lex arabiae

Legal News of the Gulf

Vol. *XXIII* – 1st Issue **January 2019**

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Meyer-Reumann & Partners

Labour Law Workshop

a legal and practical perspective on everyday employment matters

Dates

4 February, 2019: Offer letters and contracts,
How to make them work from the start

5 March, 2019: Policies and procedures,
Dos and don‘ts for employers

3 April, 2019: Terminations I - Termination process,
The best way to prepare for a pain-free termination

1 May, 2019:
Terminations II - Termination meeting,
Common mistakes when communicating the termination to an employee and how to avoid them

Event registration starts at 8:00 AM
Event timing will be at 8:30 AM to 10:00 AM

Speakers

Agni Skafidas
has spent over 19 years in general and specialised HR roles in Europe, the US and the UK before relocating to the Middle East. She is the Managing Director of OLAM, a UAE-based consultancy firm simplifying HR to fit their client‘s needs and culture. She and her team provide reliable HR expertise and work closely with their clients to create clear and pragmatic HR solutions sustainable for SMEs.

Dr. Michael Krämer
has practiced law in the UAE and wider Middle East since 2005 and has been working with Meyer–Reumann & Partners since 2015. His practice focuses on advising international clients in relation to the legalities of their day–to–day commercial matters.

Registration

Attendance of each of these four workshops is AED 100 / person.
Breakfast will be served. To participate contact us dubai@myer-reumann.com.

Location

The World Trade Club,
33rd Floor,
Sheikh Rashid Tower,
Dubai, United Arab Emirates.

United Arab Emirates

Cooperation of M&P with MKS Business Group

Guiding Principle

In our constant approach to widen the area of expertise that we as M&P can offer as benefit to our Clients, we are pleased to announce the cooperation of M&P with the MKS Business Group. Clients will have access to a wide range of business services including management solutions, HR Executive search and seminars and trainings offering the possibility to attend workshops in Germany that will specifically cater to the market of the Middle East focusing on the best approaches to engage in business in general and to set up a legal entity in particular.

A. Introduction of MKS Business Group

With offices in Germany and in the United Arab Emirates, the MKS Business Group, founded by Marion Käser-Seitz, serves medium-sized as well as large international companies. The strength of the MKS Business Group is the combination of expert knowledge with an international competence network and the holistic support of customers. The services range from personnel consulting to in-house seminars and from coaching to support in positioning in international markets

In the cooperation with M&P it is planned to offer a series of seminars and workshops in Germany to facilitate and support strategic decisions of companies and their management for the expansion of the business to the Middle East countries.

B. Know-How and expertise

The experts of QRC Personalberatung International GmbH, MKS Consultancy and AWI Management Seminars share as partners the competences of MKS Business Group and with this combination, each of the partners is able to support clients all over Europe during the complete recruitment process and in providing solutions for Interim Management.

With 35 years' experience in management - the MKS Business Group and its competent partners including M&P are the reliable point of contact for a successful entry strategy in the Middle Eastern region for German companies who would like to grow their export business.

The series of seminars and workshops will start in the first quarter of 2019. Further information will be announced on the following websites www.qrc-group.com/; www.awi-group.de; and www.meyer-reumann.com. For direct enquieries please email to dubai@meyer-reumann.com.

Elena Schildgen
Meyer-Reumann & Partners,
Dubai Office

Saudi Arabia

Implementation of the Jebel Ali Free Zone Authority concerning the Offshore Company: an overview

Guiding Principle

The Jebel Ali Free Zone Authority ("JAFZA") recently has issued a new regulation - not yet into force - regarding Offshore Companies. These new rules mark a significant step forward for the Offshore Companies set up in JAFZA and provide new tools for protecting the interests of foreign investors; thus below are mentioned some relevant provisions of the new regulation.

One of the most important provisions is the possibility to appoint just one director, whereas before the business and affairs of an offshore company shall be managed by not less than two directors. Furthermore the director is no longer required to be a natural person and this role can be performed also by a corporate entity, subject to the approval of the Authority.

Other relevant rules concern the matter of shares. First of all it will be possible to create different classes of shares and every class will have different rights regarding the governance of the company. The transfer of a share in an Offshore Company requires the approval of the Registrar and it will not be complete without payment of the applicable fee to the JAFZA Authority.

Under the previous regulation it was ambiguous whether an Offshore Company was deemed to be carrying out business onshore in the UAE if it held real estate and/or shares. The new provisions clarifes that an Offshore Company is permitted, amongst other things,

- to hold a lease of a property for use as its registered office in any designated freehold area in the UAE approved by the Authority,

- own property in one of the designated freehold areas in the UAE and

- own a stake in another operating Company onshore within the UAE.

Also regarding the residence visas there are important changes. Under the new regulation an Offshore Company that owns property in one of the designated freehold areas can apply to JAFZA for residence visa for its members (Shareholder and/or Director).

The new regulations amends also the provision concerning any Resolution passed by members. It has been now defined as a Resolution to be passed by 75% of the members - voting in person or through proxy - at a general meeting of which notice specifying the intention to propose the Resolution has been duly given. The old Regulations required instead a simple majority.

Finally under the new provisions it will be possible for an Offshore Company by a Resolution to apply to the Registrar for its corporate form to be converted to a Free Zone Company in the Jebel Ali Free Zone. Once the Offshore Company is converted to a Free Zone Company, the date of incorporation of the Free Zone Company will be that of the Offshore Company and all rights and obligations of the Offshore Company shall continue with the Free Zone

Company. The Free Zone Company shall comply with all provisions of the Jebel Ali Free Zone Companies Regulations.

When the new regulation will come into effect investors will have access to new and important corporate governance tools.

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

United Arab Emirates

New Foreign Direct Investment Law - Full Foreign Ownership or Smoke and Mirrors?

Guiding Principle

In the UAE, the most common type of corporate entity to pursue business activities with is the company with limited liability, or short "LLC". It is no secret that LLCs in mainland UAE require a UAE national majority shareholder, either a UAE national individual or a corporate entity fully owned by UAE nationals. Overcoming this "51/49" rule has been something the expat UAE business community has been dreaming of for a very long time. The newly issued "Federal Decree Law No. 19 of 2018 regarding Foreign Direct Investment" ("FDI Law") promises paving the way for full foreign ownership. Does it live up to its promise? The answer is "yo" as in a mixture of both, yes and no.

A. 100% Foreign Ownership is Possible

Yes, thanks to the FDI Law it will be possible, in principle, for a foreign company or individual to fully own a mainland LLC in the UAE. In short, the FDI Law establishes a mechanism, which aims to enable the Departments of Economic Development to establish procedures enabling foreigners to establish "Foreign Investment Companies". Some such Foreign Investment Companies may be fully owned by foreigners, some may be foreign owned up to a certain percentage only. This, as many other licensing requirements for such companies, has not been determined in the FDI Law as such, but will be subject to the recommendations and decisions of various authorities.

Once duly licensed, such Foreign Investment Company will be subject to various obligations and benefits. Obligations are likely to include mandatory employment of a certain extent of UAE national workforce (Art. (13) 3. FDI Law) and keeping various authorities informed on a continuous basis of the company's activities (Art. (13) 6./7. FDI Law). The benefits, on the other hand, are mostly those, which "regular" companies in the UAE enjoy as well, such as the authority to transfer profits out of the country (Art. (8) 2. FDI Law) or, subject to approval of various additional authorities, to perform fairly standard operational procedures, such as merging with another company, changing shareholders or changing the legal form of the company (Art. (8) 5. FDI Law).

B. Smoke and Mirrors – Conclusion

Does the FDI Law really, as so many have hoped, abandon the 51/49 rule? Or are at least some industries now exempt from it? Realistically, the answer will have to be "no".

In all its uncertainty, the FDI Law is very clear in one respect: while the doors to 100% foreign ownership are open in principle, the FDI Law has made sure that hardly anybody (if anyone) will ever make use of this "option". Maintaining a UAE national "Sponsor" maybe uncomfortable and something most business operators in the UAE would like to avoid. Yet, it has become an established and fairly cheap exercise (nowadays, "Sponsors" ask for annual fees of as little as AED 15,000).

Successfully registering a Foreign Investment Company will most certainly be cumbersome. It will require dealing, on a continuous basis, with numerous UAE authorities. This, in short, means that registering and maintaining a Foreign Investment Company will be a rather expensive exercise. An obligation to employ members of the UAE national workforce on top, while applaudable in principle, is likely to add additional cost. The benefits of maintaining a Foreign Investment Company, on the other hand, are not many, apart from maintaining full ownership in an ideal scenario. Most "incentives" described in the FDI Law are such that any other commercial entity in the UAE enjoys as well.

In light of the above, I cannot help the impression that the FDI Law will end up being not much more than the proverbial carrot one will never reach. Achievable in principle, but not so much in reality.

Dr. Michael Krämer
Meyer-Reumann & Partners,
Dubai Office

Bahrain

Bahrain releases new VAT Law No. 48/2018

Guiding Principle

On 9 October 2018, the Kingdom of Bahrain (Bahrain) released its Value Added Tax (VAT) Law under Royal Decree No. (48) of 2018. The VAT implementation date will be 1 January 2019.The Law sets out the general principles for the application of VAT in Bahrain. In line with the Unified GCC Agreement for Value Added Tax (VAT), VAT will be implemented in Bahrain on 1 January 2019.

A. Background information

In November 2016, the Gulf Cooperation Council (GCC) Member States executed the Common VAT Agreement of the States of the GCC (GCC VAT Agreement), outlining the framework that Member States should follow when implementing their domestic VAT rules. Saudi Arabia and the UAE implemented their VAT systems on 1 January 2018.

B. Characteristics of the VAT Law

The Bahrain VAT Law differs from the VAT rules of the United Arab (UAE) and the Kingdom of Saudi Arabia (KSA).

Some of these key differences relate to the zero-rating and VAT exemption provisions in the Law. In particular, it is expected that Bahrain will apply the zero-rate on basic food items, the construction of new buildings, education and healthcare services, local transport services, as well as oil and gas and derivatives. The sale and lease of real estate as well as certain financial services (i.e. those with an implicit fee) and life insurance/reinsurance will be exempt from VAT. Financial services provided for an explicit fee including account management, certain trade finance services and fund management will be subject to standard rate VAT. Standard rate VAT will also apply to non-life insurance/reinsurance.

C. The key features of the VAT Law

I. Effective date of implementation

In accordance with the Article 4 of the Royal Decree, the Law will come into force on 1 January 2019.

II. Scope of VAT

In accordance with the Article 2 of the Law, the supply of all goods and services made in Bahrain, as well as imports, shall be subject to VAT.

III. Rates of VAT

Article 3 of the Law provides for a standard rate of 5%, while certain goods and services may be subject to a zero-rate or exempt from VAT.

IV. Tax period

In accordance with the Article 35, the Regulations will specify the duration of the tax period, which should not be less than one month.

V. VAT registration

The Bahrain Ministry of Finance (MoF) has recently announced that VAT registration will be carried out in three different phases, depending on the value of the businesses' annual supplies.

Article 29 provides an overview of the persons required to be registered for VAT purposes.

Businesses with annual taxable supplies exceeding BHD 5 million will be required to register by 20 December 2018 effective for 1 January 2019. Businesses with annual taxable supplies of more than BHD 500,000 will be required to register by 20 June 2019 effective for 1 July 2019. All other businesses that exceed the mandatory registration threshold of BHD 37,500 will be required to register by 20 December 2019 effective for 1 January 2020. Businesses may register on a voluntary basis during the transitional period if the value of their annual taxable supplies exceeds the voluntary registration threshold of BHD 18,750. Non-residents will be required to register for VAT if they make taxable supplies on which they are required to account for VAT regardless of the value of supplies.

VI. VAT Groups

In accordance with the Article 30 and upon application and approval (as per the Regulations), two or more taxable persons resident in Bahrain may apply for registration as a VAT group, provided that they are related parties and are registered for VAT at the time of application. Each member of the VAT group is responsible for the VAT payable by the group and other VAT obligations. Supplies made between members of the VAT group are not considered as taxable.

VII. Financial Services

Most financial services are exempt from VAT unless such services are carried out in return for a fixed fee, commission or discount. The supply of general insurance will be subject to VAT at the standard rate of 5%. Life insurance is exempt from VAT. Islamic finance products will be treated the same way as the equivalent non-Islamic financial product for VAT purposes.

VIII. VAT Returns

Under the transitional measures for 2019, VAT returns will be due on quarterly basis for businesses with an annual turnover of more than BHD 5 million and who are required to register for VAT for 1 January 2019. All other businesses that register on 1 January 2019 or before 20 June 2019 will be required to submit a single return for the tax period from the date of registration to 30 June 2019 and two quarterly VAT returns for the remaining six months of 2019. Subsequently, businesses with annual turnover exceeding BHD 3 million will be required to file VAT returns on monthly basis and all other businesses will be required to file on quarterly basis. VAT return and payment will be due within one month of end of the tax period.

IX. Zero-rated supplies

Article 53 of the Law sets out provisions where certain supplies and sectors will be zero-rated(subject to satisfying conditions and procedures that will be outlined in the Regulations). These include:

- Local transport sector;
- Oil, oil derivatives and gas sector;
- International transportation services and the supply of related means of transport
- Construction of new buildings;
- Supply and importation of foodstuffs (based on a list approved by the Financial and Supply of goods under a customs duty suspension scheme
- Economic Cooperation Committee);
- Supply of educational services, as well as the related goods and services to nursery, pre-school, primary, secondary and higher education;
- Preventive and basic healthcare services, as well as related goods and services;
- Supplies or imports of certain medicines and medical equipment;
- Export of goods to outside of the implementing states;
- The supply or importation of investment gold, silver and platinum with a purity level not less than 99%, which is tradeable on the Global Bullion Market (and subject to obtaining a certificate);
- Export of services to a customer residing outside the implementing states;
- The first supply of gold, silver and platinum after extraction for commercial purposes;
- Supply and import of pearls and precious stones (subject to obtaining a certificate);

X. Import VAT

In accordance with the Article 51, import VAT should be paid to the customs authority, where Bahrain is the first point of entry. Tax authorities may allow the taxable person to defer the payment of VAT until submission of the VAT returns.

XI. Exemptions

Articles 54 to 56 set out the scope of exemptions, which include:

- The supply of financial services, unless payment is made by way of an explicit fee, commission or commercial discount;
- Supply of vacant land and buildings by way of lease or sale;
- The importation of:

a) Goods where the supply of such goods in the final country of destination is exempt or zero-rated;

b) Goods that are exempt from customs duty in accordance with the terms and conditions set forth in the Common Customs Law, and that are as follows:

1. Diplomatic exemptions;
2. Military exemptions;
3. Used personal effects and household items transported by nationals living abroad on return and expatriates moving to live in Bahrain for the first time;

c) Personal luggage and gifts carried by travelers

d) Necessities for people with special needs

XII. Issuance of a Tax Invoice

In accordance with the Article 39, tax invoices should be issued within 15 days of the month following the date of the supply.

XIII. Penalties

The law outlines the penalties that could be imposed for non-compliance. These include penalties for failing to register for VAT (up to BHD10,000) and failing to provide the tax authority with information it requests (up to BHD5,000).

In accordance with the Article 63, the following violations could be regarded as tax evasion, and could result in imprisonment:

- Failing to register for VAT within 60 days of the registration deadline;
- Charging VAT on non-taxable items;
- Failure to provide a tax invoice;
- Failing to pay VAT within 60 days of the payment deadline;
- Unrightfully recovering input VAT.

D. Conclusion

Although businesses (who are registered or are required to be registered) will have until 31 July 2019 to complete their first VAT return there are a number of critical activities that will need to be undertaken by 1 January. At a minimum, they will need to be able to issue VAT compliant invoices, particularly if they operate in the retail or B2C sector. In addition to this, businesses will need to understand their VAT obligations with respect to their supplier and customer contracts – this means whether the transitional rules apply or whether pricing adjustments may need to be made.

The introduction of VAT in Bahrain will affect all economic sectors. Businesses may require considerable effort and action to update their people, processes, systems, contracts and stakeholders for VAT. For businesses accustomed to operating in a tax-free environment in Bahrain, VAT compliance requirements will require a fundamental change in many business practices.

Tarek Jairwdeh
Meyer-Reumann & Partners,
Dubai Office

Oman

Omani Law of Contracting and Damages

Guiding Principle

Contracting has been a major focus of foreign companies in the Sultanate of Oman. The project market in the country provides a steady source of activity to many foreign companies active throughout the Middle East.

Hence, in the framework of lex arabiae's series on articles about the Sultanate of Oman we take the opportunity to shed light on the contracting structures of Omani law. These have been subject to major changes some time ago as Oman decided to shift its civil law from sharīʿa to a civil code system in 2013.

As part of the same reform, the general law of damages was incorporated into the civil code removing it from sharīʿa and giving it its own legal basis. As the system of damages frequently is a core subject in any kind of legal system and contractual relations, we incorporate it into this article and show its interdependency to contractual relations.

A. General

During his reign in the Sultanate of Oman, Sulṭan Qabūs initiated a number of legal reforms especially by continuously codifying laws and thus replacing Islamic religious law (*sharīʿa*) in practice. Amongst these codifications are the Commercial Companies Law of 1974 (CCL), the Commercial Law (CL) introduced by Sultani Decree 55/1990 and most recently the Civil Transactions Law (CTL) introduced by Sultani Decree 29/2013 issued on May 6, 2013 and entered in force three months after publication.

The CTL is the Omani Civil Code that comprises a general part, the general and special law of obligations and property law. Family and inheritance law are codified in different laws. The CTL is largely modelled on the example of the Emirati Civil Transaction Law from 1985.

Since its enactment, the CTL contains

- the general principles of obligations including the conclusion and rules of contracts (Art. 66 et seq. CTL.),
- the regime of damages (contractual in Art. 264 et seq. CTL and torts/delict as well as some general rules in Art. 176 et seq. CTL),
- the general rules for limitation of claims (Art. 340 et seq. CTL) and
- a number of standard contracts amongst them the Works Contract (*muqāwala*) in Art. 626 et seq. CTL.

As special law for merchants, the CL might overrule some stipulations of the CTL for commercial transactions.

B. The Works Contract (*muqāwala*)

In the context of common law and English language legal terminology, the description of the contract in context here resembles special challenges. Whereas most civil code systems do have a defined term of a contract for specific work to be completely performed in consideration for monetary remuneration, Common Law mostly uses the term "Contracting" for these kind of activities. This however, leads to the challenge to differentiate between contracts and contracting in general and the specific contract outlined above. Therefore, we chose to make use of the term "Works Contract" (*muqāwala*) in the context of this article. This short example can also illustrate how difficult it sometimes can be to employ common law concept in a civil law environment like the GCC and how many difficulties it might embody for only English speaking common law qualified lawyers to actually assess communicate and develop these kind of concepts.

Art. 626 CTL defines a Works Contract (*muqāwala*) as a contract (ʿaqd) based on which the contractor of the Works Contract (*muqāwil*) produces a good (shay) or completes a service (*adāʼ ʿamal*) in consideration for remuneration. The main differentiation to a Service Contract (*ʿaqd ʿamal*) as per Art. 651 CTL is that the latter has the delivery of a service (*yaqūm bi-ʿamal*) as its object, which will occur in another person's interest and under supervision.

I. Conclusion of the Works Contract (*muqāwala*)

In basic, Omani law needs three elements for a valid contract: consent (*riḍā*), object (*maḥall*) and cause (*sabab*). Consent consists of coherent offer and acceptance in correct form. Concerning the Works Contract (*muqāwala*), no special stipulations about contractual form have been made. As per Art. 627 CTL, it can be agreed that the necessary materials for the Works Contract (*muqāwala*) may be provided by either party and the obligation of the contractor reduced to its work only. As however, the law does not state one of these options as the rule and one as the exception, it is advisable to include these regulations in the contract. Furthermore, Art. 628 CTL states it as mandatory to individualize (*taʿyīn*) the object of the contract by outlining the features and kind, the way it should be worked, the time in which it should be completed and its remuneration. In case the contractor provides the material, it is recommended to outline its features in quality and quantity in the contract.

II. Relevant Duties in the Contractual Relation

The contractor is especially obliged to complete the work as per the conditions of the contract and in the given time (Art. 631 CTL). In case the material has to be provided by the contractor, it has to be provided in the way outlined in the contract or as the incumbent custom prescribes (Art. 629 Para. 1 CTL). If the material is provided by the ordering party, the contractor has a contractual duty to guard and treat it with the necessary professional care (Art. 629 Para 2 CTL). By default, the contractor is requested to provide tools and means for his work (Art 630 CTL).

On the other hand, the ordering party is obliged to accept the handover of the ordered work (Art. 638 CTL) and to pay the agreed price (Art. 639 CTL) Moreover, Art 640 et seq. CTL provide for a number of rules allowing to deviate from the agreed price in specific circumstances and setting a default price for the work.

III. Sub-Contracting

Unless conditioned by the kind of the work itself or by an agreement, Art. 644 Para. 1 CTL allows for the contractor to make use of sub-contractors wholly or in part. However, this does not relieve him from any responsibility (Art. 644 Para. 2 CTL). The subcontractor himself is by default not entitled to approach the ordering party directly (Art. 645 CTL) for any claims.

C. Applicable Regime of Damages – Especially Liquidated Damages

Omani Law differentiates between two different kinds of liability: contractual and tortious/delictual liability. A special case might be argued for certain cases of strict liability (*ḍamān*) that might be triggered by the conclusion of a specific contract but has legally prescribed consequences.

In general, Omani law follows the French model of a strict separation between contractual and tortious/delictual liability, meaning that a specific occurrence can only be subject to one or the other.

I. Strict Liability

The above mentioned type of strict liability special to the contractor of a concluded Works Contract (*muqāwala*) can be found in Art. 632 et seq. CTL. Art. 636 CTL clearly states that any contractual condition easing the liability of the contractor or engineer as per the preceding Articles is considered void.

The general rule of strict liability is stated in Art. 632 CTL by stipulating that the contractor guarantees for whatever damage or loss results from his services or works, however this liability finds its limits in case of results that cannot be checked out (in advance).

Art. 634 Para. 1 CTL establishes a joint strict liability for the engineer and the contractor of a building or fixed structure for ten years from its handover (Art. 634 Para. 3 CTL) in case of a full or partly collapse thereof. This liability is excluded in case of the reason for the destruction resulting from the ground itself or if the ordering party approved the structure or building and unless the construction has been intended to exist for less than ten years. This includes a strict liability for any defects resulting in a threat to the strength/durability of the building or its integrity (Art. 364 Para. 2 CTL).

In case of an engineer who is assigned to design the building only without a supervision duty in execution, his liability is limited to faulty design.

Claims from strict liability as outlined above are limited to be heard by the courts for a period of three years from the time the collapse of the building or the discovery of the fault or defect (Art. 637 CTL).

II. Contractual Liability

Apart from the strict liability outlined above, contractual covenants and obligations are subject to standard contractual liability.

In the case of a termination of a Works Contract (*muqāwala*) the party suffering from damages due to termination/withdrawal of the other party, will be entitled to damages as per applicable customs (Art. 650 CTL). The damages can be material and immaterial, but have to be proved by the damaged party.[1]

The CTL establishes a default of contractual liability for several constellations. The most prominent one of them, enshrined in Art. 264 CTL, establishes a liability for cases of inability to perform an obligation in kind as long as there is no external reason outside the obligee's control for the non-performance. The same applies for any delay in performance. Both kinds of liability require a legal notice by default of the law (Art. 265 CTL). Art. 266 CTL lists cases that exclude the necessity of a legal notice the most relevant for them are in case of impossibility or loss of purpose, in case the obligee knows of the object of the contract to be stolen or to be acquired without legal base, and if the obligee states in writing that he is not willing to perform. The parties can agree to relief the obligor from his notification duty in writing either in the contract itself or subsequently and vis-a-vis a certain object of the contract or not.[2]

Other reasons for contractual liability are set out in Art. 259 Para. 2 CTL stating that if the obligee does not perform his due service, the obligor is entitled to ask for a judgement for performance and in cases of necessity is even allowed to ask for performance without the judgment all on expense of the obligee.

If performance occurs based on a judgment or if the obligee insists to not perform, the court will determine the compensation to be paid to the obligor (Art. 263 CTL).

In case a contractual obligation is not an amount of money, parties can determine the amount in the contract or in a subsequent agreement (Art. 267 Para. 1 CTL). This would be the regulation of Omani law, closest to liquidated damages. However, as set out in Art. 267 Para 2 CTL, the court has upon request of one of the contractual parties full discretion to review the actual amount of damages and adjust the compensation accordingly.

The default method to calculate damages in these cases are to grant material and immaterial direct (*mubāshir*) damages. Direct damages in Omani legal scholarship and jurisdiction are defined as "natural outcomes of the damaging act" (Art. 181 CTL) or more precisely it does not include, what the obligor could reasonably not expect as damages. In principle, parties are free to reduce the amount of liability in a contractual context. However, this principle of freedom of contract seems to have its boundary at least in cases of intent and grave mistake/negligence (*khata' jasīm*) as illustrated in Art. 261 CTL. Furthermore, the court might make use of its discretionary authority e.g. established by Art 267 Para 2 CTL as mentioned above in an extensive way. As per our knowledge of Omani judgements, this happens and the exact motives for the amount of damages found by the courts are rarely explained. On the other hand, the underlying

[1] c.f. *al-Muṭawwal fī sharḥ qānūn al-muʿāmalāt al-madanīya li-Salṭanat ʿUmān* (CCTL) – Long Commentary on the CTL of the Sultanate of Oman Vol. 7, p 243.

[2] c.f. CCTL, Vol. 3, p 391.

principles of sharīʿa, that are frequently used to interpret the new CTL are very reluctant in granting damages that cannot be proved with a high element of certainty and contain a considerable element of speculation, as Islamic law does not allow speculation (*gharar*).

III. Tort/Delict Based Liability

Tort/delict liability covers all damages not causally based on a breach of a contractual obligation or covenant. In consequence, tort/delict liability has a far wider scope of application then in other jurisdictions e.g. Germany or Common Law. This is most clearly illustrated by Art. 138 CTL, stating that any condition easing tort/delict liability is void.

In general, Omani CTL follows an approach, where all damages caused to someone else must be compensated by the committing person (Art. 176 Para. 1 CTL).

Special regimes apply with regards to personal actions resulting in damages inflicted to body or life (*nafs*) (Art 186 CTL), destruction of assets (itlāf al-māl) (Art 187 et seq. CTL), conversion or assault on things (*al-ghaṣb wa-l-taʿaddī*) (Art. 191 et seq. CTL), responsibility for the actions of other people (Art. 196 CTL) and for animals or things (Art. 197 CTL) as well as when exercising public rights (*al-ḥaqq al-ʿāmm*) (Art. 200 CTL).

In general, if the damage happens by direct infliction (bi-l-mubāšara) it must be compensated even without any culprit element. If it only happens by way of causation (*tasabbub*) a culprit element in form of intent or negligence is required (Art 177 CTL) (c.f. CCTL Vol. 2, p 699).

The infliction can be a positive action or a refrain thereof, though the law only talks about the first one (c.f. CCTL Vol. 2, p 699). Furthermore, the word damage implicates that the infliction has to be illicit; however, it has been intentionally left open what kind of examples would be covered by this in order to leave this to the discretion of the concerned judge (c.f. CCTL Vol. 2, p 698 et seq.). The law nevertheless provides for a number of situations that would not be considered as damages e.g. cases outside control of the concerned person such as natural disasters, force majeure, sudden and unexpected happenings as well as interferences of third parties or the damaged himself (Art. 177 CTL). Additionally, states of legitimate self or foreign defence omit responsibility (Art. 178 CTL).

The damages in case of tort/delict liability would be calculated in accordance with the same principles as contractual ones, as most of the provision on damages are regulated in the tort/delict parts of the CTL and analogously applied to contractual damages. Therefore, the concept of direct damages as "natural outcomes of the damaging act" (Art. 181 CTL) applies in this context even more.

Tort/delict liability would usually be limited to claim after five years in accordance with Art. 185 CTL.

IV. Liability Related Aspects, especially Interest

Based on sharīʿa considerations, interest will only restrictively be granted under Omani law. One of the major exemptions can be made in the context of commercial transactions where loans or obligations can be subject to interest (Art. 80 CL). A loan would then be considered commercial, if it is taken by a merchant in connection with its business or for the purpose of using it in a commercial transaction (Art. 79 CL). The interest itself must be agreed upon by the parties (Art. 80 CL). The maximum applicable interest rate is determined yearly by the Ministry of Commerce and Industry in agreement with the Chamber of Commerce and Industry based on the term, purpose and risk of the credit (Art. 80 CL). Interest can be taken for a delayed payment during the period of delay (Art. 80 CL). Damages exceeding the interest can be claimed if the damaged person suffered greater damages. These damages will be estimated by the court (Art. 81 CL).

D. Termination/Withdrawal from the Contract

Shaped on an initially French model, Omani law still maintained the rule of termination/withdrawal from a contract either to be mutually agreed (Art. 169 CTL) or in case of mutually obliging contracts to be initiated by a judge in case of non-performance after legal notice (171 CTL). As per Art. 170 CTL, there is also the possibility to agree upfront in the contract upon certain situations, where the contract should be deemed self-terminating without the need for a court order. This however can only apply to situations of non-performance of one of the contractual obligations and the party affected by this non-performance is not relieved from its duty to give legal notice. Practically speaking, a unilateral termination/withdrawal from a contract totally being subject to the discretion of the concerned party becomes possible by this institute. However, the situations when applicable must be put in writing in the contract and the notification procedure duly observed. As per our regional experience, courts also regularly put an emphasis on the contractual clause itself and can frequently be very formalistic about this.

As per Art. 90 CL commercial contracts can be structured including an option to cancel the contract (in remuneration for money). This is however limited in exercise to the point, where the party itself has started its own performance or accepted the performance of the other party.

Art. 646 CTL sets out that a Works Contract (*muqāwala*) will come to an end in one of the following cases:

- Success
- Termination/withdrawal either by agreement of the parties as well as by a judge's order.

As per our understanding, the above-mentioned way of self-termination should also be applicable here as well. Firstly, as an agreement on reasons for self-termination is an anticipated agreement demanded as per Art. 646 CTL. Secondly, as the termination/withdrawal regulations of the Works Contract (*muqāwala*) are just understood as an expression of the commonly applicable principles.[3]

E. Limitation of Claims

Like in most other jurisdictions, in Oman a right shall not be extinguished by limitation of claim but the claim will not be heard by a court if the other party will claim limitation (Art. 340, 353

[3] c.f. CCTL Vol. 7, p 218 et seq.

CTL).

The general scheme of periods for limitation of claims as per the CTL contains three different intervals. The general interval is 15 years as long as no special other period can be applied (Art. 340 CTL). The general period of limitation of claims between merchants is ten years (Art. 92 CL). Another period of ten years will be applicable in cases of periodically recurring rights with the exception of benefits claimed due to possession in bad faith and certain rights in connection with religious foundations (*waqf*) which are subject to a period of limitation of 15 years.

The second period of limitations of claims is set at five years. It includes a number of claims e.g. remuneration and expenses of engineers and experts (Art. 342 No. 1 CTL) as well as unlawfully paid fees and taxes (Art. 342 No. 2 CTL) and any rights of merchants from commerce and industry given to persons not trading these objects (Art. 342 No. 3 CTL). Any of the aforementioned periods of limitation of claims will be extended to 15 years, if a written (muḥarrar) acknowledgement (*iqrār*) or title (*sanad*) with regards to these rights is issued (Art. 343 CTL). The begin of the limitation period is the day on which an obligation becomes due, a suspensive condition realizes or in case of an action on a warranty/guarantee, from the date its maturity is established (Art. 344 CTL). The default limitation period between merchants, starts with the day an obligation can be fulfilled (Art. 92 CL).

The limitation period can be subject to suspension (Art. 346 CTL) and restart (Art. 350 et seq. CTL).

It is forbidden to waive the possibility to defend by limitation of claims, before the respective right has been established; likewise it is forbidden to agree on a period of limitation of claims exceeding the legally established ones (Art. 354 CTL).

F. Summary

In general, it can be stated that since the introduction of the CTL, the general law of obligations in Oman as well as the Works Contract (*muqāwala*) have a new legal basis. This in parts has brought about a number of material changes to the direct application of sharīʿa utilized before. The increase in precision of legal provisions however has a number of limits.

The first of these is the large amount of discretionary authority given to judges with regard to the factual requirements of certain legal provisions as well as their legal consequences. As stated above, this is intended by the Omani legislator and legal precedent, though persuasive is difficult to establish in a number of cases, as judges would usually not give an in-depth written insight of how they were motivated to use their discretionary authority.

A second limit can be seen in the CTL being introduced after the CL. As in other jurisdictions in Oman a later law even implicitly repeals an earlier law. Thus, a number of rules that might even be explicitly or implicitly spelled out by the CL might now be overruled or repealed by the CTL. This becomes particularly true in respect of Art. 5 CL stating that where no legal text exists commercial law shall be governed by custom with the more precise custom and a locally common custom between parties overruling the general custom. Only if customs do not exist, sharīʿa would have to be applied. As per this Article a number of customs have been overruled by the change from sharīʿa to CTL. On the other hand however, special law also overrides the general law, so if a certain special custom between merchants exists within the scope of any of the matters tackled above, it might well be, that a judge would apply this in a special case rather than resorting to the CTL, or he might interpret the CTL in the light of this custom.

As the CTL is still relatively new, not all of these issues have been tackled or fully solved yet. The future evolution of Omani law in these very essential topics hence remain an issue of constant interest.

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