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Meyer-Reumann & Partners
P.O. Box 9353
Dubai, U.A.E.
Tel: 00971-4-331 7110
Fax: 00971-4-331 3832
dubai@meyer-reumann.com
www.meyer-reumann.com

With offices in
Dubai + Alexandria + Erbil + Muscat + Riyadh

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GCC

Foreign Shareholderhip in Different GCC Countries

Guiding Principle

Recently the UAE Cabinet has taken steps to consider revising the rule of 51% mandatory Emirati shareholder ship. This decision has fond broad reflection in the community of foreign investors to the region. In line with its series article on the Omani legal landscape and its continuous engagement in the Kingdom of Saudi-Arabia (KSA), M&P would like to take the opportunity the present foreign shareholdership structures and investment conditions in these three countries.

A. Introduction

The dependency on oil is over! This message is clearly recognizable throughout policies announced in the entire GCC area. A growing focus on foreign investment and in particular foreign direct investment seems to be the *leitmotif* and motto theme of economic policies in the region. Presumably fueled by tax revenues in particular the Dubai Executive Council under Sheikh Ḥamdān has been reducing government fees in order to facilitate further economic dynamics and seems to target with these measures also foreign investors. The initiatives of the Dubai Airport Free Zone (DAFZA) and the Government of Dubai to allow DAFZA companies to branch out into the mainland without having to acquire local office space can be seen in line with this. Inter alia, perspectives for longer visas, employment opportunities for different employers and the announcement of a Federal foreign investment law seem to complete a bundle of measures undertaken by federal and local governments to attract more foreign direct investment. There may well be a perspective to see the dawn of a shift of paradigms in UAE policy on foreign investment. Until now in many aspects, UAE foreign investment policy has been to protect and give the countries citizens its share in wealth economic growth created in the country. This has been put in place by providing citizens with legally guaranteed positions in its economic system such as the exclusive commercial agency for citizens, the 51% rule for shareholders, monopolies for certain professions (e.g. court lawyers) or easier conditions to access to certain publicly sanctioned positions (e.g. court experts). All of this has been a very successful approach for years. However, currently this structure seems to discourage the inflow of foreign capital needed for further economic growth and policy makers find themselves in front of the challenge to readjust certain factors in this equation. One of the most prominent of these factors about to be adjusted is the mentioned 51%-rule of mandatory national shareholdership. Assuming that the same structure of demands and request for foreign direct investment is somewhat similar in all three countries, we would like to present the status quo, how foreign investment is being treated in the UAE, KSA and Sultanate Oman with regard to foreign shareholdership and discuss advantages and disadvantages of the different approaches to foreign investors.

B. The situation in Different Countries

Foreign direct investment in company shareholdership shall be analyzed under the following core legal factors:

(1) The existence of a framework of international treaties most notably Bilateral Investment Treaties (BITs) and Free Trade Agreements.

(2) The existence of a specific foreign investment legislation for every single country.

(3) Specific provision on foreign investment in the countries legislation most notably corporate legislation

I. UAE

1. International Treaties of the UAE with Relation to Shareholdership

The UAE is part of the World Trade Organisation since 1996. This makes it party to a number of global treaties with regard to trade such as the GATT, GATS and TRIPs. However, foreign shareholdership is not only about the exchange of goods, services or the use of intellectual property rights on the spot but a rather mid or long-term assignment of money for a specific purpose in order to generate revenue. Thus, it is rather to be seen as investment then as trade and is not subject to the WTO administered multilateral treaties.

However, in a less than global context other international treaties can have more detailed provisions having influence on shareholdership structures in national law. Amongst probable sources therefore can be regional treaties most notably the ones establishing a Common Market, Customs Unions or Free Trade Zone between two or more states.

In particular, the Gulf Cooperation Council (GCC) as an international organization has been establishing such a Common Market for and in between its member states since 2007. Based on the contractual Framework thereof, the UAE does grant GCC persons (physical and corporate) the right to hold 100 % of the shares in a UAE company.[1)]

Although the UAE is party to further Free Trade Zone Agreements either directly or through its membership in the GCC, none of these agreements thus has as far reaching influence in the field of foreign investment in shares in UAE companies.

A further source of international public law influencing the position of foreign shareholders in a country can be bilateral investment treaties (BITs). These are concluded between two states and try to safeguard foreign investments of national of one party state to this agreement to the other party state. First concluded between Germany and Pakistan, BITs haven been a success story in safeguarding minimum standards between states and investors. Despite individually different from each other, BITs do have some common traits and features repeating itself in most of these treaties. Most of the BITs contain guarantees from expropriation and provide for equal treatment of foreign and domestic investments as well as the requirement to grant the investors of the party state the most favorable treatment

[1] C.f.: al-Bandārī Abu Saʿda, Mustafā, Qānūn al-Sharikāt al-Tijārīya al-Imarāti, p.165

given to any other foreign investor. A special feature of BITs in international public law is the mechanism of solving conflicts between the party state and the investor from the other party state: The investor will usually be entitled by the BIT to approach international arbitration against the state. This makes BITs a very effective instrument for the protection of foreign investments; however, party states will usually take care not to over-commit themselves in these contexts.

To illustrate how such a BIT is enacted in detail, the BIT between the UAE and Germany shall be presented a little more in detail. Core terms in relation to shareholdership of foreigners are „investor“ and „investment“. As per Art. 1 No. 1 b) of the Agreement between the Federal Republic of Germany and the United Arab Emirates for the Promotion and the Reciprocal Protection of Investments (BIT D-UAE) the term „investment“ shall comprise any kind of asset invested in any form by the investor of one Contracting State in the territory of the other Contracting State in accordance with its legislation […] including shares, stocks and debentures of companies or other rights or interests in such companies. The term "investor" is further defined in Art. 1 No. 2 a) BIT D-UAE as German citizens and juridical persons or companies or associations irrespective of their legal personality established in accordance with German laws and having its seat in Germany. Hence, shareholdership of German nationals or companies in a UAE Company are covered by the BIT D-UAE. However, a German investment in the UAE will only be considered an investment as per the definition given above if it is in accordance with UAE legislation. Art. 10 Para. 1 of Federal Law No. 2 of 2015 on Commercial Companies (UAE CCL) legislates that with the exception of Joint Liability Companies and Simple Commandite Companies, where all the joint partners of any of such companies shall be UAE nationals, any company established in the State shall have one or more UAE partners holding at least 51% of the share capital of the company. This means that any foreign shareholdership exceeding this rate in basic will not be considered as an investment in the scope of the BIT D-AE. Art. 3 Para. 1 BIT D-UAE states that

"*each Contracting State shall accord investments made in its territory, owned or controlled by investors of the other Contracting State, treatment not less favorable than that, which it accords in like situations to investments of its own investors, or investors of any third State, whichever is the most favorable*"

Notwithstanding this does not justify a contravention of Art. 10 Para. 1 UAE CCL, as the above mentioned passage of the BIT D-UAE only applies to completed investments not to investments to be made such as establishing a company or obtaining company shares but rather only to shares being already obtained by the law. Art. 3 Para. 2 BIT D-UAE states that

"*each Contracting State shall accord investors of the other Contracting State, as regards management, maintenance, use, enjoyment, or disposal of their investments, means of asserting rights thereto, transfers, compensation, or any other associated activity therewith in its territory treatment not less favorable than that which it accords to its own*

investors or to investors of any third State, whichever is the most favorable".

As per this provision only the enumerated rights and actions are covered by the protective scope of the BIT thus again not including establishing a company or obtaining shares of an already existing one. To assure this position from another perspective, Art. 3 Para. 3 BIT D-UAE states that such treatment shall not relate to privileges, benefits or incentives which either Contracting State accords to investors of third states on account of its membership of, or association with, any existing or interim agreements leading to a customs or economic union, a common market, a free trade area, a monetary union or similar international agreement. This prevents that even in case of a wide interpretation of the aforementioned provisions GCC privileges mentioned cannot be taken as a reference for any of the most favorable treatment clauses. Thus, the most favorable treatment clauses would only be applicable to the scenario discussed here, if the UAE would grant any other nationality the right to more than 49% foreign shareholdership, which at the moment does not seem to be the case.

2. National Investment Law

The UAE does not have a national investment law yet. Provisions on foreign investment are spread throughout the entire system of laws. However, the discussion in this context illustrates the advantages of having a centralized piece of legislation on this topic and it becomes apparent why the UAE might foster its enactment as currently presented in public media discussion.

3. Specific Provisions in National Legislation – Most Notably Corporate Legislation

As already outlined the core provision of UAE legislation on foreign shareholdership is Art. 10 Para. 1 UAE CCL excluding foreign shareholders from being personally liable partners in a commercial company and in all other cases from holding more than 49% of company shares in a commercial company.

The UAE CCL also includes a prominent exception to this rule found in Art. 5 UAE CCL and in Free Zones. Free Zones as locally limited spots where in core exceptions to the rule of maximal 49% of foreign shareholdership are facilitated, wherever a corporate entity is based there. The number and models of Free Zones throughout the UAE have reached a variety hard to oversee and certainly too differentiated to be presented in detail here. However, establishing a company in a Free Zone comes at an often-neglected price. Free Zones are in several aspects of UAE legislation considered foreign entities. This means that they are technically not licensed to conduct business in the UAE mainland outside of Free Zones. Though largely neglected, this rule frequently comes into consideration e.g. in context of public tenders, where Free Zone Companies are usually not invited to participate.

Another possibility to open up the relatively stare provisions of Art. 10 Para. 1 UAE CCL would basically require a change to the law itself. Art. 10 Para 2 CCL does only give Cabinet the possibility to reserve certain categories of activities exclusively to UAE

nationals. However, it seems to be an approach widely discussed in the media of opening to a 100% foreign shareholdership in UAE companies by the end of 2018. It remains at this stage open, to what extend such an opening would cover all sectors of activities of companies and all sizes of companies. The nationality of shareholders would be irrelevant at least in the framework of BITs as the German one mentioned above. A final thought in relation to the proposed liberalization would also be that it would likely come at another price for a number of reasons such as rendering present Emirati shareholders as well as Free Zones (a major employer of UAE Nationals) without immediate purpose. The example of the introduction of the current system of foreign shareholdership in KSA (as detailed below) illustrates that instead of letting Saudi citizens participate in the economy as company shareholders a system of quotas for Saudi employees was established.

It thus remains an interesting topic to follow how these issues will be tackled by the UAE in the scope of the proposed forms.

II. Sultanate Oman

Though not as large as the UAE market, the Sultanate of Oman does not have a less interesting and complex legal landscape with regards to foreign shareholdership in companies offering chances and opportunities to foreign investors as well as potential pitfalls to be observed.

1. International Treaties of Oman with Relation to Shareholdership

Oman's integration into a network of foreign investment treaties seems to be more open and conciliatory to foreign investors, yet more complex then the structures established in the UAE. This can even be seen in seemingly minor details such as Oman apostilling and accepting apostilles with regard to the authenticity of foreign documents. Such detail can in every day life transaction become rather important as it saves time and money whenever foreign documents have to be presented.

a) Free Trade Zones

Oman as the UAE is part of the GCC and thus offers similar benefits with regard to foreign shareholdership to GCC nationals as the UAE. In addition, any Free Trade Zone Agreement concluded by the GCC comprises Oman as well. However, as we have discussed the current acquis of Free Trade Zone Agreements concluded by the GCC does not foresee any effects on foreign shareholdership ratios.

Outside the Common scope of the GCC, Oman has enacted further Free Trade Zone Agreements, most notably the Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (US-OM FTA). Its Chapter 10 is especially dedicated to investment and sets out in Art. 10.3 Para 1 and 2 US-OM FTA that each Party shall accord a treatment no less favorable than that it accords, in like circumstances, to its own investors or to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition. The clear difference between the BIT D-UAE and

the US-OM FTA in this context is that establishment, acquisition, expansion are covered here as well and thus enabling US Investors to be considered like Omanis even when setting up a Company or acquiring shares in it and thus being able to this up to 100% like Omanis.

b) BITs

Like the UAE Oman has a number of BIT relations in force in between them with German Austria, Switzerland Italy and the UK. Again, for reason of simplicity the Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments (BIT D-OM) shall be taken as an example.

The term "investment" as defined in Art.1 No. 1 BIT D-OM despite little differences is still about the same as in Art. 1 No. 1 BIT D-UAE. This is the same for the term "investor" in Art. 1 No. 3 Lit. a BIT D-OM and Art. 1 No. 2 Lit. a BIT D-UAE, without the request of a company based in Germany to be founded according to German law in the BIT D-OM.

However, a major difference can be seen in Art. 3 Para 2 BIT D-OM stating that

"*neither contracting state shall subject investors of the other contracting state, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favorable than it accords to its own investors or to investors of any third state, whichever is more favorable to the investors.*"

The language here is far vaguer than in Art. 3 Para. 2 BIT D-UAE, that clearly limits the activities protected to an enumerated list. On the other hand, activities that have a clear impact on the amount of shares in a foreign company as in vestment like establishment, acquisition, expansion as set out in the US-OM FTA are not mentioned. It thus remains open if the BIT covers these or not. A direct demand for being treated by way of most favorable treatment like a US-Investor is excluded by Art. 3 Para. 4 BIT D-OM, excluding a most favorable treatment for privileges granted in the frame of a free trade zone. Practical problems, however, seldom arise, as Oman interprets its National Investment Law for German investors in a rather generous way.

2. National Investment Law

Unlike the UAE, Oman has a national investment law. A national investment law focusses on licensing foreign investors for their investment in the country. This usually implies an additional step from the investor to receive a preliminary license for its investment. This for example is not the case in the current UAE model, where a commercial license is required but this only applies to the entity to be licensed not to the investor. On the other hand, advantages are usually that a single authority (e.g. a foreign investment agency) can act as a one stop for fulfilling all requirements as a foreign investor and once the investment license is issued the investor is usually being treated like a national investor in the scope of the license. In the UAE, e.g. every authority has to check on special provisions for foreign investors in its scope. In the context of the UAE,

however, the DEDs of the Emirates have developed to be one stop shops for any investors to a large extend and the difference is less notably to foreign investors. Finally, one major difference between the UAE and Oman has to be pointed out with at least some implication on this issue: Whereas Oman is a central state, the UAE are a federation of seven Emirates where Emirates and Federation share split sovereignty. Whereas licensing of commercial LLCs with commercial activities will be nearly fully administered by Emirates' authorities (DEDs) in accordance with local and federal laws in cases of joint stock companies, branches of foreign companies or industrial activities, federal laws come into play that are being executed by federal authorities. In case of enacting a federal investment Law in the UAE as envisaged, it might be questionable if this would involve additional federal or local authorities and this deepening the administrative process. Oman is at an advantage here in having only one level of sovereignty and thus seems to have chosen the approach of unified foreign investment legislation and licensing much earlier and more decisively.

The current Omani Foreign Capital Investment Law (OM IL) was issued based on Royal Decree No. 102/94 in 1994.

Art. 1 OM IL states the requirement for a foreign investor to be licensed in order to conduct any commercial, industrial or tourism businesses or otherwise participate in an Omani Company. Art. 2 No. 1 Para. 1 OM IL establishes the default structure of such an investment as being in an Omani LLC whose capital is at a minimum of OR 150 000 /- and a maximum shareholdership of the foreign shareholder of 49% in this company. Given that the value of the Omani Rial (OR) is amongst the highest valued currency units in the world, OR 150 000/- is quite a reasonable amount of money for the share capital of the company.

However, the OM IL includes a certain flexibility by granting a certain amount of options and exemptions from the above stated rules to foreign investors. Hence as per Art. 2 No. 2 Para. 1 OM IL, the above percentage may be increased up to 65% of the Company's capital by a decision from the Minister of Commerce and Industry following a recommendation from the Foreign Capital Investment Committee. This option is frequently granted to investors. In order not to violate the most favourable treatment of its BITs Oman is quite conciliatory in interpreting the requirements therefore. A third exemption to the general rule established by the OM IL is the option enacted in Art. 2 No. 2 Para. 3 OM IL. It stipulates that the percentage, referred to in the above paragraph, may be further increased up to 100% of the Company's capital for the projects which contribute to the development of the national economy upon the approval of the Development Council and following a recommendation from the Minister of Commerce and Industry, provided that the project's capital shall not be less than RO 500,000/-. Moreover, Art. 3 OM IL states exemptions from the categories established by Art. 2 OM IL as enlisted above in case of exemptions from the conditions specified in the above Article for companies which conduct business in

the Sultanate of Oman by virtue of special contracts or agreements with the Government of the Sultanate or which are established by virtue of a Royal Decree and parties conducting a business which is declared by the Cabinet as necessary for the country. Furthermore, the OM IL sets out the instructional framework especially the Foreign Capital Investment Committee under the Ministry of Commerce and Industry, which is responsible for the aforementioned recommendations. The law also establishes basic provisions for the procedures to be applied and for special tax and penal provisions.

Thus through its investment law and the influence of the BITs and the international treaties on the OM IL, Oman offers a far more flexible yet complex system of foreign shareholdership than the UAE.

3. Specific Provisions in National Legislation – Most Notably Free Zone Legislation

An overview of Omani legislation on foreign investment would be incomplete without at least giving an insight into some of the further relevant provisions thereon.

Certain activities such as practice of attorneys in court might be fully reserved to Omanis. Others like commercial agencies might only be acted out through an LLC if this has 49% or less foreign shareholdership. However, these things can be checked when obtaining the investment license through the one stop shop concept as an investment license for these activities will not be granted or restricted to a minority shareholdership.

It might be also interesting to note that Oman has not yet inserted the possibility to a one shareholder LLC into its company and corporate legislation, making a second shareholder for a mainland LLC necessary. However, shares can be distributed in a ratio of 99 to 1.

In order to complete the picture about foreign investment legislation in Oman, Omani Free Zones must be considered. Oman, similar to the UAE has established Free Zones in the country at Al-Mazunah, Sohar, Salalah and Duqm with further projects following. Due to the above outlined flexibility in foreign investment structures in mainland, the concept of Free Zones does not have the same impact and demand as in the UAE. Activities in Omani Free Zones are more restricted that the ones offered by UAE Free Zones. However, the offer exemptions to general Omani legislation in a number of more fields then in neighbouring UAE. A 100 % foreign shareholdership is guaranteed. Natural persons can establish a single shareholder LLC, a minimum capital as outlined above is not required. The minimum capital will be determined by most Free Zone authorities on a case to case basis. Tax exemption are granted and a reduced Omanisation quota applied. Also trade with Omani mainland can be possible but might require additional tax imposed on the Free Zone Entity. In general many Omani Free Zones are no independently developed bodies with an own legislation (as most notably the financial Free Zones in the UAE) and understand themselves as a "value for money" concept. This leads to packages offered to investors at a considerable price rather

than offering very competitive rates for setting up and a number of additional fees afterward as has been pursued by UAE Free Zones.

III. Kingdom of Saudi Arabia

Saudi Arabia shares many common traits with Oman such as the being a central state and a one monarch system. However, it is a country of other dimensions by land area and population in comparison to the two countries mentioned before with quite a considerable domestic market. Having been depended on oil more than any the other two countries treated yet and willing to reform itself at an unpreceded pace currently in the region, Saudi foreign investment is subject to most probably the most massive dynamics in the region now. Due to this, changes in Saudi over the last years and predictably in the future have been more deep than anywhere else but could also serve as indicators for ways maybe to be taken in the UAE.

1. International Treaties of the KSA with Relation to Shareholdership

In its integration into the system of international public law, KSA has always been less determined than its aforementioned neighbours and more self-confident with regard to a distinct point of view. In logical consequence, apart from the GGC rules, Free Trade Agreements such as US-OM FTA will hardly be found with regard to Saudi legislation even despite the historically strong and continuous relation between Riyadh and Washington.

Even when considering Saudi BITs, it becomes apparent that the number of them is less than the ones existing with the countries discussed before. Germany, Austria and Switzerland do have BITs with KSA, however Italy and the United Kingdom do not. Again, focussing on the Treaty between the Federal Republic of Germany and the Kingdom of Saudi Arabia concerning the Encouragement and Reciprocal Protection of Investments *(Abkommen zwischen der Bundesrepublik Deutschland und dem Königreich Saudi-Arabien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen)* (BIT D-KSA) it surprises that it is not conducted in English as the two aforementioned ones, but rather only imperative in German and Arabic as per its closing remarks and not available in an English translation on the internet. Also concerning its content, it is more precise and clear concerning limiting the areas of applicability. The definition of "investor" and "investment" with regard to company shares held by Germans as per Art. 1 BIT D-KSA are still closely parallel to the ones in the aforementioned two BITs. Yet, Art. 3 Para 1 and 2 stating the general principles of national treatment and most favored nation's treatment are made explicitly subject prior admission/licensing of the contracting state. Similar to the BIT D-UAE, Art. 3 Para. 3 BIT D-KSA states that

"*each Contracting State shall accord investors of the other Contracting State as regards to management, utilization, use, enjoyment of their investments, or disposal of their investments, means of asserting rights thereto, transfers, compensation, or any other associated activity therewith in its territory treatment not less favorable than that which it accords to its own investors or*

to investors of any third State, whichever is the most favorable"

The BIT D-KSA uses an enumerated catalogue. Hence, the BIT D-KSA is the one with the probably most limited scope of the ones discussed. Seeing this again in the context of the number of Saudi BITs it becomes apparent, that BITs are instruments less used for investment protection then in the two aforementioned countries and hence, with less influence on shareholdership of foreign investors.

2. National Investment Law

The just discussed relative weakness of international private law in KSA contexts, however, does not mean that foreign investors in KSA are subject to a less strong position than in the aforementioned countries. Like Oman KSA has made use of the opportunity to enact a national investment law.

The prohibition of investment without license originates in Art. 1 Anti Concealment Law (SA AC) stating that a non-Saudi may not, under any circumstances, engage or invest in any activity unlicensed under the Foreign Investment Law or under any other laws, regulations or decisions.

In consequence, a license in accordance with Art. 2 Para. 1 Foreign Investment Law (SA FI) shall be issued by the Saudi General Investment Authority (SAGIA) for foreign capital investment in any investment activity in the Kingdom, whether permanent or temporary.

The SA FI remains relatively silent on the requirements for such a license. However, it clarifies the main legal consequences for a license holder. The most important and general consequence is set out in Art. 6 SA FI stating that a project licensed under the SA FI shall enjoy all the benefits, incentives and guarantees extended to a national project, according to laws and directives. Art. 5 SA FI further categorizes forms of foreign investments as either jointly owned by a national and foreign investor or wholly owned by a foreign investor, implying that projects without local shareholdership should be possible. Moreover, Art. 4 SA FI allows a foreign investor to obtain more than one license for different activities. Art. 7 SA FI provides for the guaranteed repatriation of profits and Art. 11 SA FI gives guarantees against confiscation and expropriation. Art. 8 SA FI allows the ownership of necessary real property and Art. 9 SA FI entitles the licensed project entity to be a visa sponsor. The aforementioned issues are in many cases also objects of BITs. Here the Saudi approach to foreign investment becomes apparent: rather than making international commitments and granting basically only this internationally confirmed acquis like the UAE, KSA prefers a unilateral approach with granting privileges in its national legislation exceeding by far the commitments enacted in international treaties.

The second main aspect of the SA FI is establishing the legal base for SAGIA through the SA FI itself and especially through its executive regulations and related cabinet decisions. SAGIA as the responsible government entity for foreign investment in the KSA enjoys a very powerful position. Being founded by a cabinet decision, SAGIA is an independent legal person and its Governor has the position of a minister.

Several ministries have an influence onto SAGIA through an obligatory seat in its Board of Directors. Yet, differently from the Omani Foreign Capital Investment Committee SAGIA is detached from a single ministry, has the power to issue the licenses itself and has a major share in determining the material requirements of foreign investment in the KSA.

The main cornerstones for material requirements of foreign investment in the KSA are mainly set out in the executive regulations of the SA FI (ExR SA FI) as enacted by SAGIA in accordance with Art. 17 SA FI. Artt. 6-8 ExR SA FI outline the main requirements such as admissibility of product and production methods as well as minimum capital and requirements regarding the investor himself. Certain requirements such as minimum capital can continuously be adjusted by SAGIA. Furthermore Artt. 16 – 19 ExR SA FI outline the obligations of a once licensed entity.

In a third main axis the SA FI establishes the main procedural rights and provisions for investors vis-a-vis SAGIA and the main provisions for settling potential disputes. These are also part of the ExR SA FI. In particular Art. 9 ExR SA FI empowers SAGIA to issue a guide to encompassing regulate licensing requirements and procedures.

About minimum national shareholdership, this is usually connected to the licensed activity. Whereas certain activities are by law (especially the Appendix to the SA FI) reserved to 100% Saudi shareholdership, other activities need a minimum of Saudi shareholdership in the company executing it. This can range from 70% mandatory national shareholdership in the telecom sector down to 20 % in transport. In some cases, a certain percentage of minimum national shareholdership is not required but may have positive implications on other requirements set out by SAGIA. The most notable example being trading. Here a 25 % Saudi shareholdership in the company will reduce the capital to be invested by the foreign shareholder to 20 Million/- RS in comparison to 30 Million/- RS in case of 100% foreign owned trading businesses.

To sum it up, the KSA national investment law has created a very strong and independent body determining a highly differentiated system for foreign investment included therein a very complex structure with regard to minimum shareholdership, in which however a 100% foreign shareholdership is taken as the default scenario.

3. Specific Provisions in National Legislation – Most Notably Free Zone Legislation

As noted before, certain activities cannot be exercise by foreigners in the KSA at all. The most notable probably being the one of commercial agency, which is restricted to 100% Saudi entities by Art. 1 of the Commercial Agency Law (SA CA). In general, though, these activities can be found in the negative list of the SA FI Appendix.

What makes the KSA even more interesting than Oman from a legal point of view is, that all vehicles of the corporate legislation can be used for foreign investments. This includes one shareholder LLCs existing in KSA as well as stock companies (interestingly

enough KSA legislation does not require public or private stock companies to have different legal forms) or branch offices. Representative offices called technical and scientific offices (TSO) have been licensed restrictively in practice as investors have frequently used them as factual branches with commercial activity, which is not within the scope of their SAGIA license.

Moreover, it might be interesting to note that the KSA like Oman applies a quota of mandatory Saudi employees in its entities.

A specialty of KSA law is that it does not know the idea of Free Zones as the two aforementioned jurisdiction do. This is due to the idea that 100% foreign ownership is the default principle governing Saudi foreign investment legislation. What the KSA knows, is the idea of Special Economic Zones, where certain incentives are given to special industries in order to cluster them in a certain area. This however, is usually not done through allowing foreign shareholdership above the (anyway mostly 100%) default ratio. Very recently the new mega-project "Neum" has been looming on the horizon. As far as it has been outlined, it could be described as Super Free Zone as its intended legal autonomy from the main Saudi acquis of laws seems to go far beyond the dimensions of the Financial Free Zones in the UAE and could rather be classified as a Special Administrative Region like Hong-Kong or Macao in China.

C. Conclusion

As stated in the introductory words to this article, the dependency on oil is over. Monolithic concepts for economic growth and development dependent on one or few raw materials in Gulf countries do not seem to be the way of the future. Foreign direct investment and in particular a differentiated and most probably dynamic model will shape the future of foreign investment legislation in many countries.

This article aims to show how legal approaches can differ and which other factors might come into play in this context. It has shed light onto a very small outtake of factors and combination of variables. Just to mention that other GCC countries in turn again might have different models. Kuwait seems to pursue an investment license requirement for nationals as well as for foreigners coming close to the UAE commercial licensing model yet through a unified authority. On the other hand, Bahrain seems to have adopted a model of 100% foreign ownership in companies without having a national investment law.

The number of ways how systems of foreign direct investment in the Gulf might develop seem to be of every potential shade and color. In this context, even the announcement of the UAE to adopt a national investment law allows hardly any predictability what model this law will be following and under which circumstances the announced 100% ownership for foreign investors will be granted. However, the system of BITs, the UAE is involved in, seems to enable a prediction, that most foreign investors should be treated at an equal level with regard to nationality under a new national investment law. If this is also the case for each volume of investment, each type of investor and investment and for each activity and sector as well as for

each place and legal form remains as open as to what commitments from the investor's side this will be made possible. However, M&P will monitor these developments closely and advise in accordance with the latest results.

Currently a maximum percentage of possible foreign ownership in a regional company depends on a number of factors such as the country to be invested in, the country of origin of the foreign investor or its investing vehicle, as well as the sector and activity in which the project will be, the legal form of the project or even the place of the project in the country and its envisaged relations with customers domestically and internationally. To find the optimum solution for such an investment, professional and experienced legal assistance and counsel with a regional expertise beyond borders of one country should be the way of choice in order to let your foreign investment in the region be as fruitful as possible.

Heinrich Köllisch
Meyer-Reumann & Partners,
Dubai Office

United Arab Emirates

The right to be forgotten- Impact of the new GDPR on companies in the UAE

Guiding Principle

Effective from May 25 2018, the new General Data Protection Regulation was set in force in the member states of the European Union, except in the UK. In times of increasing data-transparency due to a fast developing online culture, the EU decided to uniform the data protection regulations for all member states of the EU. However, what are the effects of this introduction for companies located in the UAE or is there any impact at all?

The answer to this question, as always, is simply, but complicated at the same time: it depends.

A. Overview of existing UAE Regulations

Unlike the EU, the UAE does have neither a federal data protection law nor a regional data protection law for the Emirate of Dubai. A comprehensive protection of personal data by companies collecting data is not required.

There are some specific regulations regarding data in place, but none of them equals a comprehensive data protection law. Art. 31 of the Constitution provides for a general right to privacy by providing that “freedom of communication by post, telegraph or other means of communication and the secrecy thereof shall be guaranteed in accordance with the law”. Along broadly held view, this provision has been

intended to enshrine a basic right to privacy in relation to an individual's personal and family affairs.

According to the Civil Code, (Federal Law No. 5 of 1985) wrongful invasion of this right to privacy might constitute a "wrongful act" for which a civil action for damages would lie. However, here the "wrongful act" is connected to "damage to reputation" and "invasion of privacy" (as granted by the Constitution).

According to Art. 378 of the Penal Code (Federal Law 3 of 1987) a person violates the private or familial life of individuals by perpetrating one of the following acts:

(1) "*If he lends his ears, records or transmits, through an apparatus of any kind, conversations that took place in a private place or through the telephone or any other apparatus.*

(2) *Captures or transmits, through any kind of apparatus, the picture of a person in a private place*

shall be sentenced to detention and to a fine unless authorized by law, or without the victim's consent. People living in the UAE do have a right of protection of any personal data related to an individual or private family life, but only in regard of publication of this data."

Beyond the above-mentioned regulations, the Electronic Transactions and Commerce Law (Federal Law No. 1 of 2006 and its corresponding Dubai Law No. 2 of 2002 relating to Electronic Transactions and Commerce) and the Cyber Crimes Law (Federal Law No. 5 of 2012), set out regulations connected to data, but not regarding to the commercial use of data.

In contrast with the UAE and the regulations applicable in the mainland of Dubai, the Dubai International Finance Centre (DIFC, a Freezone in the Centre of Dubai) has its own comprehensive data protection regulations in place. These regulations equal international and European standards, but are only applicable in the Freezone and not transferable to the mainland or other Freezones.

B. Time for an Internal Audit

Whether a company in the UAE has to be compliant with GDPR mainly depends on several factors.

I. Location

Companies located in the UAE, without a mother-company in the EU or head-office etc. do not fall under the scope of the GDPR. As mentioned above, neither a federal data protection law nor a regional data protection law for the Emirate of Dubai exists.

Nevertheless, companies dealing with European business partners or clients should not leave the GDPR completely aside. As GDPR compliance is mandatory for European companies, the probability is high that they will ask their business partners to be GDPR compliant as well. The possibility of the introduction of a comprehensive data protection law in the UAE, adapting to international standards (as in the DIFC), exists and should not be underestimated.

All the companies that are closely connected to their European "motherships" and do receive data for working, processing etc. are under the scope of GDPR. For some of them having their origin in countries that already had a good data protection law

in place the changes might not be radically new, but still, awareness has to be created for the requirements that have to be fulfilled now and what changes in the company and its system have to be made.

II. The Type of Data

Another important factor that has to be considered related to GDPR is which kind of data is collected, processed etc. in a company. Article 4 (1) of the regulations describes that data in relation to GDPR means 'personal data'. This means any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as:

- Name
- identification number
- location data
- online identifier
- one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Personal data is the key point related to GDPR, as the new definition of personal data now comprises a way larger definition than in any before existing European data protection law. In times of digitalization the European states aimed to construct a piece of legislation to protect its citizens of an increasing transparency caused by the daily collection of personal data.

But as a logical consequence the GDPR also states in Recital 26 and Article 4 (5) "*the principles of data protection should therefore not apply to anonymous information that is [.......] data rendered anonymous in such a manner that the data subject is not or no longer identifiable.*"

"*pseudonymisation means the processing of personal data in such a manner that the data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person*"

Companies could circumvent the compliance requirements set out by the GDPR with a pseudonymisation / anonymization of data, if the connection to personal data is not required.

III. Is the Data really Needed and what is Done with It?

Companies that fall under the scope of GDPR should check now, where data is collected and what is done with this data and in particular, is this data really required?

If the answer is yes, an extended audit related to compliance with GDPR is required and necessary to avoid future problems and potential losses. This audit should be a combination of technical, as well as legal audit. A technical audit will be required to see if as well hard- and software fulfill the requirements that were now newly introduced by GDPR, i.e. the possibility of a data subject to request the deletion of its data. In this case, it is not enough to delete the data by putting it into the "digital trash bin". This kind of deletion is just the overwriting of the data with new data, but the overwritten data is still not

completely deleted. This means that mechanisms need to be implemented to secure, that requirements like this are met.

On the other hand, a legal audit going hand in hand with a technical audit should be conducted. Especially to see where exactly the new requirements have to be implemented, where exactly is the company positioned and what is required for every single company, as an all-round solution matching for all companies will not be possible.

C. Conclusion

Summarizing the above, it depends on many various factors, whether companies have to be compliant with GDPR and if, how? With the complexity on the technical as well as on the legal side, general advises related to GDPR are nearly impossible and should be treated with caution.

If you wish any legal assistance regarding this complex and difficult topic or help with your internal legal audit, we would be happy to assist you.

Mariem Al-Ssayrafi
Meyer-Reumann & Partners,
Dubai Office

United Arab Emirates

Brief Remarks Concerning the New Arbitration Law in the UAE

(Federal Law No. 6 of 2018)

Guiding Principle

Finally, after a long wait, the UAE has issued a new Arbitration Law, the Federal Law No. 6 of 2018, in accordance with the provisions of the Arbitration Chapter in the UAE Civil Procedures Federal Law No. 11 of 1992 and its adherence to the New York Convention in 2006.

A. Key Points of the New Arbitration Law

The new Arbitration Law covers all the key points regarding the subject of arbitration law. Below is a short summary of these key points:

I. Scope of Application, Article 2.

The new regulation shall apply to any arbitration conducted in the UAE unless the parties have agreed that another law should govern the procedure, provided there is no conflict with the public order and morality of the state. Likewise, the law shall apply to any international commercial arbitration conducted abroad if the parties have chosen this law to govern their procedure.

II. Capacity to enter into an Arbitration Agreement, Article 4.

An Arbitration Agreement may only be concluded by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to

arbitrate.

III. A Written Arbitration Agreement Article 7.

An Arbitration Agreement shall be in writing; otherwise, it shall be void. There is also a list of situations in which the written form is deemed.

IV. Composition of the Arbitral Tribunal, Article 9.

The Arbitral Tribunal consists, by agreement of the parties, of one or more arbitrators. Where the parties have not agreed on the number of arbitrators, their number shall be three, unless otherwise decided by the concerned body. The number of arbitrators, if several, shall be uneven, otherwise the arbitration is void.

V. Interim or Conservatory Measures, Article 21.

The Arbitral Tribunal may, at the request of a party or on its own motion, order any party to take such interim or conservatory measure as the Arbitral Tribunal may consider necessary given the nature of the dispute. This shall include, in particular:

- an order to preserve evidence that may be relevant and material to the resolution of the dispute;
- taking necessary measures to preserve goods which constitute part of the subject-matter of the dispute such as an order to deposit goods with a third party or to sell goods which are susceptible to damage;
- preserving assets and funds out of which a subsequent award may be satisfied;
- maintaining or restoring the status quo pending determination of the dispute; and
- an order to take action that is likely to cause, current or imminent harm or prejudice to the arbitration process itself.

VI. Determination of Rules of Procedures, Article 23.

The parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings, including their right to subject such procedure to the rules in force of any arbitration association in the state or abroad; where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate.

VII. Place of Arbitration, Article 28.

The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the Arbitral Tribunal having considered the circumstances of the case, including the convenience of the parties. The Arbitral Tribunal may – unless otherwise agreed by the parties – hold arbitration hearings at any place it considers appropriate to conduct any of the arbitral proceedings, while providing the parties sufficient advance notice of the hearing, and may also hold Arbitration hearing with the parties and deliberate by modern means of communication and electronic technology. The Arbitral Tribunal shall deliver or communicate the minutes of hearing to the parties.

VIII. Language of the Arbitration, Article 29.

Arbitral proceedings shall be conducted in Arabic unless otherwise agreed by the parties.

IX. Power of the Court to Act on a Request for Evidence, Article 36.

The Arbitral Tribunal may, on its own motion or if a party so requests, request from the Court assistance in taking evidence. The Court may execute the request within its competence, ordering witnesses to appear before the Arbitral Tribunal in order to give oral testimony or adduce documents or any evidentiary materials. The request shall be made to the Chief Justice of the Court who may take any of the following decisions:

- to order sanctions prescribed by the laws of the state against any witness who fails to appear or answer questions without lawful excuse;
- to direct a third party to produce documents in its possession which are essential for deciding the dispute; and
- to order a rogatory commission.

X. Binding Force, Article 52.

An Arbitral Award shall constitute *res judicata*, and shall be enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court.

B. The Impact of the New Regulation

The new Arbitration Law provides a new arbitration system being extremely helpful in encouraging international business and in solving complex business disputes in the greater MENA region.

This UNCITRAL-based Arbitration Law would align the UAE with the international standard and would bring the UAE towards the road to becoming an international centre for commercial arbitration.

Dr. Sara Corradi
Meyer-Reumann & Partners,
Dubai Office

Egypt

The New Cities in Egypt

Guiding Principle

From a total area of approximately one million square kilometers, only 7.7% is inhabited in Egypt as per the estimates of the local authorities. Having a population of more than 104 million, the limited inhabited area represents a huge pressure on the lifestyle in Egypt. The lack of sufficient employment opportunities and poor services are some of the inevitable results of the population density, which is concentrated around the Nile Valley. Following 2011 uprising, the decision to start building new cities for absorbing the population growth came as part of the fundamental changes that Egypt witnessed thereafter. A new capital city located 60 kilometers to the east of Cairo and a new touristic city at the Egyptian north-west coast are two examples for the new cities currently under development, in line with the highest international standards as the Egyptian officials have indicated. The officials expect that these new cities will create new horizons for the national economy.

A. Population Density in Egypt

In 2015, the Central Agency for Public Mobilization and Statistics (CAPMAS), the state statistical agency in Egypt, has issued a statement showing that the

inhabited area in Egypt is 7.7% only from the one million square kilometers representing the total area of the country.

This limited inhabited area resulted in high population density concentrated around the Nile valley. CAMPAS has further indicated that Cairo is the largest populated governorate in Egypt with a population of more than 9.5 million, reaching almost to 10% of the 104 million representing the total population of Egypt including Egyptians living abroad. Cairo governorate is part of the Greater Cairo area, which is the metropolitan area consisting of all cities in Cairo, Giza and Qalyubia governorates, with a total population estimated at about 22.5 million with an area of 1,709 km^2 and density of 10,400 for each km^2.

Giza is the second largest populated governorate as per CAMPAS statistics with approximately 8.5 million and percentage over 8% of the total population. The third largest populated governorate is Sharkia with approximately 7.3 million and percentage reaching 7%;

On the other hand, the governorates that are not located on the banks of the Nile are having a significantly lower density in spite that they are composed of larger areas. For instance, the population in governorate such as South Sinai is about 173 000 only, with a percentage of 0.2% of the population. Same for New Valley governorate having a population of approximately 230 000 while possessing 45% of the total area of Egypt and the Red Sea governorate with approximately 352 000 inhabitants.

B. Egypt after the 2011 Uprising

While the 2011 uprising in Egypt has succeeded in achieving its target by removing the former president Hosni Mubarak from power, it caused a lot of unrest in the country. As the new administration took control, it started a reform that included some fundamental measures including building new cities aiming to extend the limited inhabited area of the country. The plan included a new capital city instead of Cairo.

This is not the first time that Egypt builds new cities. However, cities such as 6 October in Giza, 10th of Ramadan in Sharkia and Burg Al-Arab in Alexandria are mainly industrial cities that included accommodation and recreation facilities for its inhabitants from the workers at the factories representing the base for these cities.

Later on, real estate developers started developing luxuries districts for the investors working in these cities who do not want to spend much time going back and forth to their factories. The new districts attracted other upper-class inhabitants who were looking for accommodations away from the crowded streets of the old cities.

However, the development of these cities did not help in solving the problem of the excessive population density at the Nile valley, as it was not built for that purpose in the first place.

C. New Cities

Unlike the abovementioned cities that were planned mainly as industrial cities only, the new cities are planned to be a comprehensively advanced cities attracting large population and possessing large areas. The new cities will include governmental, administrative, industrial and residential districts as per the highest international

standards.

The building of new cities is a part of the new vision for the country "Egypt 2030". The vision included in the urban development section, the target of increasing the inhabited area of the country to be 12% for accommodating the annual population growth.

Increasing the inhabited area is expected to stimulate accelerated economic growth through establishing major development projects and providing as a matter of urgency a variety of jobs.

Currently, 15 new cities are under development, which are: Administrative Capital, New Alamein, East Port Said, New Mansoura, October Gardens, New October, New Sheikh Zayed, New Ismailia, Djalala city, New Obour, New Toushka, Naser, West Qena, New Malawi and New Fashn.

Some of these new cities that are currently under development are:

I. The New Administrative Capital City

In its efforts to develop the historical city of Cairo as a leading center for the MENA region through a thriving economic environment supported by diversified economic activities and sustainable development to ensure that the city historic and natural assets are preserved and facilitated by an efficient infrastructure, the Egyptian government announced its decision to move its administration head offices to a new city.

The Egyptian government intends to move all the governmental and administrative activities to a new city that will absorb a large part of the high density in Cairo.

The new administrative capital is currently under development, 60 kilometers east of Cairo. The location was chosen for its proximity to the Suez Canal area and the regional roads. The target population during the first phase is about 0.5 million people in addition to the number of 40 to 50 000 government employees that will be transferred to the new offices in the new city. It is planned to increase the capacity to 100 000employees after the first three years.

The total area of the city is 170 000acres, the population at the completion of the city's growth shall be 6.5 million people, about 2 million job opportunities are expected to be generated.

II. The New Al-Alamein City

The Egyptian north-west coast on the Mediterranean sea is a popular tourist destination for Egyptians due to its mild atmosphere and the attractive beaches. For that purpose, a lot of tourist villages were built for Egyptians to use during summer vacation.

Planning to duly benefit from the current capabilities of this coast, the Egyptian government announced the start of the works for developing a new city directly on the shores of the north-west coast.

The new Al-Alamein City is a new model for the Egyptian coastal cities to achieve integrated development, providing a diversified economic base. The new city will be the first of a series of cities in the north-west coast in regions such as Ras Al-Hikma, Burani and others. The new city will be built over 48 000acres.

With a beach façade on the coast of the Mediterranean with a length of 14 km,

the city is planned to accommodate 3 million people containing 25 000hotel rooms, 14 residential districts and 8 000 acres of industrial and logistics zones, 5 000 acres of commercial and service zones and 1 000 acres for universities and research centers including the University of Alamein for Science and technology, a branch of the Arab Academy for Science and Technology, and international hotel school, and a city of culture and science.

III. Galala City

Djalala city is another new tourist city with an area of 17.5 000 acres that is currently established on the Djalala plateau, which is located at Kilo 118 of the Cairo - Ain Sukhna road. About 60% of the city has been completed.

The new resort city features a marina for yachts fully equipped with a depth of 55 meters long. Any tourist may come from abroad as the city contains a border guard headquarters, a customs building, a catering and cafés districts and a tourist walk.

There is also the El Gouna area, a large area in the heart of the resort, with shops, cafés and tourist attractions to meet the requirements of tourists.

In the same place, there is a commercial centre and leisure centre with 8 cinema houses, which are equipped with state-of-the-art equipment, an ice-skating hall, a video arcade, a restaurant complex with a meeting and conference hall, a hypermarket and a fountain in the centre.

The project also includes a 297-room beach hotel, 28 hotel villas attached to the hotel, 48 chalets, one attached to the hotel, and 96 chalets with 4 models.

The mountain hotel consists of 309 rooms designed to all overlook the sea, 8 VIP villas and water lakes.

A cable car line for 4.5 km track with 9 cabins at 665 meters height will be established at the city. A mountainous corniche with a track for bicycles. The

The project will include the King Abdullah University and the Saudi German Hospital.

This in addition to the city of workers in the resort, especially that the size of the planned employment within the resort will be about 10 000 workers. This city will include schools, hospitals and cafés and all the necessary facilities for the workers of the city.

Hany Kenawi
Meyer-Reumann & Partners,
Riyadh Office