

# Entity Structuring in Dubai

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**M**y inaugural column in *Offshore Investment* July/August 2008 (Issue 188) discussed the Dubai International Financial Centre (DIFC), the primary companies formed or operating under the Companies Law,<sup>1</sup> the Registrar of Companies, general aspects of company formation and registration, and a description of the two primary companies: Company Limited by Shares and Limited Liability Company.

In this issue, "Dubai Digest" continues to discuss the Companies Law, and any reference to "company" or "companies" includes both a Company Limited by Shares and a Limited Liability Company.

A company that was formed under the laws of a jurisdiction other than that of Dubai (a "Foreign Company")<sup>2</sup> may have financial or business reasons for the company to operate in Dubai. Moving the Foreign Company to Dubai is made possible through a transfer of incorporation. The Companies Law includes provisions for a Foreign Company, which is defined as "a Company incorporated in any jurisdiction other than the DIFC."

## Transfer of Incorporation

Under Article 117 of the Companies Law, a Foreign Company may make an application for continuation to the Registrar in accordance with the Regulations, subject to several conditions. The foreign jurisdiction where the Foreign Company is incorporated must authorize such continuation. The application must be executed under seal, signed by an officer of the Foreign Company, verified by an affidavit or other sworn statement by the signing person and

accompanied by articles of continuation complying with its articles. In addition, the Registrar may require other documents to be included with the application.

The articles of continuation shall include any amendments to the original articles of incorporation, and amendments necessary to make the articles of continuation conform to the Companies Law or any other relevant law applicable in the DIFC.

The approval by the Registrar of the application is provided under Article 118. Upon approval, the Registrar: issues a certificate of continuation with terms and conditions the Registrar deems appropriate; registers the company; and gives the company a registered number. The effect of a certificate of continuation under Article 119, which includes its effective date, is that the Foreign Company becomes a company subject to and as if incorporated under the Companies Law, and the articles of continuation become the articles of the company. The certificate of continuation is treated as the certificate of incorporation of the company. The Registrar sends a copy of the certificate of continuation to the appropriate official or public body in the jurisdiction in which the application for continuation was authorized. The Registrar, by final decision and not subject to appeal or review by the Court, may refuse to issue a certificate of continuation in his discretion; and the Registrar is not required to provide reasons for his refusal. "Court" is defined as the DIFC Court as established under Dubai law.

A Foreign Company continued as a Dubai Company under the Companies Law preserves its property, rights and privileges and is subject to all liabilities, disability and debts that existed before

continuation. If the Foreign Company were a party to any legal proceedings prior to becoming a company in Dubai, the Foreign Company continues to be subject to those legal proceedings.

Conversely, a Dubai Company may transfer to a jurisdiction other than the DIFC through a transfer of incorporation in accordance with Article 122. The transfer to another jurisdiction must be authorised by a Special Resolution and authorised by the Registrar in the manner prescribed by the Regulations. A Special Resolution for a Company Limited by Shares is defined as:

a resolution passed by at least 75% of the votes of the Shareholders as (being entitled to do so) vote in person or, where proxies are allowed, by proxy, at a General Meeting for which notice specifying the intention to propose the resolution has been duly given.

And a Special Resolution for a Limited Liability Company is defined as: a resolution passed by the votes of Members holding Membership Interests representing more than 75% (seventy-five) of the share capital of the Company held by Members entitled to vote and voting in person or, where proxies are allowed, by proxy, at a General Meeting for which notice specifying the intention to propose the resolution has been duly given.

A "General Meeting" is defined as "a meeting of Shareholders or Members of a Company." The application for transfer is made to the appropriate official or public body of a foreign jurisdiction to transfer its incorporation, requesting that the company continue as a Foreign Company. An application is not permitted unless the laws of the foreign jurisdiction provide that the Foreign Company will continue to have all the property, rights and privileges, will be subject to all the liabilities, disability and debts that it had before the continuation, and remains a party subject to any legal proceedings commenced in any jurisdiction to which it was a party before the continuation.

A company that is continued as a Foreign Company ceases to be a company in Dubai and files a copy of the certificate or instrument of continuation certified by the appropriate official of the foreign jurisdiction with the Registrar. The Registrar strikes the name of the company off the register upon receipt of the foreign jurisdiction certificate or instrument of continuation. The Registrar may refuse to authorise the company to apply to be continued under Article 122(1), but the company may appeal to the Court from a decision of the Registrar.

## Corporate Capacity and Transactions

Dubai does not try, through its legislation, to control the acts of the Shareholders or Members of a company. However, the Companies Law does provide the DIFC with authority over Shareholders or Members who do not operate in compliance with the Companies Law. Under Article 25, a company in Dubai is treated as a natural person acting under express or implied authority and may make, vary or discharge a contract or sign an instrument on behalf of the company. For example, a contract is given effect when a company, or a person or agent acting on behalf of the company, purports to enter into the contract before the company is formed (Article 26), and the person acting on behalf of the company is personally bound by and entitled to the benefits of the contract, subject to several exceptions:

1. The parties may agree that the contract is not effective if the company is not formed.
2. The parties may agree that the person purporting to act for the company is not personally bound by the contract and entitled to its benefit if the company is not formed.
3. Within a reasonable time after the company is formed, it may by act or conduct show its intention to be bound by such contract and thereby is entitled to its benefits.

In such event, the person who purported to enter into the contract as agent is neither bound nor entitled to any benefits with respect to the contract. Under this third exception, the person who purported to enter into the contract for the company or as agent for the company ceases to be bound and entitled to any benefits.

## Holding Company

The Companies Law contains provisions with respect to a holding company. Under Article 27, a body corporate is not allowed to be a Shareholder or Member of its holding company, subject to several exceptions. An allotment or transfer of shares or Membership Interest in a company to its subsidiary is void. An allotment is defined as "in relation to Shares, a transaction by which a person acquires the unconditional right to be included in a Company's register of Shareholders in respect of such Shares." First, a Shareholder or Member of a company that becomes a subsidiary of a holding company may continue as Shareholder or Member if the subsidiary has no voting rights at meetings of the holding company; does not acquire additional shares or Membership Interest in the

holding company except on a capitalisation issue; and, within 12 months, disposes of all such shares or Membership Interest. Second, if the subsidiary is acting as a personal representative, the general rule prohibiting a body corporate to be a Shareholder or Member of its holding company does not apply. In referring to a body corporate, the said general rule and the exceptions, includes a subsidiary nominee for a body corporate.

## Class Rights

The Companies Law authorises a company to have classes of shares. If the articles or the terms of issue of shares or Membership Interests include a provision for the variation of the rights attached to a class of shares or Membership Interests, those rights can only be varied in compliance with the provisions of Article 28 of the Companies Law. If no such provision for variation of rights is made, the rights may be varied only if: (a) consent in writing is given by the holders of two-thirds in share value of the shares or total Membership Interest value of the class;<sup>3</sup> or (b) a resolution is passed at a separate meeting of the Shareholders or Members of that class sanctioning the variation. The variation of rights attached to a class of shares or Membership Interests by an alteration in the provisions of the articles or by insertion of such provision into the articles shall be treated as a variation of those rights.

Shareholders and Members have a right to object to variation under Article 29. Holders of not less than 5% of the share value of shares or total Membership Interest value who did not consent to, or vote in favour of the variation, may apply to the Court to have the variation cancelled. Upon such application, the variation is set aside unless and until the application is confirmed by the Court. The application to the Court must be made within 28 days after: (a) the date on which the rights were varied with respect to any class of shares or Membership Interests in the manner referred to in Article 28(2); or (b) the date the consent was given or the resolution was passed with respect to rights attached to its class of shares or Membership Interests that were varied in the manner referred to in Article 28(3). The Shareholders or Members may appoint, in writing, one or more other persons to file the application on their behalf. Written notice is required to be signed by or on behalf of the applicants and given to the Registrar within seven days after the application is made to the Court. Upon satisfactory compliance with these requirements and after hearing the applicant and any other

persons appearing to the Court to be interested in the application, the Court may, in considering all the circumstances, determine that the variation unfairly prejudices the Shareholders or Members of the relevant class and disallow the variation or otherwise confirm the variation.

### Accounting Records

The Companies Law is focused on assuring that financial statements of a company are prepared with reasonable accuracy in order to reflect the true financial condition of a company. First, Article 101 requires the company's records to be sufficient to properly show the transactions that the company is engaged in and show the financial condition of the company. Second, because the directors or managers are required to provide assurance that the company's true financial condition is being reflected, accurate records must be kept and maintained. As a result, the Companies Law places the burden on directors or managers to ensure that accounting records are prepared properly and maintained to provide a true reflection of the financial condition of the company. Also, accounting principles or standards must meet the requirements of the Registrar or as prescribed by Regulations so as to reflect the true profits or losses of the company under Article 103. The Board of Directors of the Dubai International Financial Centre Authority (DIFCA)<sup>5</sup> may, under Article 100, extend, waive or modify Regulations relating to accounting and auditing matters, including: accounting standards, codes of practice, extending or shortening a financial year in certain circumstances, the appointment qualifications, remuneration and other matters relating to auditors. The Board of Directors may also waive the requirement for the preparation of accounts and examination reporting by auditors.

Written notice is required to be signed by or on behalf of the applicants and given to the Registrar within seven days after the application is made to the Court.

Upon written request made by a Shareholder or Member of a company, he is entitled to receive a copy of the company's latest audited accounts and auditor's report without charge under Article 104. The qualification and registration of auditors are provided under Articles 105 and 106, and the appointment and removal of auditors are provided under Article 107. Under Article 102, a company's financial year begins on the date it is incorporated and can last no longer than 18 months in the first year as determined by the directors or managers. Upon a transfer of incorporation, that

company's first financial year may start at the end of the previous financial year, at the option of the directors, in the jurisdiction from which it was transferred and shall last for 12 months from that date. The second and each financial year thereafter shall last 12 months from the end of the previous financial year.

### Inspection and Remedies

The Registrar, in his discretion and in pursuing his objective, may appoint one or more inspectors to investigate the affairs and submit a written report of a company under Article 124, as the Registrar may direct. Appointed inspectors may also investigate and report about the affairs of another company that is or was related to the company being investigated, with the consent of the Registrar. Under Article 125, an inspector who suspects a person to be in possession of books and records in his custody, or any power relating to the affairs of the company, may be required to meet with the inspector upon reasonable notice, answer all relevant questions regarding the affairs of the company, and provide reasonable assistance in connection with the investigation. The inspector may require a director or past director to produce records in his custody or power related to a bank account if the inspector suspects that such current or past bank account received payments related to the affairs of the investigated company.

At the conclusion of the investigation, inspectors are required to make a written report to the Registrar under Article 126. The Registrar may take one or more of the actions of: providing copies of the report to the company with or without requiring that it be disclosed to members whose financial interest may have been affected by the matters covered in the report; and providing a copy of the report to the Dubai Financial Services Authority (DFSA) with respect to a company licensed, registered or recognised by the DFSA.

Under Article 127, the Registrar may direct a company to comply with the Companies Law if an officer fails to comply with a provision of the Companies Law, the Regulations or legislation administered by the Registrar or any requirement made by the Registrar pursuant to any power under the Companies Law, Regulations or legislation. Legislation, as defined, "includes Regulations or rules made under legislation." Other powers of the Registrar include requiring a company to comply with any provision of the Companies Law or the Regulations, or directing a company to call a General Meeting of the Shareholders or Members. If an officer has failed to comply with a direction, the Registrar may apply to the

Court to require the company or officer to comply with the direction of any provision of the Companies Law, the Regulations or any legislation administered by the Registrar; and the Registrar may request an order directing a company or officer to pay any costs incurred by the Registrar as a result of filing in the Court.

### Dissolution of Companies

Through a Special Resolution, the Shareholders or Members of a company may voluntarily wind up the company in accordance with DIFC Insolvency Law No. 7 of 2004, as amended under Article 128. The Registrar may also give notice to a company that in three months it shall be struck from the register, unless provided reasons to the contrary. The notice to strike may be given by the Registrar if he has reason to believe that the company is not carrying on business, is not operating, is acting in contravention of the Companies Law, or the interests of the DIFC will be prejudiced if the company remains on the register under Article 128(2). If a dissolution event under Article 128 occurs, the Registrar shall strike the name of the company off the register and the company will be dissolved. Upon striking the name of the company, any liability of a director, manager, Shareholder, or Member continues and may be enforced as if the company were not dissolved. If a person shows to a court that he has been aggrieved by the decision of the Registrar under Article 128, the Court may order a stay, affirm, revoke or vary the decision of the Registrar and any other Court order, providing that such order is not inconsistent with the Insolvency Law regarding the dissolution of the company.

The Companies Law provides specific rules with respect to the formation and operations of a company, including specific requirements for the actions of Shareholders and Members. Provisions are also included for accounting requirements, placing the responsibility on the directors or managers to provide the true financial condition of a company. The procedures for the dissolution of a company are also specifically spelled out in the Companies Law. In the next issue, "Dubai Digest" will continue with discussions of entities and structuring in Dubai.

#### END NOTES:

1. *Companies Law, DIFC Law No. 3 of 2006.*
2. *Terms and words are defined under Article 3 of Schedule 1 to the Companies Law.*
3. *Article 28(2) of the Companies Law.*
4. *The Board of Directors of the DIFCA is defined as "the governing body of the DIFCA."*