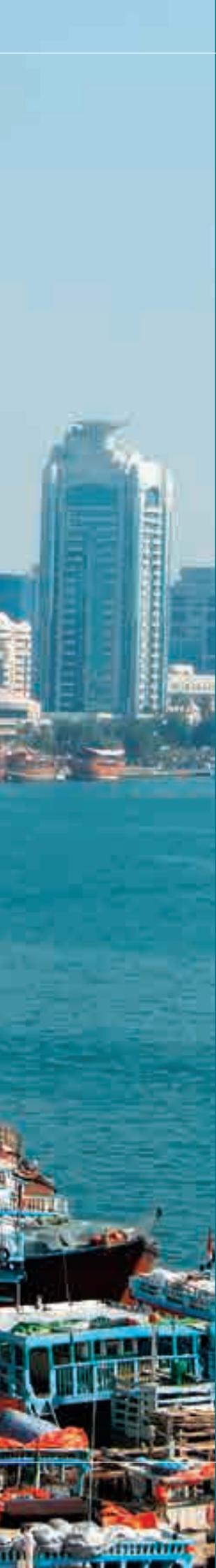


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CLYDE & CO

Corporate news

October 2016





Message from the editor

Welcome to the October edition of Clyde & Co's MENA Corporate newsletter.

In this issue we cover:

New Companies Laws: GCC Comparisons

During the last 12 months, we have seen each of the Kingdom of Saudi Arabia, Qatar and the UAE adopt new commercial companies laws. In this article, we compare and contrast these new laws and look at some of the key themes emerging across the three jurisdictions.

UAE Competition Law

The UAE Cabinet has issued resolutions setting out the relevant percentage thresholds applicable under the Competition Law. In particular, the threshold for dominant position and for notifiable economic concentrations has been set at 40% of the relevant market. All relevant legislation required to understand the Law has now been issued.

What does it mean to be a General Manager (GM) in the UAE?

The GM under UAE law is a corporate officer, charged with a number of legal duties. As the company's representative "on the ground" in the UAE, it is important for the GM to understand the full extent of his or her responsibilities and potential liabilities.

Other key legal updates since our last newsletter include:

- The recent announcement that the UAE Cabinet has approved the final draft of the much-anticipated new Federal Insolvency Law. The draft will now be submitted to the Federal National Council for approval and is expected to be finalised in a matter of months. Press reports indicate that

the proposed draft includes flexible new strategies to bail out businesses in financial distress. Significantly, the new law is also reported to contain provisions regarding the decriminalisation of bounced cheques - a move aimed at encouraging business owners to stay and work to restructure their debts rather than fleeing the country. We will publish future updates as and when more information becomes available.

- The recent announcement that 100% foreign ownership in KSA will now be permitted in the retail sector, subject to the foreign investor fulfilling certain conditions (see our Update for further information and analysis - [click here](#)).
- The clarification by the UAE Ministry of Economy as to which provisions relating to Public Joint Stock Companies are carried over to LLCs by virtue of Article 104 of the Law (see our Update for further information and analysis - [click here](#)). The UAE Cabinet has also recently approved a proposal by H.E. Sultan bin Saeed Al Mansouri, Minister of Economy, to extend the period for existing companies in the UAE to comply with the provisions of the UAE Companies Law, by one year.

We hope that you find this newsletter a useful and informative read. If you have any feedback or comments, please do not hesitate to contact us.

Phil O'Riordan
Regional Head of Corporate

New Companies Laws: GCC Comparisons

During the last 12 months, we have seen each of KSA, Qatar and the UAE adopt new commercial companies laws. In this article, we compare and contrast these new laws and look at some of the key themes emerging across the three jurisdictions.

Corporate structuring

All three jurisdictions have taken steps to streamline the procedures relating to the establishment of companies and to include further flexibility in terms of corporate structuring. Highlights include.

- Single-member companies: each of the UAE and KSA now allow single member limited liability companies (LLCs) and joint stock companies (JSCs), subject to various conditions and restrictions. Qatar has also modernised its regime by replacing the former “Single Person Company” with a single member LLC.
- Holding companies: the concept of a holding company is now expressly recognised in each of the three jurisdictions, allowing for greater flexibility when structuring corporate groups. Holding companies are in all jurisdictions required to prepare consolidated financial statements.
- Removal of obsolete forms of company: for example, each of the UAE and KSA has removed the little-used concept of a “partnership limited by shares”. The UAE has also removed the unregistered “joint venture company” (muhassa) as legal company form, requiring investors in the country to adopt more transparent, registered corporate vehicles. In contrast, similar forms of unregistered company have been retained in both KSA and Qatar.
- Share capital: the minimum capital requirement for a JSC in KSA has been reduced from SAR 10 million for listed JSCs, and SAR 2 million for unlisted JSCs, to SAR 500,000. In Qatar, there is no longer any statutory minimum level of capital for LLCs – capital must instead be determined by the shareholders. However, these reductions contrast with the UAE, where minimum capital levels for JSCs have instead been increased (there has been no statutory minimum capital requirement for LLCs since 2009).

- Processes and procedures: a “one stop shop” system is to be introduced in Qatar to shorten and simplify company registration procedures. However, the time-frame for implementation of the new system is uncertain.

Due diligence & accounts

Generally, there is an increased emphasis on transparency and making company information publicly available. In KSA, a JSC’s constitutional documents are to be published on the website of the Ministry of Commerce and Industry (MOCI) and will be available to the public, while in Qatar, companies are directed to make publications available on their websites if they have them, such as the publication of the memorandum and articles of association of public shareholding companies. The UAE envisages the creation of a new Companies Registrar and “concerned parties” will be able to request copies of documents filed with it. UAE JSCs are now required to publish their memorandum and articles on the company’s website.

There is also a more rigorous approach to company accounts and audit. In the UAE, there is a new requirement for all companies to prepare accounts in accordance with international accounting standards. There are new maximum limits on successive re-appointment of auditors of JSCs in each of the UAE and KSA, for three and five years, respectively. In KSA, LLCs now have three rather than four months from financial year-end to prepare their accounts and these must be filed with MOCI; in the case of a JSC, the financial statements must be signed by the chairman, the CEO and the CFO. In Qatar, the financial statements of public companies must now be made available to shareholders at least one week prior to the annual general assembly; previously the time period was three days.

Corporate governance

All three jurisdictions have taken steps to enhance their regulations in the area of corporate governance, as demonstrated by the examples below.

Saudi Arabia



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JSCs

- Directors must be appointed by cumulative voting (this prevents a majority shareholder from controlling the composition of the entire board by preventing votes being cast on each appointment as separate resolutions).
- The chairman of the board should not hold an executive position.
- There is a limit of SAR 500,000 on a director's total remuneration.
- A director's appointment may be terminated if he fails to attend three consecutive board meetings without good reason.
- The board must convene at least twice a year.
- The time limit for fraud claims against directors has been extended.
- An audit committee must be appointed to review and report on the company's financial statements and internal controls.

LLCs

- The limitation period for claims relating to the liability has been increased. The former limit was three years from discovery of the wrongful act. This has been increased to either five years from the date of the date of the end of the financial year when the act was committed or three years from the date of termination of the manager's appointment, whichever comes later.
- Managers are now personally liable for the company's debts if the "LLC" suffix is not used or capital of the company is not written beside its name – as such, the entity treated as an unlimited liability entity where its limited the liability status is not publicly evident.
- The Annual General Assembly must be convened within four months (rather than six months) following the end of the LLC's financial year.

Qatar



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Public Shareholding Companies

- Directors must be appointed by cumulative voting.
- The basis on which directors' remuneration is calculated has been reduced from 10% of adjusted net profit to 5%.
- Members of the board are now liable for "gross error" when undertaking their duties.

LLCs

- Shareholders holding 20% of the share capital may now request the LLC's managers to convene a General Assembly (formerly the threshold was 25%).
- The new liability standard for "gross error" also applies to LLC managers.

UAE



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All Companies

- New positive statement of the duties of those authorised to manage the company.
- Restriction on companies exempting officers (current and former) from liability.
- Introduction of ostensible (apparent) authority of directors/managers to protect third parties who deal with the company in good faith.

JSCs

- Directors must be appointed by cumulative voting.
- Wider prohibition on loans to directors covering loans to their family members and companies in which they hold a significant interest.
- New provision to address unfair prejudice.
- New rules for related party transactions.

- Wider restrictions on the powers of the board.
- New prohibition on a PJSC or its subsidiaries providing financial assistance for the acquisition of shares, bonds or sukuk in the company.

LLCs

- New provision on manager liability, including for "gross error".
- New provision addressing manager conflicts of interest.

Capital markets

All three jurisdictions have made changes to facilitate capital markets transactions. For example:

- Non-pre-emptive share issues: such issues are now permitted in Qatar and the UAE with the approval of 75% of the shareholders; in the UAE, the issue must be made to a “strategic investor” who fulfils certain criteria.
- Share buy-backs and pledges: a JSC in KSA can buy back and pledge shares according to guidelines issued by MOCI/CMA. Previously there were various restrictions on such actions.
- Free float: in the UAE, there has been a reduction in the minimum free float for listed JSCs from 55% to 30%. This aims to encourage local companies to seek a listing, as the founders may now retain control over their businesses.
- Listing and trading process: in the UAE, offers for sale are now permitted and provisions permitting and facilitating book-building, underwriting and trading in nil-paid rights on a rights issue have been included (subject to further secondary regulation).

Conclusion

Across each of the three jurisdictions, we can see various themes emerging:

- more streamlined and flexible corporate set-up options
- improved access to company information and more rigorous approach to corporate accounting
- greater emphasis on corporate governance and directors’ duties
- facilitation of capital markets transactions



It is also interesting to note that the UAE, in particular, has also chosen to adopt some Western corporate law concepts such as the new prohibition on financial assistance and ostensible authority of directors. These are not, as yet, concepts which have been carried over to KSA and Qatar.

While it is too early to assess fully the impact that these developments will have in practice, the general trend towards modernising company law regimes is to be welcomed.

UAE Competition Law: Cabinet issues market share thresholds

The UAE Cabinet has issued resolutions setting out the relevant percentage thresholds applicable under the Competition Law. In particular, the threshold for dominant position and for notifiable economic concentrations has been set at 40% of the relevant market. All relevant legislation required to understand the Law has now been issued.

Previous Clyde & Co legal updates have considered in detail the main provisions of the UAE Competition Law (Federal Law No. 4 of 2012) (the Law) and the Executive Regulations (Council of Ministers' Resolution No. 37 of 2014) (the Regulations).

The Law prohibits certain anti-competitive practices and provides for the establishment of a "Competition Regulation Committee" (the Committee) under the authority of the UAE Ministry of Economy (the Ministry). The Regulations deal in detail with the procedures relating to applying to the Committee for exemptions, approvals and the examination of complaints.

The Law has been in force since February 2013 and the Regulations since October 2014. However, the application and enforcement of the provisions has not been possible in practice due to the absence of certain key information. This has now been addressed by two Cabinet Resolutions (Resolution Nos. 13 and 22 of 2016). Both Resolutions take effect as from 1 August 2016.

What is now prohibited?

- *Restrictive agreements* - the Law prohibits "restrictive agreements", such as those which specify prices or conditions for the buying or selling of goods and services, or are tantamount to collusion in respect of tendering and bids, or which have the effect of limiting the flow of goods or services to the market or conversely flood the market with such items. Agreements which divide markets or assign clients based on geographic area and those which hinder the entrance of businesses to the market are also banned.

A "weak impact agreement", however, is taken outside of the scope of the definition and therefore will not breach the Law. Resolution No. 13 provides that a restrictive agreement will be deemed to have a "weak impact" if the total share of the establishments that are party to the agreement does not exceed 10% of the *total transactions in the relevant market*.

- *Dominant position* - it is prohibited for "dominant" establishments in a relevant market to take advantage of this position to breach, minimise or prohibit competition, by undertaking practices such as price fixing, undercutting prices, discriminating with no objective justification in respect of prices for identical contracts or obliging a client not to deal with a competitor. Such companies are also prohibited from disseminating false information about products or their prices and undersupplying or flooding the market with their products.

Resolution No. 13 specifies that a "dominant position" accrues if the market share of the establishment exceeds 40% of the *total transactions in the relevant market*.

- *Economic concentrations* - where a proposed "economic concentration" may affect competition in a relevant market, particularly to create or enhance a "dominant position", an application for approval should be submitted to the Committee at least 30 days prior to concluding the relevant contract. The concept of "economic concentration" is widely drafted to capture not only traditional share acquisitions but also transfers of assets and liabilities from one entity to another.

Under Resolution No. 13, an application must be made where the market share of the parties exceeds 40% of the *total transactions undertaken in the relevant market*.

Notably, the 40% threshold mirrors the percentage threshold for dominance and notifiable economic concentrations applicable in the Kingdom of Saudi Arabia (KSA), but is higher than the 35% applicable in Kuwait for merger control notification. KSA's competition legislation came into effect in 2005. Whilst the KSA regime is similar to that introduced in the UAE, there is little public information available in KSA on merger notifications, or enforcement against restrictive practices, from which we may draw parallels.

¹ "The New Federal Competition law in the UAE"

"The new UAE Competition law: merger and acquisition control: stay ahead of the competition"

"UAE Competition Law – Executive Regulations now published"

"No safe harbour for IP licences in the UAE"

Are IP licences covered by the Law?

Article 3 confirms that the Law applies to any exploitation of IP rights which may affect competition in the UAE. For those involved in the licensing of IP, Article 5 of the Law on restrictive agreements is likely to be of most concern. For many IP owners and their licensees, restrictions of this nature are common place. Take, for example, an exclusive trade mark licence which places restrictions on the licensee's use of the trade mark. This may potentially contravene Article 5 of the Law.

Importantly for the licensing of IP rights, the Law does not include any specific exemptions either for vertical agreements (such as franchise agreements and other IP licences) or for technology transfer agreements. Similar block exemptions which are available in the European Union do not apply under the Law. In other words, the Law does not contain any 'safe harbour' provisions for those involved in the licensing of IP rights in the UAE.

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What are the implications for businesses?

Now that the applicable thresholds have been specified, businesses operating in the UAE must analyse their current contractual arrangements and market position in order to determine whether they should apply to the Committee for an exemption from the application of the provisions on restrictive agreements or dominance. Potential mergers and acquisitions with a UAE element will also need to be reviewed in light of the provisions on economic concentrations, with transactions meeting the 40% threshold requiring pre-approval. In practical terms, undertaking this analysis may not be straightforward. See further below, *Are there any other issues to be aware of?*

Breach of the Law may result in significant fines (which can be doubled in the event of repeated breach) and other penalties such as a requirement to suspend business activities. Furthermore, payment of a fine under the Law will not protect the violating company from a civil suit for damages by an aggrieved party or the application of more severe penalties under any other applicable law.

Are there any exemptions?

Under the Law, there are a number of exemptions granted. These include:

- registered commercial agency agreements from the scope of the prohibition on restrictive agreements;
- certain sectorial exemptions, including telecommunications, financial services, oil and gas, pharmaceuticals, electricity and water, transport, post services, cultural activities, and drainage and sanitation activities;
- government-owned entities. Resolution No. 13 extends this exemption to establishments which are owned at least 50% by the Federal or an Emirate government (see further below, *Are there any other issues to be aware of?*); and
- small and medium enterprises (SMEs). Resolution No. 22 sets out a "unified definition" of a SME for the purposes of UAE law and distinguishes between enterprises operating in the trading, manufacturing and services sectors. An establishment may meet the relevant criteria depending on the number of employees or annual revenues. The thresholds are relatively high - for example, an enterprise in the manufacturing sector will qualify as "medium" with annual revenues of up to AED 250 million. See further our Bulletin (<http://www.clydeco.com/insight/article/smes-in-the-uae>).

What is the status of the Competition Regulation Committee?

As noted in the introduction, the Law provides for the establishment of a Competition Regulation Committee, under the authority of the Ministry. The Committee is essential to the operation and enforcement of the Law

and the Regulations. It is the body to which filings must be made in accordance with the Law and is empowered to issue decisions on compliance with the Law. It is also charged with proposing general policy for the development of competition regulation in the UAE.

The Law provides for the Committee to be formed by way of Cabinet Resolution. We understand that the Committee has been appointed and has convened at least four times, although the relevant Cabinet Resolution has not yet been made publicly available. We hope that the Committee will provide access to its policies and some information on its decisions. Understanding how the Committee interprets and applies the Law, particularly in relation to the definition of market share (see below, *Are there any other issues to be aware of?*), will be crucial for businesses to understand the duties which the Law imposes on them. It would also be helpful if the Committee will be prepared to engage in informal discussions with parties to clarify whether or not an application is likely to be required in any given case.

The Federal Competitiveness and Statistics Authority has also been established recently. We understand that this is a separate body from the Committee, although its establishment may be relevant to the application of the Law (see below, *Are there any other issues to be aware of?*).

Are there any other issues to be aware of?

Despite the welcome clarifications provided by the Resolutions, various uncertainties remain. In particular:

- **Status of the Committee** - although we understand that the Committee has been established, it is not clear whether it is yet accepting applications for exemptions or pre-approvals. It is likely that parties will be required to use specific forms and to follow particular processes when making applications, which have not been made public to date.
- **Definition of the “relevant market”** - no further guidance is provided to explain what constitute a “relevant market” in any given case. This is critical to the practical application of the Law and the Regulations. The way in which a market is defined may vary and affects whether an establishment holds a dominant position, whether a restrictive agreement will have a weak impact or whether an economic concentration is captured. For example, the market in “luxury 4x4 cars” is more restrictive than the market in “4x4 cars” or the market in “luxury cars” and more likely to trigger a notification requirement. It is hoped that the Ministry will issue further guidance in this respect.
- **Scope of the geographic area of a “relevant market”** – the Law applies to all economic activity in the UAE, and also to economic activity outside of the UAE but which affects competition in the UAE (such as an overseas merger which may affect the businesses of UAE branch entities).

The definition of a “relevant market” against which the share of that market is assessed under the Law involves products or services required by consumers in a “certain geographic area”. It is possible that market shares may not just be determined by reference to the whole of the UAE, but also by reference to the consumers in individual Emirates.

- **The definition of a “transaction”** – the percentage of 40% applies to the “total transactions” in a relevant market for the purposes of the definition of both dominant position and economic concentration. It is unclear whether “transactions” will be measured by volume (for example, total number of 4x4s sold in the UAE/Emirate) or by revenue generated (total income received from all sales of 4x4s in the UAE/Emirate). The period over which the transactions must be calculated is not specified either, which may be relevant if the economic conditions in a particular market change over time.
- **Accessibility of information** – if a party needs to make a filing with the Committee, it will need to include some analysis of its share of the relevant market in the UAE. This may not be easy, given the lack of official public information. As noted above, however, the Federal Competitiveness and Statistics Authority has been set up with a view, amongst other things, to strengthen the availability of national data and, in particular, open data. This may be a useful source of market share information in the future.
- **Scope of government entities excluded** – Resolution No. 13 does not expressly state whether the exemption for government-owned entities captures indirect interests such as entities held through subsidiaries and joint ventures. Although presumably a wide interpretation is intended, such that the 50% may be held indirectly, this is a point that may need to be clarified on a case by case basis.
- **IP licensing** – as noted above, there is no safe harbour under the Law in relation to the exploitation of IP rights. It remains to be seen whether the Committee will, in practice, grant exemptions for these kinds of arrangement in due course.

The Resolutions are another key development in the UAE’s business law landscape. This positive step will, we hope, be complemented with further official guidance on some of the practical issues, which should become clearer in due course.

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What does it mean to be a General Manager in the UAE?

The General Manager (GM) under UAE law is a corporate officer, charged with a number of legal duties and liabilities. A GM must be resident in the UAE and his or her name must appear on the company's trade licence.

The role of GM will frequently be referenced in the company's constitutional documents with reference to specific corporate functions. However, the incumbent may be unaware of the extent of these obligations and believe that the role is purely administrative in nature. As the company's representative "on the ground" in the UAE, it is important for the GM to understand the full extent of his or her responsibilities and potential liabilities.

Is the General Manager a director?

There is often confusion as to the nature of the GM's role and whether he or she is a "director" as that concept is understood in Western jurisdictions. This confusion is partially caused by the fact that the Arabic word used in both the former UAE Companies Law 1984 and the new Companies Law 2015 (the CCL) translates into English, interchangeably, as "manager" or "director".

It is possible to differentiate between a GM and a director in a limited liability company's (LLC) memorandum of association (MoA) by carving out the scope of each role. The GM may be charged with day to day management and running of the business (and be named on the commercial licence as such), while a board of directors is responsible for setting overall strategy, risk management involving compliance and governance, and succession planning. A GM may also be a board member, but does not need to be.

Alternatively, and indeed frequently, there is no board of directors. A LLC can operate either with a single, usually corporate, director (which typically delegates operational control to the GM), or simply with a GM alone who acts as the sole director.

CCL Obligations and Liabilities

The CCL includes a number of obligations which may apply to the GM, including the following:

- A "person authorised to manage" the company must protect its rights and exercise the diligence of a "prudent person" and must act in accordance with the objects of the company and the powers granted to him. This duty will clearly extend to the GM even if he or she is not also a

director. A "prudent person" is someone who has sufficient experience and demonstrates the necessary commitment to his duties. The duty is objectively framed but specific to the circumstances, such as the type and size of the business.

- There is a specific restriction on LLC directors competing with the LLC without the consent of the shareholders. Directors are also required to notify the board of any common or conflicting interest in any transaction which is referred to the board for approval. Although these provisions are unlikely to extend to a GM who is not a director, the GM may be subject to other non-compete restrictions, for example under his contract of employment.
- There are numerous obligations in relation to accounts and record keeping, company correspondence, the provision of information to the auditors and relevant authorities and the requirement to call a shareholders' meeting in certain circumstances. Failure to comply may result in substantial fines and possibly even imprisonment.

A GM who is also a director of a LLC may be liable to the LLC itself, the partners and third parties for:

- fraudulent acts;
- improper use of powers;
- breach of law or the provisions of the MoA;
- breach of his or her director service contract; and
- gross error.

The term "gross error" is not defined. It seems likely, however, that claims could be based on a failure by an individual director to meet the standard of care expected of "persons authorised to manage" as described above.

Any provision of the MoA or other contract which seeks to avoid the personal liability of the directors is void. In addition, the CCL prohibits a company from authorising itself or any of its subsidiaries to agree to exempt an officer (current or former) from liability. Any such provision in its MoA is void.

Other potential liabilities

Liability may arise for the GM under a range of other UAE laws and regulations, such as:

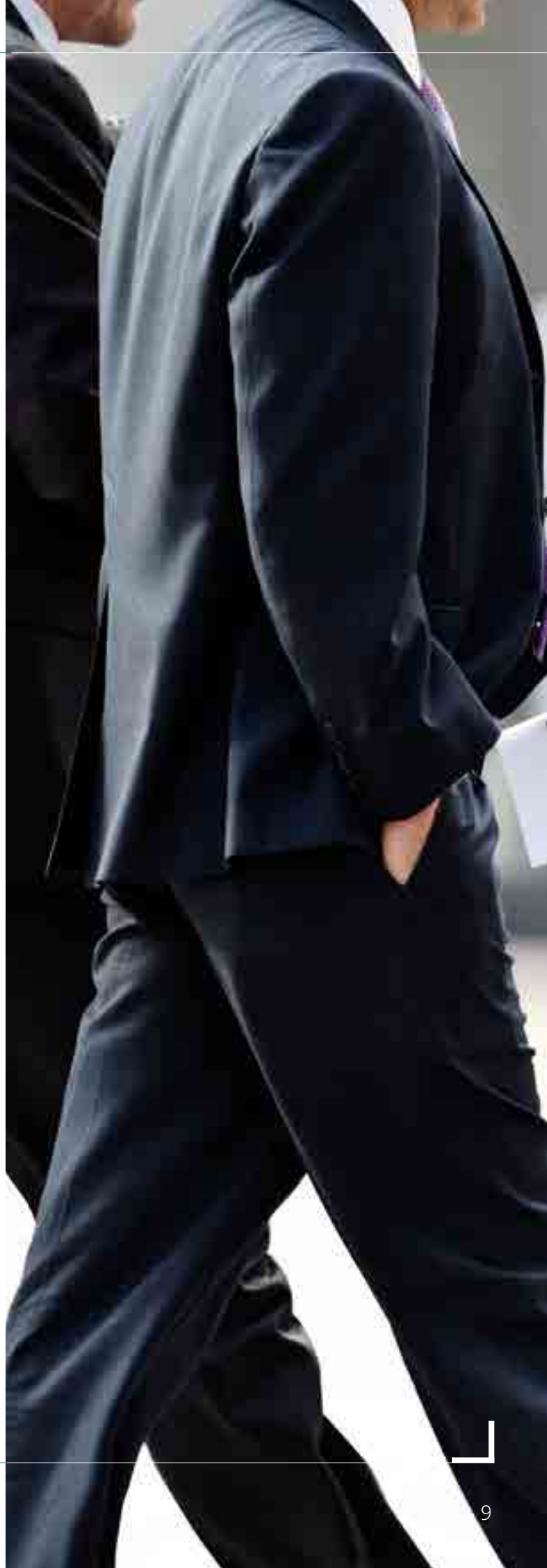
- **Tortious acts:** the GM may be liable under the Civil Code, either individually or vicariously, for acts carried on in the course of the business which cause harm to others.
- **Breach of confidence:** under the Penal Code, it is a criminal offence for a person to breach the confidence of another where the confidential information is held by the person as a result of his profession or employment and the disclosure is designed to benefit them or a third party.

Particular concerns arise where the company is in financial difficulty. Criminal liability may attach to the GM of a bankrupt company who commits “fraudulent business activities” (such as making untrue statements about the company’s capital or distributing fictitious profits), or who carries on activities which may prejudice all or some of the company’s creditors (such as preferential repayment of certain debts). There is also the much publicised civil and criminal liability which may attach to a GM who has signed bounced company cheques. Where the shareholders and any board directors reside overseas, in practice it will be the UAE-resident GM who is the most exposed in these circumstances.

Free zone companies

The specific obligations of the GM of a free zone company will depend on the regulations which apply in the particular free zone in question. There is often a range of specific obligations which arise, for example, in respect of accounts and record keeping. The Civil, Commercial and Penal Codes also apply within the free zones*.

*We do not consider the position in the financial freezones (DIFC and ADGM), where UAE federal civil and commercial laws do not apply.



Practical Tips

Make sure you understand your role and responsibilities. Review the MoA, your contract of appointment and any powers of attorney. Ask for further legal advice if necessary.

- Ensure that key corporate decisions are recorded in writing and that the interests of the company as a separate legal entity are carefully considered.
- Be particularly careful where you may have a conflict of interest with the interests of the company or where the company is in financial difficulty. Take independent legal advice if appropriate.
- Consider requesting that the company or its shareholder(s) put in place indemnities and/or D&O insurance policies to cover any personal financial loss you may incur as a result of your role.



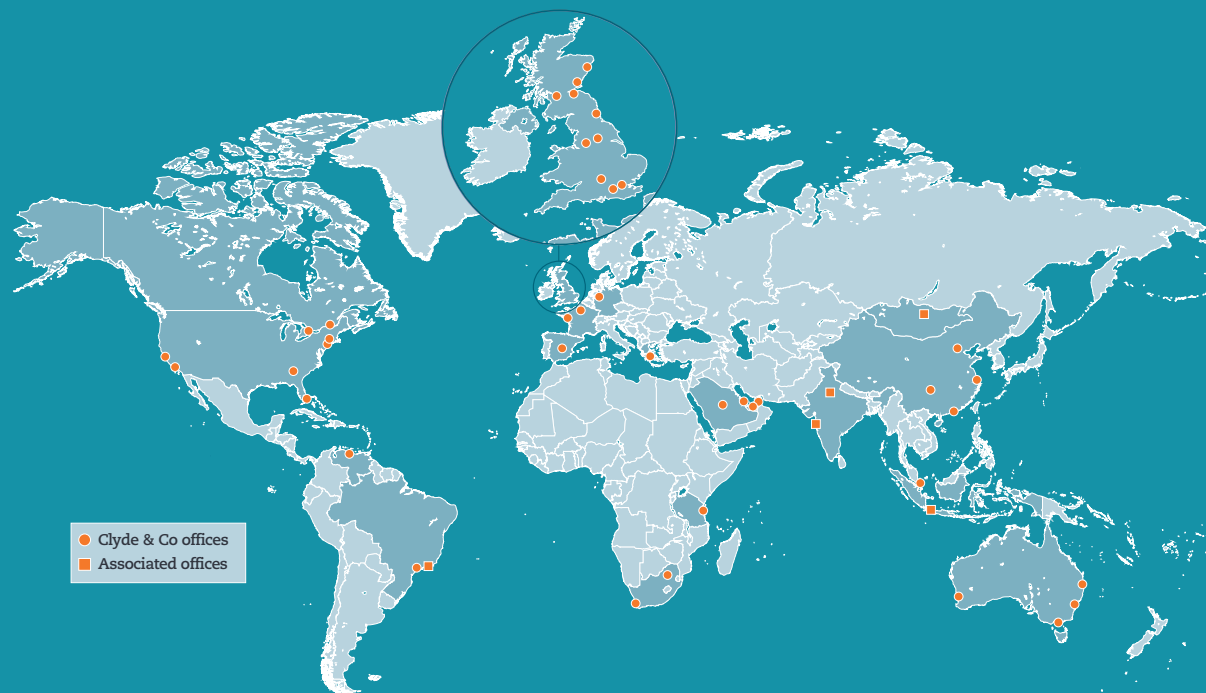
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