The Private Wealth & Private Client Review

Fifth Edition

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John Riches

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EDITOR'S PREFACE

The first six months of 2016 have been characterised by turbulence for the world in general, and particularly for those holding significant private wealth. The key development of 2016 to date has been the publication of the 'Panama Papers'. The response to the publication from governments and the Organisation for Economic Co-operation and Development (OECD) has reinforced trends seen in prior years towards greater transparency and regulation in the domain of cross-border holding structures and in the context of beneficial ownership information.

i Panama Papers

Many have pointed to the irony surrounding the approach taken by the International Consortium of Investigative Journalists (ICIJ) in Washington in the context of its publication of the Panama Papers. The ICIJ's website sets out an elaborate procedure for whistle-blowers to provide information to them on a 'confidential' basis and the organisation has been resolute in its assurances that it will keep its sources confidential. So while the ICIJ argues for full transparency of information about the holding of private wealth, it does not consider that this standard should apply to those who provide information about wealthy families, even if the information is secured by unlawful means. Clearly, the Panama Papers have highlighted some issues concerned with offshore structures being used to provide a veil of secrecy to allow unlawful activity to go undetected and there is no sympathy for those whose unlawful acts have been exposed. Of deeper concern, however, is those who have sought to defend their privacy and yet have been accused of wrongdoing on a completely false basis – the case of Emma Watson who placed her home in the name of an offshore nominee to protect herself against stalkers serves to illustrate this trend. What has been striking from a UK perspective is the extent to which journalists from respected media organisations comment on issues relating to offshore structuring using language that is sensationalist in tone and frequently wildly inaccurate. The apparent furore over the former prime minster David Cameron's holding in an entirely conventional offshore fund structure established by his late father for third-party investors was reported by the BBC as an 'offshore fund trust'. The impression one gained from this reporting was that the journalist concerned was merely including as many words in the article that he felt had negative connotations to achieve maximum effect, regardless of their technical inaccuracy.

While the Tax Justice Network asserts in a 28 June 2016 report that 'trusts become the preferred choice by tax dodgers, corrupt officials or money launderers' to avoid transparency, there is precious little evidence of the large-scale use of trusts that has been unearthed by recent revelations such as the Panama Papers. A perspective that will not be published in any newspaper in the context of the Panama Papers is to explain that the vast majority of offshore trusts are used by tax-compliant families for legitimate wealth structuring and intergenerational succession planning. However, we should not assume that this will silence those who oppose trusts as a matter of principle. The party line of the Tax Justice Network and others is that the reasons trusts escape frequent references in the context of scandals is because they are so effective in hiding wrongdoers and so are very difficult to detect. They clearly have no idea about the depth of scrutiny a family is subject to in terms of anti-money laundering or know-your-client procedures to establish a trust in a well-regulated offshore finance centre.

I do not suggest that we can afford to be complacent about the scope for misuse of offshore vehicles in any way, but it is essential we take every opportunity to explain to policymakers the entirely legitimate purposes for which the overwhelming majority of families employ trusts and similar structures as part of their succession planning and wealth structuring.

ii The Common Reporting Standard (CRS) update

We are now fully in the era of the CRS, which became effective on 1 January 2016. Certain aspects of the CRS are causing a degree of confusion in terms of implementation, especially in the trust arena. Many of the difficulties here stem from the basic conceptual framework, copied over from the Foreign Account Tax Compliance Act (FATCA), which treats a trust fund as a 'financial account'. The most notable 'glitch' in this framework is in identifying those persons connected with trusts who need to be reported on. When trustees self-report as reporting financial institutions, the concept of an 'equity interest' does not name protectors. Alternatively, if one turns to the parallel list for trusts that are passive non-financial entities, protectors are expressly named. The OECD's own position set out in a recent FAQ is that the protector should always be named, but the formal legal basis included in the CRS model treaty is doubtful. It is to be hoped that in the second half of 2016 it will be possible to obtain clearer guidance on many areas of ambiguity so that all parties are fully prepared for the first wave of CRS-related disclosure for the 2016 financial year, which will be required before May 2017.

One silver lining to this confusion and uncertainty on protectors is a renewed focus on the choice of an appropriate person to serve in a protector role. In some cases, families are electing to formalise governance processes around fiduciary holding structures and introduce independent professional protectors in place of close relatives or family friends whose understanding of their duties may have been somewhat limited.

There already appears to be a two-speed world in the context of CRS with an enthusiastic group of early adopters who have signed the Multilateral Competent Authority Agreement so as to be able to exchange information with as many nations as possible, while a more reticent group of nations plan to adopt CRS on a bilateral treaty-by-treaty basis. The EU and Crown Dependencies and Overseas Territories are in the first group, while notably the Bahamas, Hong Kong, Singapore and Switzerland are in the second.

There is an emerging trend of consolidation of offshore structures into single jurisdictions to reduce complexity and multiple service provider compliance. It will be interesting to see which jurisdictions win out in this time of transition and, in particular, whether those international finance centres such as Jersey and Cayman that have placed themselves in the early adopter group will benefit from this stance. It is becoming apparent that many clients are keen to demonstrate their commitment to working in a transparent environment to forestall the type of ill-informed criticism unleashed in the wake of the Panama Papers.

iii Exchange of Beneficial Ownership Information (EBOI)

EBOI is the latest initiative being promoted by the G5 in Europe (the UK, Germany, France, Spain and Italy) and was a direct response to the Panama Papers' publication. EBOI builds on the same concepts that underpin the CRS and FATCA. The aim is, in parallel to the tax-related disclosure generated by FATCA and the CRS, to require the annual provision of beneficial ownership information on companies, trusts, foundations and similar legal arrangements or entities. The starting point is to require all jurisdictions that participate to maintain an accurate register in the hands of competent authorities to identify the beneficial owners of all such legal entities and arrangements.

The OECD is due to report back on the framework for potential implementation of EBOI in October 2016. What is increasingly apparent from the initial proposals is that their scope could well be significantly wider than the CRS framework. Where EBOI could widen the disclosure of information further is in requiring every single entity within a holding structure to have its own beneficial ownership register. If one takes, for example, the disclosure that relates to the holding structure ultimately held through a trust, the current rules under the CRS enable trustees that are themselves reporting financial institutions to take overall responsibility for reporting on the entire structure. If all underlying entities held within the trust are themselves reporting financial institutions or active non-financial entities (NFEs), only a single report is provided in relation to the trust as a whole. However, under EBOI, it may well be necessary to make multiple disclosures on all holding entities in a trust even though they have a common set of beneficial owners. The same rules could also apply for multiple layer holding structures ultimately held by individuals.

At inception, the proposals for EBOI are based around the idea of access being provided to 'competent authorities' such as regulators and law enforcement agencies. Predictably, there are already calls from NGOs for such registers to be made public. While many jurisdictions (for example, Jersey and Bermuda) have required beneficial ownership information on companies to be provided to them for many years, the effect of the EBOI proposals seems likely to require the creation of trust registers in many jurisdictions for the first time. It remains to be seen how these registers would work in practice. It is proposed that there will be an annual requirement to update the register to note any material changes. Potentially, this annual update will need to be provided in parallel to CRS and FATCA-type data, which tax authorities required by the end of May, with reference to the position as at the end of the prior calendar year.

iv Public registers of beneficial ownership

The UK's People with Significant Control (PSC) register has been operational since 30 June 2016. It will be interesting to see the approach taken by EU jurisdictions in implementing the Fourth Anti-Money Laundering Directive. The PSC register substantially implements that directive in the UK, although its terms are not completely aligned with the Fourth Anti-Money Laundering Directive.

It is already apparent, in considering the information to be provided for the PSC register, that the ultimate quest to name natural persons rather than entities can give rise to some unexpected results. As with the CRS, particular difficulties arise where a UK company is ultimately controlled by a trust. This is because in considering the application of the rules in a trust context, one does not name, for example, corporate trustees. One is required to look to individuals who control those corporate entities. This means that the information provided with respect to those natural persons is unlikely to have any meaningful connection with stated objectives of the legislation in providing greater clarity for third parties dealing with the company as to who, ultimately, influences its activities. It is also striking that in cases where the corporate trustee is owned by a listed group or controlled by a private equity firm, there may, in some circumstances, be no ultimate PSC required to be named.

If one contrasts the position here with that applicable to the French Trust Register, (ironically, made public on the same date, 30 June 2016), the information required to be made public under the French Register is extensive and, unlike the PSC register, requires one to provide details of the beneficiaries as well as the names of the trust. There is also a separate requirement to file a stand-alone 'event-based return' if the terms of a trust are modified in any way during the course of a calendar year.

The EU has recently published proposals to amend the Fourth Anti-Money Laundering Directive in the wake of the Panama Papers. In this context, it seems likely that the initial decision taken in 2015 not to require details of trusts to be placed on a public register will be reversed. If this proposal gains wider support (as seems likely), it will be interesting to see whether it will be modelled on the French register or will be more analogous to the UK PSC register.

iii Conclusion

In closing, it has never been more important for advisers to give balanced and considered advice to families on how best to structure their arrangements, not just in the light of prevailing family circumstances and tax considerations, but also in the knowledge of the likelihood that information about the holding structure will be subjected to greater regulatory, government and potentially public disclosure in the years ahead. The paradigm that currently prevails in Western Europe is markedly different from that applicable in Asia, the Middle East and Latin America.

It remains to be seen whether, in the long term, many international families who have compliant structures that are fully disclosed to tax authorities will favour the United States as a tax-favoured jurisdiction from which to administer their family structures. This is on the basis that with a thriving domestic trust industry, the US could well be seen as a reputable jurisdiction which protects families from unwarranted public intrusion into their personal affairs to a greater extent than traditional offshore finance centres if beneficial ownership registers do become public in due course.

John Riches
RMW Law LLP
London
August 2016

Chapter 36

UNITED ARAB EMIRATES

Amjad Ali Khan, Stuart Walker and Abdus Samad[1]

I INTRODUCTION

The United Arab Emirates (UAE) is a federation of the seven emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Ras al-Khaimah and Umm al-Quwain. The city of Abu Dhabi in the Emirate of Abu Dhabi is the federal capital. The Emirate of Abu Dhabi is the largest emirate by area and population and the wealthiest in terms of oil resources. Dubai is the second-largest emirate by area and population and is the trade and financial hub of the region.

As a hub for cross-border trade, financial services and an important market in the oil and gas industry, the UAE is home to numerous ultra-high net worth individuals and family conglomerates.

The UAE and, in particular the Dubai International Financial Centre (DIFC) (which is a federal financial free zone in the Emirate of Dubai) is home to a number of the world's leading wealth and asset managers, servicing the needs of their local and regional clients.

There are no personal or corporate income taxes in the UAE at the federal or emirate level other than emirate level income taxes on oil-producing companies and foreign banks. There are no exchange controls on the remittance of funds. Additionally, the UAE enjoys relatively low import tariffs and there are few restrictions on foreign trade.

The UAE is considered to be one of the most politically stable and secure countries in the region and consequently is regarded as a safe haven for investment in the region and a destination for tourists. The UAE has been unaffected by political upheaval or social unrest.

1 Amjad Ali Khan and Stuart Walker are partners and Abdus Samad is an associate at Afridi & Angell.

II TAX

One of the UAE's most significant attractions is the absence of taxation and the ease of remitting money into and out of the country. In the past year, there has been discussion of the introduction of a value added tax of 5 per cent on the sale of goods and services. At present it appears that this might be delayed beyond 2018.

A UAE corporate entity may be used for payment or receipt of royalty, interest or dividends. These structures can be established to take advantage of the UAE's extensive double taxation treaty network.

The UAE has signed double taxation avoidance treaties with over 60 jurisdictions, including China, Hong Kong, Singapore, Japan, Switzerland, Mauritius, the Seychelles, Ireland and Cyprus. Through these agreements, and by obtaining tax residency status in the UAE, it is possible to structure investments in a tax-efficient manner.

i UAE residency

It is possible for a foreign investor to become a UAE resident by establishing a corporate entity in the UAE (this may also be done by setting up a corporate entity in one of the UAE free zones (see below)) and obtaining a residence visa sponsored by such a company. The foreign investor will require an employment contract with such a company to obtain a residence visa (such employment contracts are customarily standard form documents prescribed by the authorities).

To maintain a UAE residence visa, a UAE resident must return to the UAE within six months of departure. There is no other requirement to maintain status as a UAE resident.

ii US Foreign Account Tax Compliance Act (FATCA)

The UAE and the United States reached an agreement in May 2014 to include the UAE on the list of jurisdictions to be treated as having an intergovernmental agreement (IGA) in effect in relation to FATCA. The UAE has adopted Model 1. Subsequently, the IGA was executed between the UAE and the United States on 17 June 2015, and the agreement has been ratified by the UAE pursuant to Federal Decree No. 9 of 2016. Banks and financial institutions in the UAE are complying with the requirements of IGA.

iii OECD memorandum of understanding

The UAE has proposed to adhere to the OECD (Organization for Economic Co-operation and Development) standards on transparency and tax exchange information. As a first step, on 11 June 2013, the UAE Ministry of Finance signed a memorandum of understanding (MoU) with the UAE Central Bank. The MoU contains an agreement to share tax-related information of all UAE bank customers with all countries that have double-taxation agreements with the UAE. The UAE became a participant in the Development Assistance Committee on 1 July 2014.

III SUCCESSION

Under UAE law, inheritance is governed by UAE Federal Law No. 5 of 1985 (the Civil Code), by UAE Federal Law No. 28 of 2005 (the Personal Status Law), and, in some instances, by the DIFC Wills and Probate Registry Rules (the Probate Rules).

All inheritance matters within the UAE are dealt with by the shariah courts or the DIFC Probate Registry. The shariah courts apply principles of Islamic shariah. The DIFC Probate Registry does not.

Article 17(5) of the Civil Code provides[2] that where real estate is concerned, UAE law shall apply to wills.

Article 1(2) of the Personal Status Law provides[3] that an individual who is resident in the UAE at the time of death may seek to avoid the application of the Personal Status Law (and thus avoid the rules it prescribes in relation to the fixed proportions for the heirs of the deceased). However, the Personal Status Law does not expressly amend the Civil Code and, accordingly, it remains unclear whether a non-Muslim foreigner may seek to avoid the application of principles of shariah in relation to the inheritance of real estate located in the UAE other than by making use of the DIFC Probate Registry.

One issue with real estate is that even where the deceased leaves a will it may be contested by the heirs of the deceased on the grounds that a will not made in accordance with the shariah contravenes the provisions of Article 17(5) of the Civil Code.

In so far as moveable assets are concerned, inheritance is governed by the law of the jurisdiction in which the testator is domiciled (for non-UAE nationals, this would normally be the country of their nationality, assuming that only one passport is held).

Accordingly, in so far as moveable assets (such as funds in bank accounts, shares and securities) are concerned, it is possible for a non-Muslim foreigner to provide for the devolution of moveable assets in a manner selected by him or her.

To avoid uncertainty non-Muslim foreigners generally own real estate in the UAE through corporate entities, which avoids the application of shariah law to the inheritance of real estate.

Alternatively, non-Muslims may make use of the newly created DIFC Probate Registry. The DIFC Probate Registry allows non-Muslims who are at least 22 years of age and have assets located in the geographical limits of the Emirate of Dubai to prepare and register wills in respect of such assets. Wills registered with the DIFC Probate Registry shall be governed by and construed in accordance with the Probate Rules.

Wills intended to be registered with the DIFC Probate Registry must be drafted in accordance with the rules of the DIFC Probate Registry, which prescribe a recommended form for a will. In addition, such wills must be signed before an officer of the DIFC Probate Registry and electronically stored in the DIFC Probate Registry's system. The testator (i.e., the individual making the will) will be required to appoint one or more administrators to his or her will. The administrator shall have responsibility for distributing the assets of the testator in accordance with the terms of the will. A fee of 10,000 dirhams is payable upon registration of a will.

Once registered, the intention is that the terms of the will can be given effect to by the DIFC courts. Decisions of the DIFC court must as a matter of law, be enforced by the Dubai

2 Article 17(5) provides that the laws of the United Arab Emirates shall apply to wills made by aliens disposing of their real property located in the state.

3 Article 1(2) provides that this Law shall apply to citizens of the United Arab Emirates state unless non-Muslims among them have special provisions applicable to their community or confession. This shall equally apply to non-citizens unless such a non-citizen asks for the application of his or her law.

courts. It is then anticipated that the other relevant Dubai governmental authorities (such as the Department of Economic Development in respect of assets such as company shares, or the Lands Department in respect of real property) would abide by orders ratified by the Dubai courts. It is hoped that, eventually, the various government departments will accept orders made by the DIFC courts directly (i.e., avoiding the need to get the DIFC orders ratified by the Dubai courts).

The DIFC Probate Registry is a new, and insofar untested, system. Accordingly, it remains to be seen how wills registered with the DIFC Probate Registry are in practice enforced in the Emirate of Dubai.

IV WEALTH STRUCTURING & REGULATION

UAE law (outside the DIFC) does not provide for the creation of trusts. Notwithstanding the foregoing, the UAE courts will generally acknowledge a duly created foreign trust pursuant to the laws of a foreign jurisdiction. A trust can, however, be created pursuant to DIFC law (which is based on general principles of English common law).

To provide clarity for the purpose of succession planning, it is common to structure the ownership of assets through bodies corporate. One further option is to establish a foreign body corporate to own UAE assets to avoid the application of UAE inheritance law and effectively allow overseas distribution of assets based in the UAE.

The Emirate of Dubai permits property to be registered in the name of corporate entities established in the Emirate of Dubai.

If the Dubai company is in turn owned by a foreign company, any transfer of ownership of UAE assets owned through such a structure can then take place offshore, but may still trigger the payment of transfer fees where the assets include real estate.

For real estate located within the DIFC, it is permissible to hold property in the name of an offshore entity or trust. To do so, an investor must satisfy the due diligence requirements of the DIFC Registrar of Real Properties. This procedure may also involve disclosure of the ultimate beneficial owner of the real estate. Note that DIFC Law No. 4 of 2007 (as amended by DIFC Law No. 4 of 2012) (the DIFC Real Property Law) contemplates that transfers of shares in an unlisted company shall fall within the definition of a 'transfer' and accordingly trigger both (1) payment of transfer fees (currently at 5 per cent of the higher of the transfer or market price) and (2) a filing with the DIFC Registrar of Real Properties in relation to the transfer. Note that transfers of real estate that constitute a personal restructuring (for example a transfer from an individual to a corporate entity that is wholly owned by such an individual) does not trigger the payment of transfer fees but will still require the submission of a filing with the DIFC Registrar of Real Properties.

Once established, regulation and oversight of companies in the UAE (outside the DIFC) is generally non-intrusive. The relevant regulator will only enquire into the affairs of a company if it suspects that illegal activities are being conducted or if the company fails to renew its annual licence or property lease. Corporate actions (e.g., changes of directors, managers, shareholders or amendments to the company's constitutive documents or share capital) are just about the only times when regulators must be approached.

Each free zone authority requires its own level of regulatory compliance and generally these authorities do not interfere in the affairs of companies established within their respective jurisdictions. Note, however, that companies incorporated in the DIFC (and especially those regulated by the Dubai Financial Services Authority, the independent regulator for the DIFC) are subject to extensive reporting requirements, which are strictly enforced.

i DIFC Single Family Office regime

It is also possible for high net worth individuals to use the UAE as an administrative base from which to manage their investments. The DIFC offers a convenient location, developed infrastructure and a sophisticated legal system that can be used by high net worth individuals and families to manage their wealth.

Such individuals or families may establish a Single Family Office in the DIFC. Such an office would be licensed pursuant to the DIFC Single Family Office Regulations (the SFO Regulations). A Single Family Office established in the DIFC can be used to service the needs of a 'Single Family'[4] (see below for further information on this), which can cover the following services:

a the provision of services to one or more 'Family Members';[5]
b the provision of services to a 'Family Fiduciary Structure';[6]
c the provision of services to a 'Family Entity';[7] or
d the provision of services to a 'Family Business'.[8]

A Single Family Office in the DIFC is a potentially useful base from which high net worth individuals can manage their administrative, financial and investment decisions.

ii Anti-money laundering regime

Money laundering is a criminal offence in the UAE. The UAE has put in place a rigorous anti-money laundering regime. Currently, this regime is governed primarily by UAE Federal

4 A family constitutes a 'Single Family' either where it comprises one individual or a group of individuals all of whom are the bloodline descendants of a common ancestor or their spouses (including widows and widowers, whether or not remarried); or subject to such other limitations or conditions otherwise agreed with the Registrar. It is envisaged that all members of a family will be included in a Single Family and that individuals adopted as minors, stepchildren, children of adopted children and all biological children of a qualifying family member shall be regarded as members of the Single Family.

5 In references to a Single Family, a 'Family Member' means an individual forming part of the group of individuals comprising the Single Family.

6 'Single Family Fiduciary Structure' means a trust or other similar entity (such as a foundation): of which a Family Member of a Single Family or a Family Entity related to the Single Family is the settlor or Founder; and the beneficiaries of which, or persons otherwise capable of benefitting from which, are all: (1) Family Members; (2) charities; (3) Family Entities; or (4) other Family Fiduciary Structures related to the Single Family.

7 'Family Entity' means an entity (such as a body corporate or partnership) controlled by a Single Family.

8 'Family Business' means a business (whether a body corporate or partnership) controlled by a Single Family.

Law No. 4 of 2002, as recently amended by UAE Federal Law No. 9 of 2014 (the AML Law) and by the UAE Central Bank Regulation No. 24 of 2000 (as amended) (the AML Regulation).

The AML Law states that the following shall constitute money laundering:

a the transfer, transport or deposit of funds with an aim to disguise or conceal an illegal source;

b the concealment or disguise in any other manner of the source or origin of funds; and

c the acquisition, possession or use of such funds.

In addition to the AML Law, financial institutions are required to comply with the AML Regulation. The AML Regulation specifies checks that financial institutions must put in place to prevent, detect and, where applicable, report suspected or confirmed money laundering activities.

Media reports have indicated that the UAE federal government is planning to introduce a number of amendments to the AML Law. It is anticipated that these amendments will seek to broaden the type of activities that may constitute money laundering.

In addition to the AML Law and the AML Regulation, entities operating in the DIFC are required to comply with the Dubai Financial Services Authority's Anti-Money Laundering, Counter-Terrorist Financing and Sanctions Module (the DFSA AML Module). The DFSA AML Module seeks to provide a single point of reference for those entities that are regulated by the DFSA.

V CONCLUSIONS & OUTLOOK

The UAE enjoys a stable political and economic outlook. The zero-tax environment, combined with the relative ease of doing business, means that the UAE has the potential for further economic progress.

It is expected that, in line with international trends, the UAE will enhance regulation of financial and wealth management services. In particular, one key trend that is expected to play an important role in future regulatory activity is the regulation of foreign private wealth managers servicing clients in the UAE without a presence in the UAE. The UAE Securities and Commodities Authority has recently also introduced regulations to curtail marketing and sales activity in the UAE by unlicensed individuals and entities from outside the UAE. In particular, it has issued a number of regulations addressing how investment funds, securities and financial services can be marketed to residents of the UAE.

Appendix 1

ABOUT THE AUTHORS

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Amjad Ali Khan is the managing partner and a co-founder of Afridi & Angell. He represents foreign and local clients including banks and leading multinationals in banking, financial and corporate transactions in the UAE and abroad. He has considerable experience in undertaking conventional, Islamic and private banking transactions. He is regularly involved in project finance, syndicated loans and treasury products transactions.

Mr Khan is the co-author of *The Banking Regulation Review* (UAE chapter) and is a regular speaker at banking seminars.

STUART WALKER

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Mr Walker regularly advises on financial services regulation, corporate finance, mergers and acquisitions and employment matters. Mr Walker leads the field in advising parties during Dubai Financial Services Authority (DFSA) investigations and, where necessary, negotiating settlements on their behalf. He was instructed by the first authorised firm to be fined by the DFSA, and has since gone on to advise in connection with the majority of all DFSA investigations resulting in a public outcome.

Mr Walker is the co-author of the UAE chapter of *Financial Services Regulation in the Middle East* (Oxford University Press, 2008), and has contributed articles to various publications including *International Financial Law Review*. He is a regular contributor to Euromoney's *Global Banking & Financial Policy Review*.

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Abdus Samad has extensive experience advising foreign and local clients on general corporate, commercial and other matters related to the conduct of business in the region including setting up companies and joint ventures in the UAE, corporate investments, restructuring, and the acquisition and sale of businesses.

Mr Samad has also been involved in banking and finance transactions, and advises clients on banking-related products and services such as the launch of the direct debit system in the UAE.

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