Dubai: A Court System Evolves To Meet The Needs Of International Investors

*The Editor interviews **Jawad I. Ali**, Managing Partner of King & Spalding LLP's Middle East offices.*

Editor: It is nice to speak with you again. I understand you have been traveling a lot lately.

Ali: Very much so. I'm based in Dubai, but King & Spalding also has offices in Abu Dhabi and Saudi Arabia. Through those three offices we cover the entire Middle East North Africa (MENA) region and beyond. We execute transactions on behalf of Middle Easterners in this region, as well as help them with their investments in Asia, Africa, Europe and the U.S., often with the assistance of our other offices in Asia, Europe and the U.S. We have a dedicated team serving Middle Eastern clients scattered throughout our offices including in New York and and Atlanta. Our Dubai office covers the globe on behalf of Middle Eastern clients.

My personal practice involves ultra-high-net-worth individuals in the Middle East, sometimes directly, sometimes through their family offices and other times through investment companies that they own exclusively, or with other partners and family members. And, I work with closely held investment banks based in the Middle East that are owned by a few family members and friends who pool their funds and co-invest in various assets in the United States, Europe and Asia.

Editor: Last year, you spoke with us about the Dubai International Financial Centre (DIFC). Have banks, accounting and law firms, and other asset managers taken advantage of the benefits it offers?

Ali: The DIFC is thriving. Not only have all of the investment banks and most of the major international law and accounting firms based themselves there, but it has truly become a financial and capital center serving the entire Middle East and beyond. Whether you are placing funds, providing advisory services or arranging financing, if you want to have a presence in the Middle East, it's best to have your headquarters in Dubai – in the DIFC in particular – and from there you can manage your operations in other jurisdictions, whether that be Saudi, Kuwait, Qatar and elsewhere.

Editor: You mention jurisdiction. When we spoke last year, the DIFC's court system had not yet been recognized.

Ali: Since last year, that's changed dramatically. When the center was created, a court system was established, but it was limited to disputes that related to the DIFC. At least one side of the dispute had to be based in the DIFC or the deal had to have been consummated in the DIFC in order for the courts to allow the disputing parties to come to the DIFC courts. About six months ago, the ruler of Dubai expanded the jurisdiction of the DIFC courts, and now anybody can opt in their contracts to subject them to the DIFC law and can select either the DIFC courts or the arbitration center as the venue for dispute resolution.

It is expected that the DIFC courts will soon become a major center for dispute resolution for two reasons. First, the official language of the DIFC courts is English, whereas Arabic is used in the Dubai courts, and English is the language of cross-border business in the Middle East. Second, while fully codified, the laws of the DIFC are modeled after English common law. I would estimate that about 85 percent of the DIFC law is an adoption of English regulations with certain modifications to customize them to suit the DIFC and for the UAE. Certainly an English-qualified lawyer would have no problem understanding these laws, nor would a U.S.-qualified lawyer who has worked on transactions governed by English law like myself. As a member of the New York Bar with 18 years of cross-border transactions, I am very comfortable with the DIFC laws, which are definitely a departure from the Middle East civil and commercial codes.

Jawad I. Ali

Editor: Has enforcement of judgments from the DIFC been successful?

Ali: It very much remains to be seen. A judgment from the DIFC courts will be enforced in Dubai and potentially in the entire United Arab Emirates (UAE), but what if one of the parties is Kuwaiti or Saudi? Will the DIFC courts be recognized as a UAE court and therefore its judgment enforceable in the other GCC (Gulf Cooperation Council) countries? Or, will the DIFC court's judgment be treated as a foreign judgment (such as a New York or London judgment), which is not automatically enforced and may be retried in the jurisdiction where enforcement is sought?

Nevertheless, from the UAE – and, in particular, the Dubai – point of view, this is a significant step. A party's other option is to go to the regular courts, which are overburdened and can be ineffective. Furthermore, the proceedings are in Arabic, so you have the additional task of translating documents from English to Arabic.

Editor: I understand there is new competition regulation in the United Arab Emirates. Would you please elaborate?

Ali: In a nutshell, this is good news. Until this law, which takes effect on February 23 of this year, the UAE did not have a competition law. The new law more or less follows international standards. It is designed to regulate market behavior with a particular emphasis on regulating restrictive agreements, abuse of market power and merger control. Prior to this law, any two companies in whatever industry in the UAE could merge. There was no obligation to submit to an approval process by any regulator to ensure that the merged entities would not control over a certain percentage of the market to the detriment of consumers. So now there is that framework, and the regulator is the Ministry of Economy.

Where the law departs from international standards and specifically Western jurisdictions is that there are specific carveouts for the telecommunications sector, the financial sector, oil and gas, and the production and distribution of pharmaceutical products. There are only two telephone companies in the UAE, and they control the market. In the financial sector, while there's choice, the industry is perhaps too fragmented, and a bit of consolidation might be a good thing before it is regulated. Oil and gas is a government sector – and a very sensitive one – so it will not be subject to the competition law.

Not surprisingly, the government-run postal service will not be subjected, nor will public utilities such as sewage, garbage and hygiene. Cultural activities will not be regulated either.

Editor: All of the GCC states – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE – now permit some level of FDI in real estate, subject to restrictions to varying degrees. Which nations are most open, and where have you seen the most investment?

Ali: There are two types of foreigners, GCC nationals and complete foreigners like you and me. A citizen of any of the six GCC countries at least in theory can invest anywhere in the six member states, with the exception of Mecca and Medina in Saudi Arabia, which are still restricted to Saudi nationals.

In the UAE, non-GCC nationals may not invest in real estate unless it is in a designated free zone area, of which there are many. The whole concept started in Dubai, but it caught fire and has spread to Abu Dhabi and the other emirates in the UAE. For example, I live in Jumeirah, and as a foreigner I cannot purchase my property because it lies in Dubai proper. If I wanted to own the property I live in, I would have to buy in one of the free zones, such as the Palm Jumeirah. The exact same formula exists in Abu Dhabi.

In my view, the most open market in the GCC for foreign investment is Saudi Arabia, which took a completely different approach.

All investments by foreign (non-GCC) companies and individuals in Saudi are subject to the approval of, and require an investment license from, the Saudi Arabian General Investment Authority (SAGIA). Foreign investments are permitted in all sectors in Saudi except for certain activities listed in the so-called Negative List, which is published and maintained by SAGIA. It contains a complete list of the activities that cannot be conducted by any entity in which any shareholder (or any of their underlying shareholders, pursuant to a "look through" test) is not a national of a GCC country or a company consisting wholly of GCC shareholders.

Furthermore, regardless of the official list of restricted activities, there are additional sectors in Saudi that are *technically* open to foreigners, but practically speaking are not. With regard to investments for which another license is needed from a particular ministry (i.e., the Ministry of Health, the Ministry of Education) for certain sectors (i.e., pharmacies, schools), the relevant ministries will only grant a license to a Saudi individual or a wholly Saudi-owned and Saudi-domiciled company despite such sectors not being on the list of activities reserved for Saudi nationals or companies wholly owned by Saudi nationals.

Generally, foreigners are permitted to own up to 100 percent in the share capital of a company incorporated in Saudi Arabia, unless a company is involved in an activity on the Negative List or is otherwise restricted. Trading and distribution activities are open for foreign investors in Saudi Arabia subject to the following restrictions: (1) foreign ownership is limited to 75 percent of the share capital of the trading entity; and (2) minimum foreign investment may not be less than SR20 million (equivalent to about US$5.3 million). A foreign-owned manufacturing entity is permitted, however, to distribute products that it manufactures inside Saudi.

Editor: To what degree must foreign direct investment in the GCC be Shari'ah compliant?

Ali: In the UAE, Shari'ah compliance is not a "must" at all. A foreign party that is not Shari'ah compliant itself will comply because it is partnering with a GCC person or entity who insists on the transaction being compliant with Islamic Shari'ah. When we speak about Shari'ah-compliant investments, I think in the Western terms of an ethical investment portfolio, in which the investor has excluded certain industries as a matter of principle. For example, if you are buying a company, such company's activities must not include the production or the buying or selling of alcohol, firearms or pork products. It can't be a conventional financial institution that is making money by way of lending money and earning interest. It can't be a conventional insurance company or casino, etc. Furthermore, if a Shari'ah-compliant investor chooses to finance his investments, he cannot simply borrow money; he must participate in a sales transaction. He may buy a commodity perhaps on an installment basis and pay a profit, or he may lease chattel and pay rent. So a Shari'ah-compliant investor is still financing and paying a return because the other party has given him financing, but instead of taking the money, he has either bought or rented a commodity or chattel from them.

In truth, I wish more people would "borrow" this way, as it is a method of investing that dictates the movement of capital and would definitely stimulate the market. If you follow the spirit of Shari'ah, it requires that the capital owner put his capital into something concrete and take risks, rather than simply hoard money and lend it at a profit.

The jurisdictions of Kuwait, UAE, Qatar, Oman and Bahrain do not require an agreement to be Shari'ah compliant. Saudi Arabia doesn't have a specific law that says you must invest on a Shari'ah-compliant basis – and there are many Saudis who invest conventionally and for whom I do deals daily – but if the deal is within Saudi Arabia and you need to borrow, let's say, 60 percent of the money for the deal, then you must borrow on a Shari'ah-compliant basis if you want that transaction to be legal and enforceable. If you borrow $100 million conventionally and something goes wrong, you're out of luck, because the entire agreement may be null and void as it is based on a loan with interest. Now, the same provision actually exists in almost all of the GCC countries; however, the courts in the other GCC countries have decided that they are going to enforce loan agreements, including the payment of interest.

Please email the interviewee at jali@kslaw.com with questions about this interview.