

Middle East Committee

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I. Iran*

The “#IranDeal is not a ceiling but a solid foundation. We must now begin to build on it,” tweeted Iranian Foreign Minister Mohammad Javad Zarif on July 14, 2015, as Iran reached an agreement on its nuclear program with the permanent members of the UN Security Council and Germany.¹ Full implementation of the Joint Comprehensive Plan of Action (“JCPOA”) will significantly change the Iranian nuclear program and accompanying sanctions regimes.²

Key aspects of the JCPOA restrict Iran’s nuclear program in many ways, including prohibitions on weaponization activities, research, and development; restrictions on acquisition, enrichment, and stockpiling of plutonium and uranium; multifaceted restrictions on specific facilities and centrifuge manufacturing; and continuous access to facilities and monitoring by the International Atomic Energy Agency (IAEA).³ In exchange, the EU and United States will provide sanctions relief in several sectors, including nuclear-related sanctions, energy sectors, financial and banking measures, and

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1. Javad Zarif (@JZarif), TWITTER (July 14, 2015, 6:24 AM), <https://twitter.com/JZarif/status/620946867371810816>; see also *Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif, Vienna, 14 July 2015*, EUROPEAN UNION, EXTERNAL ACTION (July 14, 2015), available at http://ec.europa.eu/statements-eas/2015/150714_01_en.htm. The five permanent members of the U.N. Security Council are China, France, Russia, the United Kingdom, and the United States (collectively, the P5; with Germany but excluding Iran, the parties to the JCPOA are the P5+1 or the EU3+3).

2. See full text of the Joint Comprehensive Plan of Action [hereinafter JCPOA] and its annexes available at *Joint Comprehensive Plan of Action*, U.S. DEPARTMENT OF STATE (July 14, 2015), available at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/index.htm>. See also *Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA)*, WHITE HOUSE, available at https://www.whitehouse.gov/sites/default/files/docs/jcpoa_key_excerpts.pdf.

3. See JCPOA, Annex I – Nuclear-Related Measures, U.S. DEPARTMENT OF STATE (July 14, 2015), available at <http://www.state.gov/documents/organization/245318.pdf>.

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United States licensing for commercial passenger aircraft and related parts.⁴ Importantly, the JCPOA contains “snap back” provisions, whereby sanctions can be re-imposed in the event of significant non-performance.⁵

The JCPOA also sets a schedule by which all parties are to complete their commitments. Once the UN Security Council adopted Resolution 2231, endorsing the JCPOA and including snap back provisions, it set in motion the JCPOA’s implementation schedule.⁶ On October 15, 2015, the IAEA announced it completed its investigation to address outstanding issues with Iran’s nuclear program.⁷ October 18 marked “Adoption Day,” the day when the parties are to begin making all necessary preparations to implement their respective commitments.⁸ United States Secretary of State John Kerry published the “JCPOA Contingent Waivers” of United States sanctions; however, the waivers will not take effect until “Implementation Day,” which is when the United States has confirmation that Iran implemented its nuclear-related commitments and is verified by the IAEA.⁹ The European Council adopted measures to lift EU nuclear-related and financial sanctions, effective on Implementation Day.¹⁰ Iran also informed the IAEA that it will implement the Additional Protocol to the Nuclear Non-Proliferation Treaty and IAEA Modified Code 3.1 of the Subsidiary Arrangements to its Safeguards Agreement on Implementation Day.¹¹ By December 15, 2015, the IAEA Director General will provide final assessment on Iran’s nuclear program.¹² Once the IAEA verifies that Iran has met its commitments, the United States and EU actions will take effect on Implementation Day.¹³

4. See JCPOA, Annex II – Sanctions-Related Commitments, U.S. DEPARTMENT OF STATE (July 14, 2015), available at <http://www.state.gov/documents/organization/245320.pdf> (specifying in note 6 at page 8 application of these commitments for non-U.S. persons; U.S. persons and U.S.-owned or U.S.-controlled foreign entities will still be generally prohibited from conducting transactions of the type under the JCPOA without authorization by the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC)).

5. See JCPOA, U.S. DEPARTMENT OF STATE (July 14, 2015), ¶¶ 36-37, available at <http://www.state.gov/documents/organization/245317.pdf>.

6. S.C. Res. 2231 (July 20, 2015), available at <http://www.un.org/en/sc/inc/pages/pdf/pow/RES2231E.pdf> (noting the provisions in ¶ 12 to reapply U.N. Security Council resolutions in the event of significant non-performance of commitments); see also *Security Council, Adopting Resolution 2231 (2015), Endorses Joint Comprehensive Agreement on Iran’s Nuclear Programme*, UNITED NATIONS (July 20, 2015), <http://www.un.org/press/en/2015/sc11974.doc.htm>.

7. See *IAEA Statement on Iran*, INTERNATIONAL ATOMIC ENERGY AGENCY (Oct. 15, 2015) [hereinafter IAEA], available at <https://www.iaea.org/newscenter/news/iaea-statement-iran-0>.

8. See *JCPOA, Annex V – Implementation Plan*, U.S. DEPARTMENT OF STATE (July 14, 2015), § B – Adoption Day, available at <http://www.state.gov/documents/organization/245324.pdf>.

9. See *Waiver Determinations and Findings*, U.S. DEPARTMENT OF STATE (Oct. 18, 2015), available at <http://www.state.gov/documents/organization/248501.pdf>; see also *Frequently Asked Questions Relating to Adoption Day under the Joint Comprehensive Plan of Action*, U.S. DEPARTMENT OF THE TREASURY (Oct. 18, 2015), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_adoption_faqs_20151018.pdf.

10. *Iran Nuclear Deal: Council Adopts the Legal Acts to Prepare for the Lifting of all Nuclear-Related Economic and Financial EU Sanctions*, COUNCIL OF THE E.U. (Oct. 18, 2015), available at http://www.consilium.europa.eu/press-releases-pdf/2015/10/40802203802_en_635807932200000000.pdf.

11. See *IAEA Statement on Iran 18 October 2015*, IAEA (Oct. 18, 2015), available at <https://www.iaea.org/newscenter/news/iaea-statement-iran-18-october-2015>.

12. See *IAEA Statement on Iran*, IAEA (Oct. 15, 2015), available at <https://www.iaea.org/newscenter/news/iaea-statement-iran-0>.

13. See *JCPOA, Annex V – Implementation Plan*, *supra* note 8, at § C – Implementation Day.

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With international economic sanctions relief potentially on the horizon, some Western companies are looking east. For example, Sephora, a French cosmetics company, is currently in talks with distributors in Iran to open several stores in 2016.¹⁴ On November 2, 2015, the United States Department of the Treasury's Office of Foreign Assets Control expanded its list of medical supplies available for export to Iran under general licensing,¹⁵ creating potential for increased sales of medical supplies to Iran.¹⁶

As others look in, Iran is looking outward.¹⁷ Currently, Iran is working to increase its oil production in anticipation of sanctions relief in early 2016.¹⁸ Once the IAEA verifies Iranian compliance, United States and EU sanctions on Iran's petroleum and natural gas sectors will also be removed.¹⁹ Even before the JCPOA was finalized, senior executives from Royal Dutch Shell, Total, and Eni met with Iran's oil minister to discuss "potential areas of cooperation with Iran, assuming sanctions are lifted."²⁰

However, Iranian Supreme Leader Ayatollah Ali Khamenei has said the nuclear deal will not lead to détente with the West.²¹ With snap back provisions for noncompliance embedded in the JCPOA and UN Security Council Resolution 2231, others may be hesitant to rush to Iran for business without greater certainty in the regulatory landscape. Even with full compliance under the JCPOA, "U.S. statutory sanctions focused on Iran's support for terrorism, human rights abuses, and missile activities will remain in effect and continue to be enforced."²²

The JCPOA is the most recent piece of the international community's response to curbing Iran's nuclear program, and full compliance with the agreement will significantly alter the regulatory and political landscape for the next decade and beyond.

14. Astrid Wendlandt and Pascale Denis, *Exclusive: France's Sephora to Open Shops in Iran Next Year*, REUTERS (Oct. 30, 2015, 2:59 PM), available at <http://www.reuters.com/article/2015/10/30/us-iran-luxury-sephora-exclusive-idUSKCN0SO2J420151030#wdwADRzepZSQxOlb.97>.

15. 31 C.F.R. 560.530(a)(3).

16. See *OFAC List of Medical Supplies*, U.S. DEPARTMENT OF THE TREASURY (Nov. 2, 2015), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_gl_med_supplies.pdf; see also Wynn H. Segall and Christian C. Davis, *OFAC Expands List of Medical Supplies Eligible for Export to Iran under General Licensing*, LEXOLOGY (Nov. 9, 2015), available at <http://www.lexology.com/library/detail.aspx?g=00e8ea7b-7d1d-444b-aecb-833ec3f62ad1>.

17. See Thomas Erdbrink, *Iran Prepares to Lure Foreign Investors After Nuclear Deal*, N.Y. TIMES (Aug. 21, 2015), available at <http://www.nytimes.com/2015/08/22/world/middleeast/after-nuclear-deal-with-west-iran-gears-up-to-cash-in.html>; see also Ali Dareini, *Iran: Caviar Back on the Market as Sanctions Begin to Ease Off*, INDEPENDENT (Nov. 10, 2015), available at <http://www.independent.co.uk/news/world/middle-east/iran-caviar-back-on-the-market-as-sanctions-begin-to-ease-off-a6735391.html>.

18. See Javier Blas, *Iranian Oil Goes Back on the Market*, BLOOMBERG BUSINESS (Nov. 5, 2015), available at <http://www.bloomberg.com/news/articles/2015-11-05/iranian-oil-goes-back-on-the-market>.

19. See JCPOA, *supra* note 5, at ¶¶ 19 & 21.

20. Clifford Krauss, *A New Stream of Oil for Iran, but Not Right Away*, N.Y. TIMES (July 14, 2015), available at http://www.nytimes.com/2015/07/15/business/international/iran-nuclear-deal-oil-prices.html?_r=0.

21. See, e.g., Brian Murphy, *Iran's Leader Backs Nuclear Deal with Warning to West over Sanctions Relief*, WASHINGTON POST (Oct. 21, 2015), available at https://www.washingtonpost.com/world/irans-leader-backs-nuclear-deal-with-warning-to-west-over-sanction-relief/2015/10/21/12de5b54-77ec-11e5-bc80-9091021aeb69_story.html.

22. *Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA)*, *supra* note 2, at page 3.

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II. Kuwait*

In 2012, Kuwait's parliament promulgated the New Companies Law ("NCL"),²³ which substantially changed the corporate legal landscape in Kuwait. Amongst the changes, the NCL allowed for the creation of new types of companies, recognized shareholders agreements, convertible bonds, and *sukuk*, and accelerated and modernized the incorporation process. In 2014 and 2015, the legislature continued to modernize businesses and foreign investment regulations. We highlight the most significant legal developments.

A. PUBLIC PRIVATE PARTNERSHIPS

Law No. 116 of 2014 on public private partnerships projects ("PPP Law") was issued on August 17, 2014²⁴ and took effect in April 2015, upon the issuance of its executive regulations.²⁵ The PPP Law repealed the BOT (Build Operate Transfer) Law No. 7 of 2008 and introduced substantial changes to the existing regime. Amongst other things, the PPP Law and regulations:

- 1) established the Authority of Public Private Partnership Projects (KAPP) with wider powers;
- 2) created a competition committee to supervise the bid process;
- 3) required a winning consortium to establish one or more consortium companies to hold the consortium's shares in the project company;
- 4) expressly provided that the public tenders law²⁶ will not apply to PPP projects; and,
- 5) established a grievance committee to resolve grievances resulting from the procurement process which did not exist under the BOT Law.²⁷

The new regime outlines in detail the bid process, from the expression of interest to the conclusion of the partnership contract. In addition, the PPP Law and its executive regulations exempt foreign nationals from restrictions on foreign ownership of shares in Kuwaiti companies. Thus, foreign shareholders may hold more than 40% of the capital of project and consortium companies established under the PPP Law.

Most importantly, under the new regime, an investor may provide security over certain assets of the project owned by the investor, the proceeds of the project, its shares in the project company, and in the consortium company. Also, the new security regime recognizes step-in rights for the first time in Kuwait and regulates direct agreements. In addition, lenders may, in the event of investor default, acquire the investor's pledged shares in the project company, or request their sale.

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23. See Law No. 25 of 2012, *Kuwait Al Yom* No. 1107 of November 29, 2012, page 1 and amended by Law No. 97 of 2013. The implementation regulations of the NCL were issued by the Minister of Commerce and Industry on September 29, 2013 by Ministerial Resolution No. 425 / 2013.

24. *Kuwait Al Yom* No. 1197 of August 17, 2014, 9.

25. Decree No. 78 of 2015 of March 18, 2015, *Kuwait Al Yom* No. 1229 of March 29, 2015, 22.

26. See Law No. 37 of 1964 of August 1, 1964.

27. See Law No. 7 of 2010, *Kuwait Al Yom* No. 964 of February 28, 2010, page A.

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The PPP Law and its executive regulations resolved the uncertainty created by the previous regime regarding the ownership of shares that are not subscribed for by the public. Under the PPP Law, at least 6 percent but not more than 24 percent of the shares shall be allocated to public entities, no less than 26 percent is allocated for subscription by the winning bidder, and the remaining 50 percent is reserved to Kuwaiti nationals. Under the new regime, the 50 percent allocated to Kuwaiti nationals is to be held by KAPP on behalf of Kuwaiti nationals until operations commence. However, when the value of shares reserved for Kuwaiti nationals and fractional shares resulting from the distribution process have not been settled, KAPP may, at its discretion, sell the same at market value to public entities or the winning bidder, or on the stock market.

B. PRIVATIZATION OF PUBLIC PROJECTS/SECTOR

In an effort to attract the private sector to become more involved in public projects, the Kuwait legislature promulgated the privatization law in 2010,²⁸ which sets the general rules for privatization and for opening public services and state-owned companies and projects to the local and foreign private sector. The law also provides for the establishment of the supreme council for privatization.²⁹ The executive regulations of the law were just issued in 2015.³⁰

The law and its executive regulations emphasize consumer protection, preservation of the environment and national wealth and resources, and the protection of employees, particularly Kuwaiti employees. The law also imposes certain limitations and excludes certain sectors from the ambit of the law, such as education, health, and oil and natural gas production and refineries. According to the privatization regime, in order to be privatized, projects should be wholly owned by the state and should already exist. Moreover, shares of companies to which a public project is transferred are distributed as follows: (1) 35 percent auctioned to joint stock companies listed on the Kuwait stock exchange and other companies approved by the Supreme Privatization Council; (2) 20 percent to be held by governmental entities; (3) 5 percent to be subscribed by existing project employees; and (4) 40 percent sold equally to all Kuwaiti nationals.

III. Saudi Arabia

A. NEW COMPANIES LAW*

The Council of Ministers of Saudi Arabia approved the new Companies Law on 9 November 2015.³¹ The new law will take effect 150 days after its publication in the Saudi Official Gazette.³² This law is timely, and follows high demand from the legal community for updates to the old Companies Law issued in 1965. The law has 227 articles with

28. Law No. 37 of 2010.

29. See Decree No. 167/2015 of 10 June 2015, *Kuwait Al Yom* no. 1241 of 21 June 2015.

30. See Decree No. 38 of 2015, *Kuwait Al Yom* no. 1224 of February 22, 2015.

31. Press Release, Ministry of Commerce and Industry (Kingdom of Saudi Arabia), available at <https://mci.gov.sa/en/MediaCenter/News/Pages/09-11-15-01.aspx>.

32. Companies Law of the Kingdom of Saudi Arabia (2015) available at <https://mci.gov.sa/Documents/cl2015.pdf>, Article 227.

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substantial changes. This law is the result of the recent efforts of the Ministry of Commerce and Industry (MOCI).

Among several significant changes, the most notable is the establishment of holding companies in Limited Liability Company (LLC) and Joint Stock Company (JSC) forms.³³ Additionally, several provisions allow for greater flexibility for companies.

The amendments to the law facilitated coordination between the Capital Market Authority (CMA), Saudi Arabian General Investment Authority (SAGIA), and MOCI. Their jurisdictions previously overlapped in some areas. This new law makes the coordination between the three entities transparent and feasible.³⁴ Moreover, a single shareholder now may establish an LLC, while the old law required a minimum of two shareholders to establish an LLC.³⁵ Revisions to debt allowance, statutory reserve, and confidentiality are provided for in the new law.³⁶

For the JSC, two shareholders are now permitted to establish a company, while in the past, five were required. The minimum capital of the stock company now has been changed from 2,000,000 SAR to 500,000 SAR.³⁷ In addition, the law allows the establishment of a JSC with one shareholder for government entities or private parties having minimum capital of 5,000,000 SAR.³⁸ Finally, the new law provides for JSC sukuk (Islamic bonds) and debt instruments,³⁹ and allows JSCs to repurchase or mortgage their shares.⁴⁰

The one shareholder company—whether the JSC or the LLC—will provide a significant advantage for foreign companies, especially with the recent opening the wholesale and retail sectors for 100% foreign ownership.⁴¹

The new Companies Law also addresses corporate governance. For example, the law forbids one person to serve concurrently as chairman of the board of directors and CEO.⁴² Few executive regulations for this law will be issued later by the MOCI and the Board of the CMA.⁴³

33. *Id.* art. 62, 69, 70, 91,126, 195,219,212,224,225.

34. *Id.* art. 182.

35. *Id.* art. 145.

36. *Id.* art. 176.

37. *Id.* art. 54.

38. *Id.* art. 55.

39. *Id.* art. 121,122,123.

40. *Id.* art. 112.

41. Press Release, Saudi Arabian General Investment Authority (Kingdom of Saudi Arabia), *available at* <https://www.sagia.gov.sa/en/SAGIA/Media-centre/News/Saudi-Arabia-to-allow-full-foreign-ownership-in-retail-sector/>.

42. *Id.* art. 81.

43. *Id.* art. 125.

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B. FOREIGN INVESTMENT AND CAPITAL MARKETS LIBERALIZATION; LABOR AND EMPLOYMENT LAW AMENDMENTS; DRAFT BANKRUPTCY AND INSOLVENCY LAW⁴⁴

1. *Foreign Investment Liberalizations*

Saudi Arabia has historically taken a protectionist and cautious approach to foreign investment. Fellow members of the Gulf Cooperation Council (GCC)⁴⁵ enjoy the ability to invest and do business in Saudi Arabia on nearly the same level as Saudi Arabian nationals pursuant to the Economic Agreement between the GCC states.⁴⁶ On the other hand, non-GCC members face certain regulatory hurdles when attempting to invest and do business in Saudi Arabia.

a. Capital Markets Liberalization

The Capital Market Authority (CMA) is charged with supervising, regulating, and nurturing the growth of the sole stock exchange in Saudi Arabia, *Tadawul*. Since the official inception of *Tadawul* in the 1980s, trading thereon by foreign persons, firms, and institutions has been severely restricted. Indeed, because only citizens of GCC member-states and natural foreign persons holding a highly coveted residency permit could own, buy, and sell securities directly on the *Tadawul*, foreign firms and institutions could only invest in the market through a third-party by engaging in equity swaps, mutual funds, and exchange-traded funds and were not permitted to directly hold ownership over the securities.

On 21 July 2014, the Council of Ministers issued Resolution No. 388 dated 24/9/1435H giving the CMA the authority to promulgate rules easing the restrictions on foreign participation in the *Tadawul*. Shortly thereafter on 21 August 2014, the CMA issued a draft of the Rules for Qualified Foreign Financial Institutions Investment in Listed Shares (the Rules) for public comment for a period not to exceed 90 days.

The final Rules, which largely mirrored the draft Rules, were issued and put into force on 4 May 2015. In large part, the Rules seek to allow “Qualified Foreign Investors” (QFIs) and their clients to enter the market with the ability to directly own, buy, and sell listed securities upon receiving registration from the CMA.

i. *Qualification as a QFI*

To be registered as a QFI by the CMA, an entity must first submit its application for registration to an Assessing Authorized Person (AAP). The AAP is charged with investigating the application and determining the applicant’s compliance with the Rules. Particularly, the Rules require that an entity applying for registration as a QFI must:

- (a) be a bank, brokerage or securities firm, fund manager, or insurance company;

44. Amgad T. Husein, Partner, Dentons, Riyadh, Saudi Arabia, (amgad.husein@dentons.com); Mahmoud Abdel-Baky, Of Counsel, Dentons (mahmoud.abdel-baky@dentons.com), Riyadh; and Jonathan G. Burns, Associate, Dentons, Riyadh (jonathan.burns@dentons.com).

45. GCC members states include Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman.

46. Adopted on December 31, 2001 at Muscat. Entry into force on January 1, 2003.

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- (b) be licensed or otherwise subject to regulatory oversight by a regulatory authority in a jurisdiction with securities regulation standards no less vigorous than those enforced by the CMA;
- (c) have not less than SAR 18.75 billion (USD 5 billion) in assets under management (AUM) (though the CMA has discretion to reduce this required amount to SAR 11.25 billion (USD 3 billion)), including assets held by the applicant or its group for investment or managed by the applicant or its group on behalf of others; and
- (d) have at least five years of experience in the securities business industry.

Upon determination of the same, the AAP shall submit the applicant's application to the CMA for review.

ii. Additional Rules for QFIs Acting on Behalf of Clients

The Rules provide that a QFI must satisfy additional requirements in order to invest in the *Tadarwul* on behalf of clients of the QFI. First, the clients must be individually approved by the AAP as a QFI Client, which is achieved by submitting an application on behalf of each client to the AAP, who shall examine the application against the Rules. Thus, the applicant must:

- (a) notify the AAP of its intention to invest on behalf of clients;
 - (b) disclose the identities of the clients to the AAP; and
 - (c) undertake to be responsible for the management of the clients' *Tadarwul* investments.
- In accordance with the Rules, a client may only be approved as a QFI Client if it is:

- (a) a collective investment scheme (such as an investment fund) incorporated or licensed in a jurisdiction with securities regulation standards no less vigorous than those enforced by the CMA; or
- (b) a financial institution that satisfies the requirements in Parts 1.1.1(a) through 1.1.1(d) above.

Unlike the applicant's application for registration as a QFI, the clients' applications to be qualified as QFI Clients are not required to be submitted to the CMA for approval, but are subject to the discretion of the AAP.

Additional clients may be approved as QFI Clients after the applicant has successfully registered and has commenced trading.

iii. Application Procedure

Upon receiving the application, the AAP has five days to determine whether it is in compliance with the Rules. Within one day thereafter, the AAP must notify the CMA of its determination and provide a brief statement supporting the same. The CMA then must make a final determination "without delay."

iv. Ongoing Restrictions on and Requirements of QFIs

After receiving approval as a QFI, the QFI and its QFI Clients (if any) are subject to ongoing restrictions and requirements.

- (a) Limitations on Foreign ownership

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While the Rules do indeed liberalize restrictions on the trading activity of foreign investors in the *Tadawul*, they are still nonetheless narrowly tailored in some respects to constrain foreign investors in the market. Specifically,

- (i) QFIs together with their affiliates (if any) and QFI Clients together with their affiliates (if any) may not own more than 5 percent of the total issued share capital of any one issuer listed on the *Tadawul*;
 - (ii) QFIs and QFI Clients in the aggregate may not own more than:
 - (aa) 20 percent of the total issued share capital of any one issuer listed on the *Tadawul*; and/or
 - (bb) 10 percent of the total issued share capital of all issuers listed on the *Tadawul*; and
 - (iii) foreign (non-GCC) investors (including both QFIs and non-QFIs) in the aggregate may not own more than 49 percent of the total issued share capital of any one issuer listed on the *Tadawul*, including interests acquired through equity swaps.
- (b) Reporting and Disclosure Requirements

The Rules require a QFI to regularly provide reports on and disclosures of certain specified information.

- (i) Annual Disclosures

The QFI must provide a copy of its annual report and consolidated accounts to its AAP every year.

- (ii) Ongoing Disclosures

The QFI must immediately inform the AAP of certain specified “Notifiable Events.” These include, for example, the commencement of any bankruptcy, insolvency, criminal, legal, or regulatory proceedings against the QFI or any of its QFI Clients in any jurisdiction, as well as any knowledge of a violation of the Rules committed by the QFI or any of its QFI Clients.

- (iii) Waiver

Finally, notwithstanding all of the above, the CMA has absolute discretion to waive any or all of the Rules as applied to any applicant or client thereof upon direct application to the CMA, or at its own initiative *sua sponte*.

b. Liberalization of Wholesale and Retail Trade and Distribution Sector

Prior to Saudi Arabia’s 2005 accession to the World Trade Organization (WTO), non-GCC investors could hold only up to 51 percent ownership in wholesale trade and retail entities.

With the 2005 WTO accession, Saudi Arabia liberalized this restriction and allowed non-GCC investors to hold up to 75 percent ownership in wholesale trade and retail entities.

During the Custodian of the Holy Mosques King Salman’s visit to the United States in September 2015, which included meetings with prolific businesses and their

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representatives, the Saudi Arabian General Investment Authority (SAGIA) announced that non-GCC investors will be permitted to wholly own wholesale trade and retail entities in Saudi Arabia, subject to certain conditions.

The conditions for full non-GCC ownership of wholesale trade and retail entities in Saudi Arabia have yet to be revealed. Some potential conditions may include higher Saudization⁴⁷ percentage requirements, higher paid-up capitalization requirements, and stricter training requirements for Saudi Arabian employees. It will be interesting to see what conditions are applied, as well as whether or not such conditions outweigh the benefits of full ownership in wholesale trade and retail entities in Saudi Arabia for non-GCC investors.

At present, SAGIA has only issued a press release⁴⁸ that invites international companies to submit an application, which are assessed on a case-by-case basis for now. Thus, SAGIA is taking a slow, methodical, and cautious approach to the liberalization of this sector, which accounts for nearly 10 percent of the local economy.⁴⁹

2. Conclusion

In conclusion, Saudi Arabian regulations and legal policies and procedures continue to evolve. It is important to remain abreast of the various developments.

IV. Turkey*

Less than two weeks after Turkey's Justice and Development party scored a major election victory, a European Commission ("EC") report noted how strong political pressure continues to undermine the independence of Turkey's judiciary and the principle of separation of powers.⁵⁰

Perhaps the strongest example of this pressure was the much maligned trial of high-ranking military officials for an alleged 2003 plot to overthrow then Prime Minister

47. Saudization is the colloquial term used to refer to Saudi Arabia's official government policy of encouraging the employment of Saudi Arabian nationals in the private sector. The policy of Saudization is enforced and implemented through several programs and regulations in Saudi Arabia, including the Nitaqat Program, which categorizes employers on a color-coded scale based on the industry in which they operate and the ratio of Saudi Arabian nationals in comparison to expatriates employed. Depending on the color in which the employer is categorized, certain penalties (or benefits) may apply.

48. See <https://www.sagia.gov.sa/en/Investor-tools/Press-releases/Announcement/>.

49. See *Fifty First Annual Report 1436H* (2015G), Saudi Arabian Monetary Agency, p. 131, available at http://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/5600_R_Annual_En_51_Apx.pdf?bcsi_scan_2e285c794da36ba3=MCNy3ptEmEFQ7KtYFxDueRzoWpEAAAjrezAQ=&bcsi_scan_filename=5600_R_Annual_En_51_Apx.pdf.

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50. On November 1, 2015, Turkey's ruling AK party secured a majority of parliamentary seats. See, e.g., Mehul Srivastava & Funja Guler, *Turkey Election: Resurgent Erdogan Sweeps to Victory*, FINANCIAL TIMES (Nov. 2, 2015), available at <http://www.ft.com/intl/cms/s/0/ff5c8e3a-8078-11e5-8095-ed1a37d1e096.html#axzz3rDT2J64x>. On November 10, 2015, the EC released its 2015 Turkey Report. See European Commission, Turkey 2015 Report (Nov. 10, 2015) (noting that "no progress has been achieved in the past year" in combatting corruption and that the "separation of powers has been undermined"). The EC Report's release was delayed until after the November 1, 2015 elections.

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Tayyip Erdogan's government. The alleged coup, referred to as the "Sledgehammer" plot, centered on retired four-star General Çetin Dogan.⁵¹ More than 330 individuals were convicted for their "roles" in planning the coup.

On March 31, 2015, a retrial of 236 military suspects resulted in their acquittal. The underlying investigation, arrests, and trial in the Sledgehammer plot highlights the ongoing problems with Turkey's judiciary discussed in the EC report.

The Sledgehammer plot was made public in January 2010 by a Turkish newspaper. The paper described an alleged coup that contemplated, amongst other actions, the bombing of mosques and the downing of a Turkish military jet in a false-flag operation. The documents, which were mostly digital files, were then turned over to prosecutors who charged 365 individuals in a series of three indictments.

Throughout the trial, prosecutors alleged that the defendants lacked access to many of the documents relied on by the prosecution. These documents allegedly implicated the defendants for their roles in the plot. In the midst of the trial, defense attorneys staged a walkout due to the unfairness of the proceedings.

Evidence relied on by the prosecution to secure convictions was seriously flawed and, by most accounts, fabricated. For example, some of the documents allegedly created in 2002-2003 "planning" the coup, used fonts that were not available until Microsoft Office 2007 was released in mid-2006.⁵² Furthermore, other documents listed entities by names that were acquired years later. In one example, a document that was supposedly burned onto a CD in 2003 referred to the pharmaceutical company Yeni Recordati, which was a company formed by merger in 2008.

Despite these "inconsistencies" the Turkish court found all but 34 of the 365 defendants guilty of plotting to overthrow the elected government. Dogan and others were given twenty year prison terms. The convictions and sentences were affirmed in October 2013. However, on June 19, 2014, the Constitutional Court of Turkey ordered the release and retrial of the military officers after a unanimous ruling that the defendants' rights had been violated.⁵³

This year's retrial resulted in an acquittal, a result that many thought was long overdue. Indeed, by the time the retrial ended, most observers recognized the grave issues that flooded the original proceedings. Even before the retrial commenced, the Sledgehammer

51. Çetin Dogan's daughter, Pinar Dogan, is a lecturer in Public Policy at the Harvard Kennedy School. Çetin Dogan's son-in-law, Dani Rodrik, is the Ford Foundation Professor of International Political Economy at the Harvard Kennedy School. Pinar Dogan and Dani Rodrik wrote extensively throughout the course of Çetin Dogan's trial, retrial, and eventual acquittal. Their writings were published in outlets such as The Washington Post, Foreign Policy, New Republic and Project Syndicate. They also maintained a Turkish language blog. See BALYOZ DAVASI VE GERÇEKLER, <http://balyozdavasivegercekler.com/> (last visited Nov. 11, 2015).

52. See, e.g., Dani Rodrik, *Turkey's Miscarriage of Justice*, THE WASHINGTON POST (Sept. 21, 2012), available at https://www.washingtonpost.com/opinions/turkeys-miscarriage-of-justice/2012/09/21/e2125276-033d-11e2-8102-ebee9c66e190_story.html; Marc Patty, *A Harvard Economist. A Coup Plot. A Career Forever Changed.*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 16, 2015), available at <http://chronicle.com/article/An-Economist-Turns-Sleuth/233802>.

53. See Ceylan Yeginsu, *Turkish Officers Convicted in 2012 Coup Case are Released*, NY TIMES (June 19, 2014) (Quoting General Dogan's son-in-law Dani Rodrik who declared that "the due-process violations in the trial were evident from Day 1" and that the next step is discovering and prosecuting "those who perpetrate[d] the forgery and staged a sham trial").

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case had been under increased scrutiny and criticism. In July 2013, the UN Human Rights Council declared that the Sledgehammer defendants were arbitrarily deprived of their liberty in violation of various aspects of international law.⁵⁴

The Sledgehammer saga shows that justice remains an intrinsically political process in Turkey. Turkey has now done away with the special courts used to initially secure the Sledgehammer convictions. Overall, the handling of the Sledgehammer prosecution demonstrates the EC's continued concern over Turkey's judiciary and the principle of separation of powers.

V. United Arab Emirates

A. NEW UAE COMPANIES LAW 2015*

The new UAE Commercial Companies Law ("CCL")⁵⁵ came into force on July 1, 2015, after years of development in consultation with business. The CCL furthers the UAE's vision of a more developed economy aspiring to global standards with enhanced corporate governance requirements, shareholder protection, and social responsibility commitments.⁵⁶ Despite the absence of structural changes of particular interest to the UAE's substantial foreign corporate market,⁵⁷ the overhaul of the existing regime through the CCL is clear as it introduces new concepts, such as

- Creating sole shareholder companies (either limited liability companies (LLCs) or private joint stock companies);
- Allowing LLCs and joint stock companies to be established as holding companies;
- The establishment of a Companies Registrar;
- Allowing share pledges in LLCs; and
- The ability of public joint stock company shareholders to sell their preemption rights.

The implementation of the changes remains ambiguous in some areas, especially for the new concepts where the market requires additional guidance.⁵⁸ The introduction of holding companies⁵⁹ aligns the UAE market with other competitive global markets and

54. See Report of the United Nations Working Group on Arbitrary Detention, U.N. Doc. A/HRC/WGAD/2013/6 (Jul. 26, 2013) (requesting Turkey to remedy the situation of the 250 individuals found to be detained in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights as well as articles 9, 10, and 11 of the Universal Declaration of Human Rights).

* Christian Murad, Legal & Compliance Manager at Honeywell, authored this report.

55. UAE Federal Law No. 2 of 2015, UAE Official Gazette No. 577 (Mar. 31, 2015). The law comes into effect on 1 July 2015.

56. The anticipation of wholesale changes and particularly changes to foreign ownership restrictions for onshore companies (i.e., not in various free zones) are unaddressed by the CCL.

57. There was considerable interest during the drafting stages of the CCL in seeing the foreign ownership restriction, known as the 51/49 percent rule (local to foreign ownership ratio for onshore entities). However, this did not materialize in the CCL, as article 10 has continued this restriction. There is expectation for change in the form of a relaxed restriction, via the CCL's implementing regulations, or through a new Foreign Direct Investments law.

58. The CCL expressly sets out the structural changes but promises additional details on the implementation via cabinet resolutions and specialized committee decisions.

59. Conducting business through their subsidiaries, LLCs and JSCs can act as holding companies under article 266 of the CCL.

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increasing the appeal of the UAE regionally. This is of particular importance to large corporations looking to enter the regional market, with the UAE as a hub, or entities looking to restructure their organization to reap the benefits of tax synergies⁶⁰ with other regions or corporate alignment.

Another example of the transition towards a global standard is the CCL's mandated establishment of a Companies Registrar. The introduction of a Companies Registrar⁶¹ will centralize the registration of companies and streamline the formation and liquidation process of companies to minimize the multiple layers of administrative approvals required under the old system. This Registrar would also improve access to company records and avoid issues of multiple registrations per trade name. The transition once initiated by the Ministry of Economy will be extensive, but will increase the accessibility and appeal of the UAE market.

To further emphasize the CCL's focus on enhanced corporate governance, companies are required to retain accounting records for a minimum period of five years.⁶² International accounting standards and best practices are required when preparing their financial statements. While this is a normal internal requirement for larger multinational enterprises, this is of particular significance both to regional corporations now required to meet heightened requirements and to existing or prospective foreign or local investors that will benefit from enhanced transparency.

B. CHOICES OF COURTS AND LAWS IN THE UAE*

The UAE is comprised of seven emirates.⁶³ While the seven emirates work together in furtherance the national agenda, the larger emirates (Abu Dhabi, Dubai, and Sharjah) largely pursue their own economic policies.⁶⁴ The core principles of UAE law are drawn from Islamic law and its judicial systems operate on a civil law system adopted from the Napoleonic Codes.⁶⁵ Some of the emirates—most notably the Dubai International Financial Centre (DIFC) and the DIFC Courts—operate a judicial system distinct from the federal judicial system.⁶⁶ This section discusses the jurisdiction of the DIFC Courts and the recently established Abu Dhabi Global Markets (ADGM) and the ADGM Courts.

60. This may be a stepping stone benefit towards the widely anticipated introduction of corporate taxes in the UAE and the region.

61. The CCL authorizes the Ministry of Economy to create the Companies Registrar via regulations (articles 33-38).

62. The document retention period of accounting records is set at 5 years under article 26 and electronic versions are accepted subject to instructions.

63. Abu Dhabi, Dubai, Sharjah, Umm al-Qaiwain, Fujairah, Ajman and Ra's al-Khaimah.

64. Bashir Ahmed, *United Arab Emirates*, THE DISPUTE RESOLUTION REVIEW 835 (Richard Clark, ed., 3d ed. 2011). [hereinafter *Dispute Resolution*].

65. S. Elisa Kim, *Learning from France's Sauvegarde Reform Process: The Challenges of Drafting an Effective Framework for the New Restructuring/Insolvency Law in the UAE* (Spring 2013) (unpublished Independent Study paper, Thomas R. Kline School of Law, Drexel University) (on file with author). The French legal influence resulted from early deference to Egyptian constitutional law.

66. *Id.* See also Damien Horrigan, *The Birth of a New Jurisdiction: The Abu Dhabi Global Market* (May 2015) (unpublished conference paper), available at http://www.academia.edu/12726132/The_Birth_of_a_New_Jurisdiction_The_Abu_Dhabi_Global_Market.

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1. *The DIFC Courts and Opt-in Jurisdiction*

To diversify its revenue base, in 2004 Dubai created the UAE's first financial free zone, the DIFC.⁶⁷ In contrast to the surrounding civil law regime, the DIFC was established as a common law jurisdiction.⁶⁸ Initially, the DIFC Courts' jurisdiction extended only to entities with a nexus to the DIFC.⁶⁹ In 2011, the DIFC Courts' jurisdiction was expanded by a law that allowed parties with no nexus to the DIFC to opt-in to its jurisdiction, including by contractual selection of the DIFC Courts.⁷⁰

Since the 2011 law took effect, the number of cases filed at the DIFC has surged. Additional measures have contributed to the increase. For example, a new DIFC Courts' process allowed the conversion of DIFC judgments into arbitral awards, enabling enforcement in 152 nations under the New York Convention.⁷¹ The DIFC Courts' entry into numerous memoranda of enforcement with diverse jurisdictions, including with the United States District Court for the Southern District of New York, has raised the appeal of the DIFC.⁷²

2. *Creation of the ADGM and ADGM Courts*

On 14 October 2015, the Abu Dhabi Global Market's (ADGM) Board of Directors (ADGM Board) issued a consultation paper regarding proposed regulations governing the scope of the ADGM Courts.⁷³ The proposed ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations (ADGM Court Regulations) was open for consultation over a six-week period that ended November 13, 2015.⁷⁴

After much speculation regarding the scope of the ADGM Courts' jurisdiction, the initial rule proposed by the ADGM Board provided, similarly to the DIFC Courts, opt-in

67. See generally Horrigan, *supra* note 4.

68. *Id.*

69. See, e.g., CA 001/2011 National Bonds Corporation PJSC v (1) Taaleem PJSC and (2) Deyaar Development PJSC (May 11, 2011) (Court of Appeal), available at <http://difccourts.ae/ca-0012011-national-bonds-corporation-pjsc-v-1-taaleem-pjsc-and-2-deyaar-development-pjsc/> (concluding that the DIFC Courts had jurisdiction because the claim is a commercial case and dispute "arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the [DIFC]." Dubai Law No. 12 of 2004, Article 5(A)(1)(b)).

70. Dubai Law No. 16 of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts, Article 5(A)(2). *Extension of Jurisdiction of DIFC Courts*, UPDATE (Baker Borts LLP), 3 Nov. 2011 available at <http://documents.lexology.com/288d46a8-7735-49c3-abc8-24113a5869a3.pdf>; see also Stothard *supra* note 8. Notably, a legal opinion issued by the General Secretary of the Supreme Legislation Committee of the Emirate of Dubai at the request of the DIFC confirmed that the DIFC Courts have jurisdiction to hear and determine any claim where a government entity is a party so long as the that government entity agrees to submit the claim to the DIFC Courts' jurisdiction. See Press Release. SLC Legal Opinion on Dubai Government Entities Opting in to DIFC Courts Jurisdiction (Sept. 21, 2015) available at <http://difccourts.ae/10934-2/>.

71. Robert Maxwell Marsh & Fatima Ali Alnumairy, *Development of a Jurisdiction: An Update on the DIFC Courts*, LAW UPDATE (Al Tamimi & Co.), Sept. 2015 available at <http://www.tamimi.com/en/magazine/law-update/section-11/september-5/development-of-a-jurisdiction-an-update-on-the-difc-courts.html>.

72. *Id.*; Cases Surge, *supra* note 14.

73. <http://www.adgm.com/setting-up-business/adgm-legal-framework/public-consultations/2015/consultation-paper-no-11/>.

74. <http://www.adgm.com/setting-up-business/adgm-legal-framework/public-consultations/>.

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jurisdiction.⁷⁵ The scope of jurisdiction proposed by the ADGM Courts is apparently wider than that of the DIFC Courts as the language of the proposed ADGM Court Regulations states, *inter alia*, that the ADGM's Court of First Instance shall have jurisdiction "as conferred on it by . . . any agreement, whether or not in writing, where the parties have agreed to submit to the jurisdiction of the [ADGM] Courts."⁷⁶ In contrast, the language of Article 5(2) of Dubai Law No. 16 states that "[a]t the time of entering into an agreement, parties may expressly agree in writing to submit to the jurisdiction of the DIFC Court of First Instance" and "[f]or disputes that have already arisen, parties may expressly agree in writing to have such disputes determined by the DIFC Court of First Instance."⁷⁷ Thus, parties must expressly agree to the DIFC Courts' jurisdiction in writing, while the ADGM Courts imposes no such requirement.

3. *Key Differences Between the DIFC and ADGM*

Although both the DIFC and ADGM are common law jurisdictions on the surface, there are a few key differences. The ADGM's body of law directly incorporates the direct application of English law, including precedents of English courts.⁷⁸ The DIFC, in contrast, does not directly apply English law or English precedent. However, a DIFC court may find English law to be persuasive, especially if no precedent exists within the body of DIFC law.⁷⁹ This might be reassuring for some who are familiar with English law; however, if an ADGM court disagrees with established English law, the "ADGM Courts will have the flexibility to pass judgments as they deem appropriate."⁸⁰ Thus, there is uncertainty as to the how English law will be incorporated by ADGM Courts. Given their deeper body of case law, the DIFC Courts may offer greater predictability.

However, there is one area of law where businesses may choose ADGM Courts: insolvency and restructuring. Recently, the UAE was criticized—especially by SMEs, for lacking effective insolvency and restructuring regimes for businesses.⁸¹ While the DIFC has insolvency legislation based on UK laws, the legislation does not provide many avenues for restructuring, such as for administration, which is provided for under ADGM laws.⁸² Furthermore, the application of UNCITRAL Model Law on Cross-Border

75. See Section 15(2)(e), available at http://adgm.complinet.com/net_file_store/new_rulebooks/a/n/Annex-A-ADGM-Courts-Civil-Evidence-Judgments-Enforcement-and-Judicial-Appointments-Regulations-Consultation-Paper-No-11.pdf.

76. *Id.*

77. Baker Botts, LLP, Extension of Jurisdiction of DIFC Courts, Nov. 3 2011, available at <http://www.lexology.com/library/detail.aspx?g=>.

78. Jonathan Rees at al., *Comparison of Abu Dhabi Global Market (ADGM) and Dubai International Financial Centre (DIFC)*, (Freshfields Bruckhaus Deringer LLP), Oct. 2015, available at <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/ADGM%20note%20briefing.pdf>.

79. *Id.*

80. Muneer Khan & Samir Safar-Aly, *Abu Dhabi Global Market: An Overview of Proposed Financial Regulations*, Elexia (Simmons & Simmons LLP), July 23, 2015 available at http://www.simmons-simmons.com/~media/Files/Corporate/External%20publications%20pdfs/AbuDhabiGlobalMarket_AnOverviewofProposedFinancialRegulations_20150825102651.pdf.

81. See Tom Arnold, *Surge in SME Debt Defaults Exposes Flaws in UAE insolvency Rules*, Reuters (Nov. 3, 2015) available at <http://www.reuters.com/article/2015/11/03/emirates-debts-idUSL8N12V0YI20151103>.

82. Rees, *supra* note 25.

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Insolvencies was incorporated into ADGM regulations, providing additional guidance for parties.⁸³

4. *Conclusion*

“[T]he DIFC Courts are a strange phenomenon: an island of British and American style common law inside an Islamic monarchy.”⁸⁴ With the arrival of the ADGM Courts, another island of British common law has emerged. It remains to be seen whether these two islands will operate entirely separately or if an isthmus will arise to connect these two UAE pioneers as they pursue parallel tracks toward greater access to justice and responsible business. The evolution of the legal and business landscape will likely determine whether the ADGM will succeed or fail. However, despite the criticism of skeptics, “the UAE has often surprised its critics and naysayers.”⁸⁵ Time will tell if that will be true again.

83. *Id.*

84. Andrew Torchia, Dubai flexes legal muscles as financial court system grows, Reuters, September 29, 2014, available at <http://www.reuters.com/article/2014/09/29/us-emirates-courts-business-idUSKCN0HO10N20140929#0yklbvJSrZ3lWqfQ.97>.

85. Horrigan, *supra* note 4.