC; and
  - it undertakes only management, oversight and other administrative support functions in relation to those banking activities in the DIFC.
- Arrangements would also need to be made with existing clients so that advice and other financial services are not given in the DIFC unless the requisite authorisation is held by the topco.

CONTRACTS AND RECOGNITION (MIGRATION)

- Once migrated, DIFC law provides that the company will continue in the DIFC, including in respect of all its rights and obligations, as if it has always been incorporated in the DIFC. In our view, English and New York law should generally recognise the migration of a company to the DIFC and we understand most Middle East jurisdictions would also. However, legal recognition would require specific analysis in each case[i].
- Due diligence will be necessary to check whether any contractual terms provide that a migration will trigger third party rights or breaches of contract (see below on public debt and equity).

PUBLIC DEBT OR EQUITY?

- For the incorporation of a new parent company, a share for share exchange would be required, which could be a complex process for a listed company and could require shareholder approval.
- There would be no change to share capital upon a migration but shareholder consent may also be required. In addition, a listing on NASDAQ Dubai in the DIFC would trigger additional DFSA reporting and other requirements.
- If the company has listed debt instruments, bond holder consent may be needed for either of the above-mentioned structures – obtaining consent could be a complicated and time consuming process, particularly if there are different classes of debt and/or a large cross section of bond holders.

CAPITAL REQUIREMENTS

- As a lead regulator, the DFSA would supervise the group from a prudential perspective but not for conduct of business purposes for non-DIFC branches and subsidiaries. Detailed engagement would be required with the DFSA supervisory team to assess the differences, and any capital concessions or specific arrangements in place, with the existing home state regulator. A financial group without a group capital regulator would have the DFSA imposing a new capital requirement from a group

Clifford Chance Expertise

- The DFSA is willing to act
- Clifford Chance regularly advises financial institutions and other entities, established and considering establishment in the DIFC, on its regulatory framework and ongoing requirements.
- We are uniquely placed to advise our clients on these matters through our leading corporate, capital markets and regulatory practices both in the DIFC and worldwide.
- Our team includes senior lawyers with extensive experience working for the DFSA.

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[i] In this sense, recognition means that, for example, English law would recognise a contract entered into by a Topco in Cayman would remain enforceable if Topco migrated from Cayman to the DIFC.

perspective in accordance with the DFSA rules. The DFSA has implemented various Basel III requirements (such as LCR and leverage ratio) in this regard.

- Overall, depending on home state regulation and any specific circumstances of the group, there could be increased capital requirements from the DFSA. The existing DFSA rulebook is expected to continue to adapt to groups over time.

DIFC AND UAE LAWS

- The DIFC is a common law jurisdiction where UAE Federal civil and commercial laws are not applied. However, UAE criminal laws such as the UAE Penal Code and AML laws do apply. Certain administrative laws such as immigration requirements also apply in the DIFC.

NOTARISATION PROCESSES

- One aspect of life in the UAE which should be considered is the notarisation process for the legalisation of documents.
- There is no method of notarisation in the DIFC. Notaries in the wider UAE are generally required for the preparation of documents, such as powers of attorney, to be used in the UAE and abroad.
- While this would have no impact for a solely DIFC business (which is based on the English system), for a business operating in many jurisdictions, the UAE legalisation processes can include some administrative burden.

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