

## Legal Update

October 2017

### JUDICIAL LAW

#### ▪ **Launching of the Commercial Courts**

On 01/01/1439H (**21 September 2017**), the Saudi Arabian Supreme Judiciary Council has issued circular number T/967 (the "Circular") announcing that, as of the date of the Circular, the commercial circuits under the Board of Grievances will be moved under the general court system.

Pursuant to the Circular:

- First-instance judgments concerning claims for a principal value lesser than SAR 20,000 would be considered final and non-appealable, as a general rule.
- Commercial disputes concerning the Companies Law or the Commercial Agencies Law (irrespective of the claim value), as well as those concerning claims for a principal value greater than SAR 300,000 shall be heard by a circuit composed of three judges.
- Commercial disputes concerning claims for a principal value less than SAR 300,000 shall be heard by a circuit composed of a single judge.

The competences of the Commercial Courts are specified in Article 35 of the Sharia Proceedings Law (enacted pursuant to Royal Decree No. M/1 dated 22/01/1435H (25/11/2013) and include:

- Primary and ancillary commercial disputes between merchants;
- Claims made against merchants as a result of their primary or ancillary commercial activities;
- Disputes between shareholders in companies;
- Disputes related to commercial laws, without prejudice to the jurisdiction of the Board of Grievances;
- Bankruptcy claims and receivership orders; and
- Other commercial disputes.

As an exception to the above, cases relating to the breach of any commercial law shall continue to be heard by the Criminal Courts or the relevant committees, until the formulation of a process for their transfer to the Commercial Courts.

Cases currently adjudicated before the General Courts may not be transferred to the Commercial Courts.

Finally, filings to the Commercial Courts shall be made online.

▪ **Saudi Arbitration Law Now in Force**

On Friday **9 June 2017** the new Implementing Regulations of the Saudi Arbitration Law were published in the Official Gazette, meaning they are currently in force.

We would like to further clarify the process of challenging the arbitration award since it was vague prior the publication of the regulations.

Challenges to arbitral awards rendered in arbitrations seated in Saudi Arabia are now submitted to the Appeal Court. If the Appeal Court recognises the award, it will order its enforcement and its decision will be final and unappealable.

If, however, the court decides to nullify the award, its decision can be appealed within thirty days following the date of notification of the decision. An appeal against the Appeal Court's decision to nullify an award must now be submitted directly to the Supreme Court, as the Implementing Regulations make clear that the Supreme Court is the competent court referred to in Article 55(3) of the Arbitration Law.

When the current Saudi Arbitration Law was passed in 2012, replacing the outdated 1982 Arbitration Law, it was considered to be a significant transformation in dispute resolution within the Kingdom. The change was a welcome relief for the growing number of businesses choosing arbitration to resolve their disputes.

Since then, similar changes to the Enforcement Law in recent years have also bolstered arbitration in the Kingdom, bringing the process more in-line with international standards and prompting hope that Saudi might become a more arbitration-friendly jurisdiction as it seeks to diversify its economy and encourage more foreign investment.

On Monday 22 May 2017, the Saudi Council of Ministers passed the Implementing Regulations of the 2012 Arbitration Law (Implementing Regulations). Five years on, this is another important development in dispute resolution within the Kingdom, not least because the Implementing Regulations clarify many provisions that were previously vague in the Law.

The most significant provisions are as follows:

- The Implementing Regulations now clarify that the competent authority referred to in the law is the Appeal Court. This applies in all cases other than the exceptions stated in Articles 9(1), 12, and 40(3) of the Arbitration Law. This clears up any confusion or disagreements between the parties to arbitration as to which court should supervise their arbitrations.
- Summons to arbitration can now be served electronically (by e-mail, text messages etc.). This is a significant change in Saudi law as traditionally, summonses have had to be served in person. This will now make an electronic communication/document a

legally binding document when proving that a party has been officially summoned to arbitration.

- A claiming party must now submit a copy of the relevant contract, along with the name of, and contact details for, their appointed arbitrator, to the Saudi Center for Commercial Arbitration, or to any arbitral institution which the parties have agreed will administer the arbitration. The use of such institutions will encourage greater transparency in relation to the fees which parties pay to the appointed arbitrators.
- Challenges to arbitral awards must now be submitted directly to the Supreme Court, as the Implementing Regulations make clear that the Supreme Court is the competent court referred to in Article 55(3) of the Arbitration Law. This is a significant development, as many parties have to date submitted challenges to awards to the Appeal Court, and the Appeal Court has accepted them, because the competent court was not defined in the Law. The requirement to refer such challenges straight to the Supreme Court is likely to mean that such challenges will be dealt with swiftly - which is another very positive signal that Saudi Arabia is adopting a pro-arbitration stance.

## CORPORATE AND FOREIGN INVESTMENT LAW

### ▪ Full Foreign Ownership of Engineering Companies

The Crown Prince of the Kingdom of Saudi Arabia, HRH Prince Mohammed bin Salman bin Abdulaziz Al Saud, approved the decision of allowing Foreign Engineering Consultancy Companies to invest in the KSA with 100% foreign ownership during the recent Council of Ministers' meeting on **7 August 2017**. This announcement followed last year's similar decision to admit full foreign ownership in retail and wholesale businesses to operate in the KSA.

Prior to the Decision, Engineering Companies were established in the KSA under the form of a "professional company" required to be a "general partnership" type of company and governed by the Professional Companies Law. The establishment of a foreign Engineering Company was subject to certain limitations and conditions on the level of (i) its ownership structure, requiring a minimum ownership shareholding participation of twenty five percent (25%) by a KSA licensed engineer; (ii) the required type of company being a "general partnership", and (iii) the Ministry of Commerce and Investment along with the Saudi Council of Engineers being the only two authorities in charge of the licensing and incorporation, excluding SAGIA. Nevertheless, with the latest Decision and with SAGIA being KSA's licensing authority for foreign investment, Engineering Companies are now able to operate in the KSA as a limited liability type of company.

SAGIA has been proactive in welcoming the Engineering Companies applicants seeking the required licence. The latter is currently reviewing the necessary process and procedures to regulate the investment of Engineering Companies and has revealed some of the conditions

to issue the required foreign investment licence, along with the Saudi Council of Engineers' requirements. Interested businesses should be aware of two conditions:

1. they must have ten years (10) of experience within the engineering consultancy field; and
2. should be operating in at least four (4) international markets, apart from the KSA.

SAGIA will publish the conditions under which one of the two conditions may be waived.

#### ▪ **10-Minute SAGIA License**

Companies carrying any foreign ownership in Saudi Arabia are required to have a foreign investment license issued by the Saudi Arabian General Investment Authority (SAGIA) (colloquially referred to as a SAGIA License).

Recently, SAGIA announced a new process whereby major foreign investors (Applicants) can obtain a SAGIA License within 10 minutes online. However, this service is only available for certain investors, who fulfil the following conditions:

- a. the Applicant or one of its owners must be publicly listed in the international or local stock markets; and
- b. the Applicant must have achieved at least one of the following financial and technical standards:
  - i. the revenue for one of its shareholders or the parent company, according to financial statements for the latest two years, exceeds the amount of SAR 70 million;
  - ii. the assets for one of its shareholders or the parent company, according to financial statements for the latest two years, exceed the amount of SAR 100 million;
  - iii. the net profit for one of its shareholders or the parent company, according to financial statements for the latest two years, exceeds the amount of SAR 50 million;
  - iv. the Applicant or one of its shareholders owns at least three regional branches outside its own jurisdiction;
  - v. the percentage of the Applicant's export products in its home jurisdiction reaches 50% or more;
  - vi. the size of the Applicant's workforce is equivalent to 10,000 employees or more; or
  - vii. the Applicant or one of its shareholders owns a patent of an invention related to the activity in which the Applicant intends to engage in Saudi Arabia.

- **SAGIA License Validity Extended**

Currently, SAGIA Licenses are issued with a validity of one year, and must be renewed annually by submitting an application for renewal along with supporting documentation including, for example, certificates of good standing from The General Authority for Zakat and Tax (GAZT), General Organization for Social Insurance (GOSI), Ministry of Labor (Saudization), as well as audited financial statements.

This month, SAGIA announced that, beginning from **10 June 2017**, companies in Saudi Arabia can now renew their existing SAGIA Licenses with five years' validity. In order to take advantage of the extended validity, companies are required to subscribe to a special online service and submit the same documentation indicating good standing. The standard renewal fee of SAR 10,000 is paid every five years, and service subscription fees are paid at an amount and time based upon the categorization of the applicant, as follows:

For example, a Strategic (A+) company will pay SAR 150,000 towards a five-year subscription to the service, while an Advanced (B) company will essentially pay SAR 225,000 to cover its subscription to the service for the same five-year period. However, all categories will pay the standard renewal fee of SAR 10,000 in return for its renewed SAGIA License with validity of five years.

Categorization is based upon the Applicant's satisfaction of government policy mandates to train, develop, and employ Saudi nationals in high-paying, high-technology, and senior management jobs and, thus, will depend upon the Applicant's commercial activities, as well as Saudization ratios and the like.

Finally, SAGIA's announcement also claims that companies will be permitted to renew other licenses and permits for similar terms to coincide with their SAGIA License validity periods – e.g., commercial registration certificates (CR) and the like.

- **New Procedure to Open Bank Account for Companies Under Formation**

SAMA Circular No. 381000053455 dated 17/5/1438 H (**14 February 2017**) regarding the development of procedures for the establishment of institutions and companies to be electronic for all types of institutions and companies (except for joint stock companies, branches of Gulf companies and branches of foreign companies) to increase the attractiveness of the local investment environment and facilitate the procedures of starting business, to achieve the goal to achieve the competitiveness of the investment environment in the Kingdom, to identify the best countries in the world according to the standards and indicators of global competitiveness. These procedures have been developed to be as follows:

Establishing an electronic contract through the Ministry of Commerce and Investment website.

Documenting the contract with the notary public or certified notaries.

Issuing an electronic payment invoice that includes the financial consideration for the issuance of the commercial registration certificate, the cost of electronic publishing and the Chamber of Commerce subscription fees.

Issue the electronic record in PDF format and can be printed from the personal account at the electronic services at the Ministry of Commerce and Investment.

It therefore stresses the need to adhere to the following:

First: Stop issuance of certificate of capital deposit for limited liability companies in view of the abolition of the Ministry of Commerce and Investment this requirement for this type of companies before the issuance of the Commercial Register.

Second: To comply with the schedule prepared by the Ministry of Commerce and Investment, which explains the method of establishing institutions and companies according to the type of legal entity and nationality in relation to the requirement of pre-registration of capital and the certificate of deposit for issuing the Commercial Register (attached).

Third: Compliance with the rules of opening bank accounts and general rules for operating in commercial banks in the Kingdom with regard to the opening of bank accounts of legal persons.

#### ▪ **New Rules Regarding Corporate Governance**

On 27/6/1438H (**26 March 2017**), the Saudi Arabian Minister of Commerce and Investment issued decision number 32565 (the "Ministerial Decision"), pursuant to his powers under Article 125 of the Companies Law. The Ministerial Decision comprises nine articles that touch on various topics affecting either joint stock companies (see Section 1 below), limited liability companies (see Section 2 below), or both said structure forms together (see Section 3 below).

The Ministerial Decision elaborates on the existing legal framework governing conflicts of interests and the protection of minority shareholders. The Ministerial Decision will come into force once it is published in the Official Gazette.

### **Joint Stock Companies**

#### 1. Questionable Arrangements

The Board of Directors of joint stock companies must obtain the approval of the shareholders' ordinary general assembly for any contract or work entered into by the company and in which any director has any direct or indirect interest (the "Questionable Arrangements"). This rule is an extension of Article 71 of the Companies Law. The Ministerial Decision effectively extends the onus of obtaining shareholder approval from the interested director to the Board of Directors as a whole.

The Chairman of the Board must present the shareholders' ordinary general assembly with a report by the external auditors confirming that the Questionable Arrangements were conducted at a fair value and without harm to the shareholders, and particularly minority shareholders. Should shareholders sustain any harm, the liability of all directors may be engaged, except those who objected to the Questionable Arrangements and recorded their objection in the board meeting minutes.

## 2. Dual/Overlapping Functions

The Chairman of a joint stock company cannot hold any executive functions, even if the Bylaws specify otherwise.

### **Limited Liability Companies**

#### 1. Dividend Distribution

At the level of limited liability companies, dividends must be paid to the shareholders within 30 days of their approval.

#### 2. New Share Issuances to New Shareholders

At the level of limited liability companies, newly issued shares may not be granted to new shareholders except with the unanimous consent of all existing shareholders.

### **Limited Liability and Joint Stock Companies**

#### 1. Bulk Sale of Assets

For joint stock companies and limited liability companies alike, a decision to sell 50% or more of the company's assets – through one or multiple transactions in a 12-month period – requires the approval of the shareholders. For joint stock companies, this decision must be taken during an ordinary general meeting unless the company's Bylaws provide otherwise.

#### 2. Requirement to Offer to Buy All Shares

For joint stock companies and limited liability companies alike, any acquisition that brings a shareholder's share in a company at or beyond 50% triggers an obligation on that shareholder to offer to buy all remaining shares in the company within 60 days. The shareholder's offer terms and price must be equivalent to those of the most favorable transaction conducted by such shareholder during the preceding 12-month period.

- **Bankruptcy Law Announced**

Saudi Arabia will begin implementing a new bankruptcy law early next year as part of efforts to attract foreign investment and encourage private sector activity, Saudi-owned broadcaster Al Arabiya reported citing the Kingdom's commerce minister.

Under current legislation there is no easy way to wind up the activities of indebted companies in Saudi Arabia and the new law could help with government plans to restructure the economy and make it more attractive to outside investors.

The bankruptcy law has been passed to the Shura Council and we expect it to be implemented by the end of the **first quarter of 2018**," Commerce and Investment Minister Majid al-Qusaibi said in an interview according to Al Arabiya's website.

## LABOR LAW

- **Nitaqat New Round**

The new Nitaqat classifications of employer categories will now apply to employers with six employees or more and, quotas being significantly increased. In many sectors a quota which currently sees an employer fall into a high green or even platinum category will, following these changes, see the employer fall into a low green category unless the employer increases its Saudi national headcount. Only employers classified as high green or platinum may apply for block visas. These changes will be implemented from **3 September 2017** onwards following the conclusion of Eid Al Adha.

The company size thresholds can be summarized as follows:

	CATEGORY	EMPLOYEE NUMBERS
1-A	Very small	5 employees or less
1-B	Small	6-49
2-A	Medium (A)	50-99
3-B	Medium (B)	100-199
4-C	Medicum (C)	200-499
5	Big	500-2999

	CATEGORY	EMPLOYEE NUMBERS
6	Huge	3000 or more

#### ▪ 'Parallel Nationalization' Program

A welcome measure to assist employers struggling with Saudisation, is the recently announced 'Parallel Nationalization' program. The program aims to help employers who are unable to meet the requirements of the Nitaqat program (namely the achievement of quotas set according to employer size and sector). Essentially, the program will allow employers to pay fees in order to upgrade their classification within Nitaqat.

These fees will be determined according to how many KSA nationals would need to be employed in order for the employer to move to the higher or next classification category under Nitaqat. The fees will be subject to change each month. However, the employers will have the option of paying such fees six months in advance for the Nitaqat classification to be upgraded accordingly. The fees will go to support the Human Resources Development Fund ("HRDF") for the purposes of training Saudi nationals who are seeking employment.

The program is designed to make one unit of Parallel Nationalization equal to one Saudi national under Nitaqat. The calculation method is based on specific criteria in the electronic calculator on the Ministry of Labor and Social Development's website with one unit being determined by the number of KSA nationals already employed within the particular establishment.

By way of example, if an employer has ten KSA nationals, and needs to add three nationals to move to the next Nitaqat category, the first unit will be 10%, the second 20% and the third 30%. The calculation of each unit will be in line with the schedule below:

- First: SAR 3,600
- Second: SAR 4,200
- Third: SAR 4,800
- Fourth: SAR 5,400
- Fifth: SAR 6,000
- Sixth: SAR 6,600
- Seventh: SAR 7,200
- Eighth: SAR 7,800
- Ninth: SAR 8,400
- Tenth: SAR 9,000

The final cost will be the total of all units (e.g. in our example: 3,600 + 4,200 + 4,800 = SAR 12,600)

It is worth noting that an employer is eligible to amend or cancel its subscription in Parallel Nationalization at any time. The subscription payment will be made through the MOL portal for Parallel Nationalization services. If the employer discontinues the payments due, the subscription will be cancelled and will gradually reduce the percentage of Nationalization equivalent to the units of subscription.

The levies or subscription costs within this new system are high and depending on the number of KSA nationals required to achieve a certain Nitaqat classification, it may well be that it is more economical for an employer to hire more KSA nationals rather than subscribe to this new program or to aim to maintain a high green Nitaqat category rather than aiming for platinum.

The program however, will help employers that could not find Saudi nationals, and which are in the Low Green Level or Yellow Nitaqat classification, to upgrade to the preferred level and thereby qualify to obtain new visas and enable transfer of sponsorship from other employers.

#### ▪ **11<sup>th</sup> Phase of the Wage Protection System**

Under Saudi Arabia's Wage Protection System (WPS) implemented by the MOL, private sector businesses in Saudi Arabia are required to electronically submit employee wage information to a database maintained by the MOL and, further, to deposit and pay employee salaries solely through in-Kingdom banks.

The WPS has been implemented in phases, beginning with the largest firms with 3,000 employees or more. On 1 February 2016, the WPS entered its 10<sup>th</sup> stage to cover all businesses that have 80 employees or more.

Now, the WPS entered its 11<sup>th</sup> stage as of **1 August 2017** with application to companies with 60 or more employees.

Employers will have to provide details of their employees' salaries to the system within two months; if they delay providing these details for three months all services will be stopped and their foreign and Saudi employees can transfer their sponsorship / employment to other firms without their consent. Employers who delay paying salaries or fail to do so will be fined SAR 3,000 for every offence.

#### ▪ **Work Behavioral Conduct Rules Obligatory for Large Institutions**

In February 2017, the Ministry of Labor and Social Development issued a guide containing indicative policies regarding work behavioral conduct (the "Indicative Policies"). The Indicative Policies mention that behavioral and ethical rules in the workplace foster an attractive and productive work environment.

Most notably, the Indicative Policies encourage:

- a. transparency;
- b. dialogue between the employer and the employees;
- c. informing the employer of any infractions at the workplace;
- d. the avoidance of conflicts of interests;
- e. respect and cooperation between colleagues;
- f. fairness and equality in the treatment of employees;
- g. the usage of the employer's equipment and tools solely for work-related purposes;
- h. refraining from the payment of any bribes;
- i. the formulation by the employer of a clear policy concerning the acceptance by employees of gifts from third parties; and
- j. the employees to refrain from the collection of donations.

The Ministry has pursued its efforts to advance ethics in the workplace. On 6 May 2017 (10/8/1438H), it issued Ministerial Decision Number 111053, through which it ordered giant and large institutions to issue policies on work behavioral conduct by no later than **23 August 2017** (1/11/1438H).

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