Liability of Managers and Directors under the Law of the GCC Countries: A Comparative Study of the Liability Regimes Existing in the Gulf Cooperation Council Region Illustrated at the Example of Qatar, Saudi Arabia and the United Arab Emirates
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Abstract

It would appear that management liability is regulated very differently among Saudi Arabia on the one hand and Qatar and the United Arab Emirates on the other hand. Unlike the civil and commercial laws of Qatar and the United Arab Emirates, which are strongly influenced by continental European law tradition, Saudi Arabian law is largely based on Islamic law. The resulting differences are, however, not as pronounced in the area of management liability. This is largely due to the fact that corporate law in Saudi Arabia is predominantly governed by a comprehensive statute, which was drafted using inter alia the corporate regulations of Qatar, the UAE and Egypt as an example. However, certain particulars still remain. This article will highlight the differences and similarities among the management liability regulations of the three jurisdictions and introduce the reader to the relevant provisions.

1. Introduction

Management liability is a central point of concern for investors. It provides a means of control over persons with wide authority to dispose over the investors’ assets by establishing an accountability regime for managerial staff. Furthermore, understanding the relevant management liability regime in the country a manager or director is employed in is relevant to that director or manager as well. A review of the management liability regimes of the three jurisdictions Qatar, Saudi Arabia and the United Arab Emirates is currently of particular interest not only because foreign investment is particularly high in these countries but also because all three passed new corporate laws, which came into force – in Qatar and the United Arab Emirates – in late 2015 and – in Saudi Arabia – in early 2016.

The principal purpose of management liability provisions is to affect management conduct and induce desired behaviour. By virtue of their position and the authorities bestowed on them by law and agreement persons entrusted with the management of a corporation assume far reaching competences with respect to the administration of assets of third parties; those being the shareholders of the relevant corporation and other investors. Consequently, the shareholders will have an interest in the corporation’s management using these competences diligently and responsibly. Still, since diligent management of the corporation and the as-
sets it was provided with will affect the ability of the company to fulfil its obligations, the corporation’s creditors and the market in general will have an interest in their sound and diligent management. This is particularly true where the liability of the relevant entity is limited; thus, the creditors of the corporation do not have recourse against its shareholders. To serve these interests management liability regulations seek to encourage behaviour that will minimize risks through establishing responsibility for managerial conduct.\(^1\) Hence, in this regard management liability serves as a deterrent that discourages management from taking high risks. However, this deterrent effect itself poses a risk for the company and its sound operation. Where management liability is too restrictive, persons charged with the management of a corporation may become overly cautious and avoid even transactions or business opportunities with moderate risk. This may considerably harm the business activities of a corporation. Consequently, a balance has to be found that would entice management not to take unnecessarily high risks while at the same time allow them to conduct the “normal” business of the company without constant concern of being held liable for acceptable risk materializing itself.

Understanding the management liability regime existing in the jurisdiction in which a company is incorporated, therefore, is relevant for local managerial staff in order for them to appreciate their liability exposure. However, it is also relevant for the corporation itself and its shareholders. Where the existing management liability regime is not satisfactory for the investors, they may choose to amend it by agreement. This may be of particular importance where a local subsidiary shall be subjected to a higher extend of control of the parent company.

As the management and administrative structures of the different types of corporation available to investors in the countries under review pose differing challenges and requirements for their management, so do they differ noticeably in the forms and extent of liability for the persons vested with their management. This article will focus on the regimes applicable to the liability of managers of the two types of corporations most frequently utilized by foreign investors in the Near and Middle East: the limited liability company (LLC)\(^2\) and the Joint Stock Company (JSC)\(^3\). To provide the reader with a broad overview of the management liability regime established in the member states of the Gulf Cooperation Council (GCC), this study will consider the laws of Qatar, Saudi Arabia and the UAE. An analysis of these countries is of particular interest for two reasons. First of all, all three jurisdictions have

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\(^2\) The LLC under Qatari, Saudi Arabian law and the law of the United Arab Emirates (UAE) is more or less comparable to the limited liability company (Gesellschaft mit beschränkter Haftung or GmbH) under Austrian, German or Swiss law.

\(^3\) The JSC under Qatari, Saudi Arabian law and the law of the UAE is more or less comparable to the joint stock company (Aktiengesellschaft or AG) under Austrian, German or Swiss law.
passed new corporate legislation in 2015, which requires a fresh analysis of the management liability regime established by these laws. Secondly, while the civil and commercial laws of Qatar and the UAE are heavily influenced by continental European law tradition, Saudi Arabian law relies nearly entirely on Islamic law principles. Thus, this article not only serves as an update on the management liability regime as amended by recent legislative developments in these three countries, but also introduces the reader to the concept of management liability in two very different legal traditions.

2. Management Liability under Qatari Law

This Section will provide an overview of the liability applicable to managers of LLCs and directors of JSCs incorporated under the law of Qatar. Qatari JSCs may take the form of a public (stock market listed) or private (unlisted – also referred to as ‘closed’) JSCs. Due to the relatively higher capital and regulatory requirements JSCs are typically chosen for larger ventures. Where the JSC is not suitable most foreign investors opt to adopt the form of an LLC. Existing and planned

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5 Please note that while certain severe misconduct may of cause be punished under the criminal laws of the concerned countries, this article will only consider civil liability of management as well as punitive sanctions provided in the relevant commercial legislations.

6 The person(s) entrusted with the management of a Qatari, Saudi Arabian or UAE LLC are often referred to as director(s). Solely for the sake of clarity the author chose to refer to the persons responsible for the management of an LLC as Managers and those charged with managing a JSC as Directors.

free zones in Qatar comprise individual corporate laws that differ somewhat from the regulations outside of the free zones. This article will, however, only consider the regulatory regime established outside of the free zones in Qatar-Mainland. The primary Qatari legislation with respect to management liability is the Qatar Commercial Companies Law, Law 11/2015 (QAT-CCL). Additional provisions concerning the duties and responsibility of managers and directors can be found in particular in the Qatari Commercial Transactions Law, Law 27/2006 (QAT-CTL) and – where the concerned company is listed on the Qatar Stock Exchange the Corporate Governance Regulations of Companies Listed on the Qatar Exchange, issued by the Qatar Financial Markets Authority on 27 January 2009 (QAT-CGR).

The QAT-CCL comprises only few provisions that explicitly address the liability of LLC managers. However, it stipulates that the regulations governing liability of JSC directors apply to managers of LLCs alike (article 244 QAT-CCL). Thus, unless indicated otherwise, any reference made in this section to directors shall be understood as comprising both directors of a JSC as well as managers of a LLC.

### 2.1 Directors’ and Managers’ Civil Liability

The central provision establishing liability of JSC directors is article 113 QAT-CCL, which – per article 244 QAT-CCL – also applies to LLC managers. Furthermore, the QAT-CCL comprises additional liability provisions that apply only to LLC managers. Certain duties of directors of listed companies are established by the QAT-CGR. Finally, the QAT-CTL comprises regulations that govern responsibility of managerial in respect to insolvency.

#### 2.1.1 Liability under Article 113 Commercial Companies Law

Pursuant to article 113 QAT-CCL directors are liable to the company, its shareholders and third parties for damages and loss resulting from any fraudulent act, abuse of authority, breach of the QAT-CCL or the company’s articles and error of management. Such liability may not be excluded by agreement. Any provision to the contrary is void. Where loss was caused by multiple directors acting together or the action of one director was supported by other directors – for instance where an act of management was based on a unanimous decision of the company’s board...
of directors or another management body—the concerned directors are jointly responsible for compensation (article 114 QAT-CCL).13 The company or its shareholders may not in any way release the directors from their liability. Neither may the company’s general assembly absolve a director of responsibility for loss or damage caused to the company nor its shareholders during their time in office, nor may the company effectively discharge a director’s liability towards third parties by indemnifying the third party harmed (article 117 QAT-CCL). The liability of directors under article 113 QAT-CCL is time barred after the lapse of five years after loss or damage was caused, unless the relevant conduct constitutes a criminal offence (articles 114, 115 QAT-CCL). Liability for criminal acts does not lapse.

2.1.1.1. Fraudulent Act
What constitutes a fraudulent act within the meaning of article 113 QAT-CCL is not defined by statute, doctrine or jurisprudence. In any case conduct that constitutes fraud pursuant to article 355 Qatari Penal Code, Law 11/2004 (QAT-PC) will have to be regarded as a fraudulent act according to article 113 QAT-CCL.14 Still, article 114 QAT-CCL explicitly differentiates between managerial misconduct that constitutes a criminal offense and such that does not. One may, therefore, argue that a director can be held responsible for fraudulent behaviour that falls short of criminal conduct. Consequently, a director could be held liable were he—in his capacity as the director of a corporation—causes damages or loss to the company, its shareholders or third parties by causing that person to dispose over its/their assets or part thereof due to an error installed by the director through deception.15 Such conduct will in many cases also constitute an abuse of authority. Still, since it is conceivable that a director may deceive the company, its shareholder or a third party without relying on the powers bestowed on him by virtue of his position as director, “fraudulent act” remains relevant as an independent criterion of management liability.

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13 Where a board decision was passed by majority only, the directors who voted against will only be absolved from their liability under article 113 QAT-CCL where their objection is recorded in the minutes of meeting (article 114 QAT-CCL). A director not present at the relevant board meeting will only be released from his liability if he can prove that he was not aware of the relevant issue decided (article 114 QAT-CCL).


15 This definition of fraud is common to multiple jurisdictions, see e.g. for Austria: E. Köck: Wirtschaftsstrafrecht. Eine Systematische Darstellung, Wien 2010, p. 30 ff.; for Germany: R. Rengier: Strafrecht Besonderer Teil I. Vermögensdelikte, München 2016, p. 225 ff.; for England, Wales and Northern Ireland see Section 2 Fraud Act of 2006, c 35, English original text available at www.legislation.gov.uk/ukpga/2006/35/pdfs/ukpga_20060035_en.pdf (last access 20.4.2016). For lack of available definition of the term “Fraudulent act” within the meaning of article 133 QAT-CCL, it cannot be ruled out that Qatari courts would apply a definition that differs from this general definition of fraud.
2.1.1.2 Abuse of Authority

The QAT-CCL does not define what constitutes abuse of authority within the meaning of the law. For that matter, neither does any other related law such as the QAT-CTL. Considering the so called “prudent person” test, widely recognized in western jurisdictions, the conduct of a director would be characterized as an abuse of authority where such conduct is contrary to the best interest of the company and its shareholders and a prudent director in the same situation would not have acted in that manner.\footnote{16} Whether this test would be applied by Qatari courts is unclear. No relevant decisions of Qatari courts are available. Still, Qatari law provides for the general obligation of a director to exercise his powers and carry out his duties in such a way as to serve the best interest of the company and its shareholders.\footnote{17} Thus, it appears that the “prudent person” test is not foreign to the QAT-CCL and may, nonetheless, serve as a relevant guideline when assessing whether a director’s conduct should be regarded an abuse of authority.

2.1.1.3 Infringement of the Commercial Companies Law

Furthermore, a director may be held liable according to article 113 QAT-CCL where he infringes upon provisions of the QAT-CCL, thus where a director disregards his duties provided for in the statute. The QAT-CCL comprises different duties of directors. Most importantly they shall: (1) act in the best interest of the company, (2) not compete with the company (3) not enter into transactions on behalf of the company in which they have a (commercial) interest in, (4) not use insider information for their personal gain or the benefit of third parties and (5) call an extraordinary general assembly in times of financial difficulties. In addition, the QAT-CCL comprises some duties relevant only for managers of a LLC, which will be discussed in detail below.

2.1.1.3.1 General Duty of Loyalty

Qatari Law does not comprise specific provisions establishing the directors’ duty of loyalty to the company and its shareholders in one specific provision. Such a duty is, however, established by different articles of the QAT-CCL; in particular articles 108, 109, 122 (1) (5), 136 (1) QAT-CCL. Pursuant to this duty of loyalty the director of a company has to exercise his powers – thus conduct the management of the company – in such a manner as to serve the interests of the company and its shareholders. Should a director fail to comply with this duty and thereby cause damage or loss to the company, its shareholders or a third party, the harmed party may hold the director liable under ar-


\footnote{17}{While such a duty of loyalty to the company and its shareholders is not expressly established by the QAT-CCL, it derives from a variety of provisions of the QAT-CCL concerning conflict of interest between the company and its director(s); articles 108, 109, 122 (1) (5), 136 (1) QAT-CCL.}
article 113 QAT-CCL. Since this duty of loyalty is rather broad and will apply, where the more specific directors’ duties are not relevant, liability under article 113 QAT-CCL in connection with the general duty of loyalty serves as a catch-all basis for liability claims against company directors.

2.1.1.3.2 Non-Competition

According to article 108 QAT-CCL directors may not, without the consent of their company’s shareholders, enter into competition with the company. They may neither participate in any way in a transaction that may compete with the company, or trade for their own account or the account of a third party in any branch of the activities carried out by the company. Where directors breach their statutory non-competition obligation, their company may either demand compensation (articles 108, 113 QAT-CCL) or treat the transaction carried out as having been done for the company’s account; thus demand all proceeds from the directors’ competing commercial engagement (article 108 QAT-CCL).

2.1.1.3.3 Self-Dealings

Article 109 QAT-CCL prohibits directors from having a direct or indirect interest in any contract, project or other transaction involving the company. Hence, the director may not directly – by himself – or indirectly – thus through an entity, he is a beneficiary of or by using a third party as a straw man – engage in a commercial relationship with the company other than his employment. Where a director contravenes this prohibition, he is liable for any damage or loss caused to the company, its shareholders or third party due to his action (articles 109, 113 QAT-CCL).

Unlike similar provisions in some jurisdictions article 109 QAT-CCL does not expressly allow for the release of directors from this restriction.\(^\text{18}\) In fact, while article 108 Old QAT-CCL provided that directors may be released from the self-dealing ban by the general assembly where public tender are concerned, this release is no longer comprised in the equivalent provision of the new law: article 109 QAT-CCL.

In principle, this should not exclude the release of directors from the prohibition of self-dealings per se. Certain continental European jurisdictions also do not explicitly allow for a release from the prohibition of self-dealings by statute, but have established the permissibility of such release by jurisprudence.\(^\text{19}\) Finally, article 88 Qatari Civil Code, UAE law also explicitly provide for such a release (see below at 3.1.1.1.3, 4.1.1.3.3).


\(^{19}\) E.g. §181 German Civil Code (Bürgerliches Gesetzbuch) prohibits self-dealing but does not provide for a release from this ban. Still, German jurisprudence has established that such a release is permissible; most recently, Higher Regional Court (Oberlandesgericht), decision of 15.02.2015, case no. W 129/15. The same is true for e.g. Swiss law, see e.g. Swiss court deci-
Law 22/2004 (QAT-CC) generally provides for all authorized agents that they may be released from the self-dealing restriction. Thus, considering the provisions of the QAT-CC and the fact that the QAT-CCL does not explicitly prohibit the release of directors from the self-dealing ban, such release should be regarded as permissible under Qatari law.

2.1.1.3.4 Use of Insider Information

Pursuant to article 111 QAT-CCL directors or any other person employed by the company who have access to commercially relevant information may not use such information for their own interest or the interest of relatives up to the fourth degree. Any infringement of this obligation may entail management liability pursuant to article 113 QAT-CCL.

2.1.1.3.5 Duty to Call Extraordinary Meeting of the General Assembly

Article 298(1) QAT-CCL provides that where any LLC sustains losses of at least 50% of the company’s capital—thus, where the liabilities of the company amount to the value of all its assets plus 50% of its share capital—its managers shall, within 30 days of such loss being incurred, convene an extraordinary meeting of the LLC’s general assembly to decide whether the company shall be dissolved or—where the shareholders resolve to continue the company—to make capital contributions to the company in the amount necessary so that the assets less the liabilities of the company amount to 100% of its capital. Where the managers fail to do so, they shall be liable towards the company and its shareholders for any damage or loss caused by the neglect of this obligation (article 298(2) QAT-CCL). A similar requirement exists for directors of a JSC. While article 287 QAT-CCL also requires the directors of a JSC to convene a general meeting upon the JSC’s losses amount to at least 50% of the company’s capital to resolve whether to continue the company, it does not stipulate a time frame for convening such a meeting. Where the directors fail to comply with this duty they may be held liable pursuant to article 113 QAT-CCL.

2.1.1.3.6 Duties relating only to Managers of Limited Liability Companies

Article 229(2) QAT-CCL requires an LLC to always—for instance in correspondence, in contracts or advertisement—state its name followed with the term “limited liability company” or an acronym thereof. Where a company fails to do so its shareholders will lose the limitation of their liability. In case

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21 However, since thus far no decisions of Qatar courts on this matter under the new QAT-CCL are available, a risk that Qatari courts would come to a different conclusion remains.
such failure can be associated with the conduct of its manager(s), he/they may be held liable for any damage or loss incurred by the company and its shareholders (articles 229 (2), 113 QAT-CCL). Furthermore, in its ruling of 28 December 2010 the Qatari Court of Cassation (محكمة التمييز, maḥkamat at-tamyīz) found that where the manager fails to state the name of the company with the term “limited liability company” or an acronym thereof in a transaction with a third party, the company and its manager shall be jointly liable to that third party.22

Any LLC incorporated in Qatar shall keep a register at its head office comprising information on the company’s shareholders, their participation and any assignment of shares (article 236 (1) QAT-CCL). The managers of the LLC are responsible for the accuracy of this register (article 236 (2) QAT-CCL). Thus, where the register is inaccurate and a person relying on this register sustained damage or loss, this person may seek compensation for such harm from the manager(s) pursuant to article 113 QAT-CCL.

2.1.1.4 Infringement of Company’s Articles
The QAT-CCL provides for the right of the shareholders to impose additional duties on or limit the authority of the directors of their company (article 107 QAT-CCL).23 Foreign investors regularly exercise this right to limit the authorities of the local directors and thereby establish additional control over their subsidiaries. For instance, foreign investors frequently restrict the power of local directors to effect transactions by imposing obligations to request consent of the shareholders or act jointly with another director for high value transactions. Likewise, the shareholders may establish additional duties – such as stricter internal reporting duties – of the directors. Where such restrictions or additional duties are included in the company’s articles, the directors may be held liable for any harm or damage caused due to them acting without regard for these restrictions or additional duties imposed on their authority. Limitations of directors’ authorities and additional duties are, however, often comprised in side documents or employment agreements and not the company’s articles. Whether directors are also liable under article 113 QAT-CCL where they acts in violation of a restriction of their powers or an additional duty established not by the company’s articles but a side document is unclear. Since article 113 QAT-CCL explicitly refers to the articles of the company (نظام الأساسي للشركة, niṣām al-asāsi li-š-šarika), the phrasing of the provision appears to limit liability to the breach of the company’s articles. Still, even if directors would not be liable under article 113 QAT-CCL, they could be held liable under contractual (articles 256 ff. QAT-CC) or possibly tortious liability (arti-

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23 They may, however, not release the director from any of the duties and responsibilities imposed by law or mitigate the consequences of violating such duties (articles 107, 114 QAT-CCL).
icles 199 ff. QAT-CC) for breach of obligations imposed by agreements other than the company’s articles.

2.1.1.5 Error of Management

There is no statutory definition of what constitutes an error of management under article 113 QAT-CCL. Consequently, any error regardless how minor could be considered sufficient to establish liability of a director according to article 113 QAT-CCL. This would, however, significantly hinder the operation of any company, as managerial staff may be reluctant to engage even in transactions of moderate risk, since they have to consider being held liable for even minor errors. Thus, from an economic prospective such a broad understanding of liability for management error as referred to in article 113 QAT-CCL appears inadequate. In line with these considerations liability should only attach where a director makes a considerable or grave error of management. Whether Qatari courts would take a similar position in respect to liability for errors of management pursuant to article 113 QAT-CCL remains unclear, since no relevant decisions of Qatari courts are available.24

2.1.2 Liability under the Corporate Governance Regulation of the Qatar Stock Exchange

According to the QAT-CGR, the board of directors of a JSC that is listed on the Qatar Stock Exchange has wide ranging corporate governance responsibilities, which inter alia include: (1) implementing and reviewing internal codes of conduct (article 3 QAT-CGR), (2) approving objectives and strategic plans of the company (article 5.2.1 QAT-CGR) and (3) ensuring compliance with relevant legislation as well as the company’s articles (article 5.2.2 QAT-CGR).

The QAT-CGR does not explicitly state that the directors of a publicly listed JSC may be held liable for any violation of the QAT-CGR and their duties established by it. Article 5.1 QAT-CGR merely provides that the members of the board of directors shall be individually and jointly responsible for the proper management of the company. Whether any claim for compensation against the directors may be based on this provision is unclear. Still, in any case liability may arise out of the general provisions of tortious liability under the QAT-CC (articles 199 ff. QAT-CC).

24 The decision of 28.12.2010 of the Qatari Court of Cassation, Civil and Trade Division in case no. 168/2010 is sometimes cited as a ruling on how considerable a management error has to be to establish management liability. However, this decision does not generally consider management errors but refers to a specific management error – failing to attach “limited liability company” or an acronym thereof to the company’s name – liability for which was in 2010 specifically regulated in article 226 Old QAT-CCL (now article 229 QAT-CCL). Hence, since the court considered a management error that was explicitly considered by a statutory provision its ruling cannot be necessarily used a guideline for the interpretation of the term “error of management” within the meaning of article 113 QAT-CCL. Notably UAE law explicitly requires a grave error of management; see below at 4.1.1.5.
2.2 Sanctions

In addition to his liability towards the company, its shareholders and third parties pursuant to the QAT-CCL as outlined above, a director may, according to article 324 QAT-CCL, after an internal investigation and notification of the relevant director of his alleged misconduct be subjected to penalties to be imposed by the company’s management for violations of the provisions of the QAT-CCL. Pursuant to article 324 QAT-CCL possible sanctions include warning, reporting of misconduct, suspension from managerial positions and fines of up to Qatar Riyal 10,000 per day the concerned director refuses to discontinue his misconduct but not more than Qatar Riyal 1,000,000 in total.

Furthermore, any director who is found guilty of having committed an act prohibited by article 324 may be sanctioned by imprisonment of up to two years and/or fined in an amount of up to Qatar Riyal 1,000,000. These primarily include acts that defraud or mislead the public in respect to the value of the company and its shareholding, intentional distribution of profits in contradiction to the provisions of the law or the company’s articles and forging of records. Article 325 QAT-CCL comprises lesser offences, which may be sanctioned with fines of up to Qatar Riyal 500,000.\(^\text{25}\)

Additional sanctions may derive from particular laws. Most importantly the Qatar Consumer Protection Law, Law 8/2008 (QAT-CPL)\(^\text{26}\) in its article 18(1) provides that any person who infringes certain obligations and regulations of the QAT-CPL may be punished by incarceration of up to two years and/or fines ranging from Qatar Riyal 3,000 to 1,000,000.\(^\text{27}\) The relevant obligations and regulations include failure to recall and sale of defective products (articles 5, 6 QAT-CPL), failure to correctly label products (article 7, 8 QAT-CPL) and engagement in unfair business practices in order to inter alia artificially increase prices (article 10 QAT-CPL). These sanctions will be imposed on management where they either directly violated the relevant provisions of the QAT-CPL or did so indirectly due to lack of supervision of the company’s staff.

Finally, where a company is found to be insolvent directors may be subject to punitive sanctions where they fail to keep adequate commercial records, fail to comply with the liquidator as well as the competent authorities and make transactions in violation of the restrictions imposed on a bankrupt company (article 837 QAT-CTL). These acts may be sanctioned by imprisonment for a term of no less than six months and not more than three years.

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\(^{25}\) In case of repeat offenses, the penalties provided for in articles 334 and 335 QAT-CCL may be doubled; article 336 QAT-CCL.


\(^{27}\) In case of repeat offenses, the penalties may be doubled; article 18(3) QAT-CPL.
3. Management Liability under Saudi Arabian Law

Unlike the legal systems of its neighbours, Saudi Arabian law is based nearly entirely on Islamic law. Consequently, Saudi Arabian law is governed much less by codifications but rather by the šariʿa (شريعة) as interpreted by the Ḥanbalī school of Islamic law, which is the interpretation accepted in Saudi Arabia. Hence, in Saudi Arabia Islamic law comprises of the Islamic law principles derived from an interpretation of the three sources of law accepted by the Ḥanbalī school of Islamic law: the Qurʾān (القرآن), the sunna (سنة – the verbally transmitted record of the teachings and deeds of the prophet Muhammad) and the iǧmāʾ (إجماع – the consensus of Islamic scholars). Aside from šariʿa law, codified laws have been implemented in certain areas of law. Due to the primacy of šariʿa law as established by article 48 Basic Law of the Kingdom of Saudi Arabia, Royal Decree No. A/90 dated 27.08.1412 Hijri such codifications are subordinate to šariʿa law. This means they are to be interpreted in line with šariʿa law. Where a šariʿa conform construction of a codified provision is not possible, šariʿa law will prevail. Furthermore, gaps in a Saudi Arabian codification will be filled by reverting to applicable principles of šariʿa law. In the area of corporate law Saudi Arabian law is largely codified. Still, since all provisions of these codifications have to be interpreted in line with, and gaps in the statutes will be filled by application of, šariʿa law, Islamic law remains quite relevant in Saudi Arabian corporate law.

3.1 Directors’ and Managers’ Civil Liability

3.1.1 Liability under the Companies Law

The issue of management liability is regulated for both the JSC and the LLC in individual provisions of the of the Saudi Arabian by the Ḥanbalī school, any reference made to šariʿa law in this section shall be understood as referring to šariʿa law as interpreted by the Ḥanbalī school. Arabic original text available at www.wipo.int/wipolex/en/text.jsp?file_id=200020 (last access 20.4.2016). Unofficial English translation available at www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx (last access 20.4.2016).


As in Qatari law a JSC incorporate in Saudi Arabia may take the form of a public or private JSC.
Companies Law, Regulation of 1437 Hijri (KSA-CL), which was published in the Saudi Arabian Official Gazette (عَمَّ النَّاقَطَة, umm al-qurā) on 4 December 2015 and entered into force 150 days as of its publication—that being May 2016. JSC directors’ liability is governed by article 165(2) KSA-CL. The responsibility of LLCs’ managers is regulated in article 78(1) KSA-CL. Both provisions stipulate that the management of a company shall be individually and jointly liable towards the company, its shareholders and third parties for (1) violations of their duties under the KSA-CL, (2) breach of the company’s articles and (3) errors of management. Liability for fraudulent acts is not expressly mentioned in articles 78(1), 165(2) KSA-CL. Nonetheless, since both articles stipulated extended limitation periods for fraudulent acts (articles 78(3), 165(4) KSA-CL), it is clear that both articles establish management liability for fraudulent acts.

Where misconduct that would prompt liability of JSC directors under article 78(1) KSA-CL is based on a unanimous decision of the board of directors, all board members shall be liable. As for majority decisions, those directors who oppose a majority decision cannot be held accountable, provided that their objection was recorded in the minutes of the relevant board meeting. Absence from the board meeting during which a decision prompting management liability is made does not release the absent directors from liability under article 78(1) KSA-CL, unless they can establish that they were not aware of the decision or were not able to object to the decision after they became aware of it (article 78(2) KSA-CL). Similar to Qatari law the general assembly of a JSC may not release directors from their liability under article 78(1) KSA-CL (article 78(3) KSA-CL).

Liability claims against a director or manager are time barred after the lapse of three years upon the harmful act being discovered. Where the harmful act was conducted fraudulently the statute of limitations is five years (articles 78(3), 165(4) KSA-CL).

3.1.1.1 Infringement of the Companies Law

The duties of a manager of an LLC are not explicitly regulated in the KSA-CL. Unlike Qatari law the KSA-CL also does not establish that the provisions governing the duties of JSC directors shall apply to the managers of an LLC accordingly. Such a provision also was not introduced with the new KSA-CL. It was, however, generally accepted that the articles of the old Saudi Arabian Companies Law, Royal Decree M/6 of 1385 Hijri (Old

33 The Saudi Arabian legislator refers to codifications issued by it not as law (قانون, qānūn), but rather as regulation (نظام, niẓām) or decree (مرسوم, marsūm) to emphasize the primacy of šari‘a law. This publication uses the term “law” when referring to Saudi Arabian legislation only in order to maintain consistency of language. No statement as to the status of Saudi Arabian codifications in respect to šari‘a law shall be made by such reference.
34 Arabic original text available at mci.gov.sa/cl2015/Documents/01.pdf (last access 20.4.2016).
KSA-CL) governing the duties of JSC directors applied to LLC managers by analogy.\textsuperscript{36} Since the new KSA-CL makes no changes to the management liability regime, it stands to reason that the same understanding will be applied to the new KSA-CL and that the articles of the KSA-CL governing the liability of JSC directors will be applied to LLC management. Since the new KSA-CL was not yet in force at the time this article was written and, consequently, no relevant jurisprudence is available this cannot be said with certainty. Still, even if Saudi Arabian courts were to change their position with the new KSA-CL being implemented, the duties imposed on JSC directors by the KSA-CL are also founded in šarī‘a law, which will be illustrated below. Therefore, the same duties imposed on JSC directors comprised by the KSA-CL would apply to LLC managers under šarī‘a law, which remains applicable due to priority of šarī‘a law over codifications of Saudi Arabian law.

\textbf{3.1.1.1 General Duty of Loyalty}

Similar to Qatari law Saudi Arabian law does not explicitly impose a general duty of loyalty of the directors to their company. While such a general duty of loyalty appears to be founded in the more concrete duties bestowed on directors by the KSA-CL (see e.g. article 71, 72 KSA-CL), article 75 (1) KSA-CL – the principal regulation on the powers of directors – only provides that the directors shall have the “widest authority”\textsuperscript{37} to manage the company. A general duty of loyalty, however, derives from šarī‘a law. This duty of a director may derive from the director classification as an agent (دكيل, wakil) of the company’s shareholders or as trustee (امين, amin) of the shareholders’ assets.\textsuperscript{38} Regardless which understanding of the position of the director is applied, the doctrine generally accepts that šarī‘a law compels a director to loyalty towards the company and is required to treat all shareholders fairly.\textsuperscript{39}

\textbf{3.1.1.1.2 Non-Competition}

Pursuant to article 72 KSA-CL a director may not engage in any commercial activity that is in competition to a business activity carried out by the company or conduct business in any branch of the activities carried out by the company, unless with the permission of the company. Such permission has to be issued by resolution of the general assembly and needs to be renewed every year. Notably, article 72 KSA-CL does not address the issue of a director competing with the company for the account of a third party. Such a

\textsuperscript{36} Saleh: The General Principles of Saudi Arabian and Omani Company Laws, p. 81.

\textsuperscript{37} Where not indicated otherwise citations of laws are citations from the Arabic original text translated by the author.


\textsuperscript{39} Frankel: Fiduciary Law, pp. 84 ff.
duty is, however, established by Islamic law.\footnote{Islamic law requires a director to act trustworthy and with transparency. This duty is generally considered to comprise a duty not to compete with the company; see e.g. Saleh: The General Principles of Saudi Arabian and Omani Company Laws, p. 118; F.S. Al Kahtani: Current Practice of Saudi Corporate Governance. A Case of Reform, London 2013, pp. 123 ff.} Considering the priority of šāriʿa law over the KSA-CL, it is immaterial whether article 72 KSA-CL comprises a prohibition of directors competing with the company for the account of third parties. Where a director infringes this obligation, the company may choose to either seek compensation under article 78 (1) KSA-CL or consider the relevant transaction to be executed in its name and for its benefit (article 72 KSA-CL). Considering that the non-competition obligation is inter alia founded in šāriʿa law, the manager of an LLC is bound to it regardless of whether article 72 KSA-CL may be applied to LLC management.

### 3.1.1.1.3 Self-Dealing

Article 71 KSA-CL prohibits directors from having a direct or indirect interest in any transaction or contract concluded for the account of the company. Where a director contravenes this ban, he is liable for any damage or loss caused to the company, its shareholders or third party due to his action (articles 71, 78 (1) KSA-CL). Unlike its equivalent in Qatari law, article 71 KSA-CL allows for the release of the director from the restriction on self-dealing. Such release shall be granted by resolution of the general assembly and renewed annually. Whether article 71 KSA-CL may be applied analogous to managers of an LLC is irrelevant, since the same obligation exists under Islamic law as applied in Saudi Arabia.\footnote{Saleh: The General Principles of Saudi Arabian and Omani Company Laws, p. 109.} The prohibition of self-dealing under Islamic law is commonly derived from the classification of a managers as agents (وكيل, wakil) of the relevant company’s shareholders or as trustees (أمين, amīn) of the shareholders’ assets who are under a fiduciary duty compelling them to safeguard the principals’ or beneficiaries’ interests. Under Islamic law as interpreted in Saudi Arabia the concept of agency appears to prevail.\footnote{Saleh: The General Principles of Saudi Arabian and Omani Company Laws, p. 110.}

### 3.1.1.1.4 Use of Insider Information

According to article 73 KSA-CL directors may not disclose insider information concerning the company. Where they infringe this obligation, they may be held liable for damages or loss caused by such indiscretion.

### 3.1.1.1.5 Duty to Call Extraordinary Meeting of the General Assembly

If the losses of an LLC reach 50% of its capital – thus, its liabilities amount to the value of its assets plus 50% of its capital – the manager(s) must within 90 days from becoming aware of such losses, convene an extraordinary meeting of the general assembly to consider either continuing or dissolving the LLC (article 181 KSA-CL). Where the shareholders resolve to continue the company, they
have to cover the losses of the company so that the company’s assets less its losses amount to 100% of its capital. A similar requirement exists for the JSC. Article 150 KSA-CL requires the directors of a JSC to convene an extraordinary meeting of the company’s general assembly within 45 days as of discovering that the losses of the company reached 50% of its capital to decide whether the company shall be dissolved or its capital increased. Where managers or directors fail to comply with this duty they may not only held liable under articles 78 (1), 165 (2) KSA-CL, but also face punitive sanctions pursuant to article 211 (d) KSA-CL.

### 3.1.1.1 Infringement of the Company’s Articles
The KSA-CL does not explicitly state that the duties of a director may be extended in the company’s articles. This follows, however, indirectly from the fact that the articles of association of a company may deviate from the KSA-CL insofar as the articles do not conflict with binding provisions of the KSA-CL. Thus, the company’s articles shall not relieve the director from those duties explicitly imposed by the KSA-CL. However, they may introduce additional duties. Considering the existing ambiguity regarding the analogous application of the provisions governing duties of JSC directors to managers of LLCs, it is, for the purpose of clarity, advisable to include these duties in the articles of an LLC incorporated in Saudi Arabia. In addition, foreign investors frequently choose to impose further duties and restrictions of authority on directors and managers through the company’s articles or other agreements to extend control over local management. As article 113 QAT-CCL, articles 78 (1), 165(2) KSA-CL refer only to the company’s articles. Thus, their wording suggests that breach of an obligation imposed on a director in an agreement other than the company’s articles will not prompt management liability under articles 78 (1), 165 (2) KSA-CL. If this were the case the relevant director(s) may be held responsible under contractual or possibly tortious liability.

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43 Under article 180 Old KSA-CL the shareholders of a LLC would lose the limitation of their liability, if they refused or failed to make a decision as to whether the company should be dissolved or continued. This consequence was abandoned in article 181 KSA-CL. However, the company and the shareholders may now face punitive sanctions under article 211(d) KSA-CL, should they fail or refuse to make such a decision.

44 See e.g. articles 52 (6), 62 (2) KSA-CL.

45 For an overview of contractual liability under Islamic law see e.g. Nerz: Das saudi-arabische Rechts-

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44 See e.g. articles 52 (6), 62 (2) KSA-CL.

45 For an overview of contractual liability under Islamic law see e.g. Nerz: Das saudi-arabische Rechts-
3.1.1.2 Error of Management

Neither article 78 (1) KSA-CL nor article 165 (2) KSA-CL define what constitutes an error of management that would prompt liability of management under these provisions. Thus, even minor mistakes could produce management liability according to articles 78 (1), 165 (2) KSA-CL. Since this would significantly hinder the operation of a company, economic considerations suggest that error of management within the meaning of articles 78 (1), 165 (2) KSA-CL should be interpreted more restrictively. Still, since no relevant jurisprudence of Saudi Arabia courts is available, this article cannot establish whether Saudi Arabian courts would follow this interpretation.

3.1.1.3 Fraudulent Act

Liability of the directors of a JSC as well as LLC managers for damages or loss caused by their fraudulent actions is provided for by articles 78 (1), (3), 165 (2), (4) KSA-CL. What constitutes a fraudulent act is, however, not defined by the law. Under Islamic law fraud is generally understood to be the suggestion, as a fact, of that which is not true, by one who does not believe it to be true or the suppression of that which is true, by one having knowledge of the fact. Whether Saudi Arabian courts will apply this definition of fraud in respect to management liability can, however, not be said with certainty, since no relevant jurisprudence is available.

3.1.1.4 Abuse of Authority

The directors’ liability for abuse of their authority is also not mentioned in articles 78 (1), 165 (2) KSA-CL. Furthermore, a duty not to exploit managerial powers is not expressly mentioned in any other provisions of the KSA-CL. Still, management liability for abuse of authority is generally considered to be established by the KSA-CL.

3.1.2 Liability under the Corporate Governance Regulation of the Capital Market Authority

Directors of a publicly listed JSC are bound to the Capital Market Regulation issued by the board of Capital Market Authority pursuant to Resolution 1/212 of 2006 dated 21.10.1427 Hijra (KSA-CGR), which established inter alia corporate governance duties and responsibility in addition to those deriving from the KSA-CL. These include laying down rules of internal control (article 10 (b) KSA-CGR) and internal codes of conduct (article 10 (c) KSA-CGR). Furthermore, some duties also established by the KSA-CL are re-

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47 While some commentators have suggested that such a ban could be established by article 75 KSA-CL (or article 73 Old KSA-CL), this article only states that the directors shall have the “widest authority” to manage the company.
affirmed in the KSA-CGR; such as the ban of self-dealing without the permission of the general assembly (article 18 (a) KSA-CGR, article 71 KSA-CL) or the obligation not to compete with the company without the approval of the general assembly (article 18 (b) KSA-CGR, article 72 KSA-CL). The KSA-CGR does, however, does not comprise a provision that would allow for the directors to be held liable for breaching their obligations under the KSA-CGR.\textsuperscript{50} Thus, liability for a violation of the directors’ duties will – unless such violation also constitutes an infringement of the KSA-CL – likely only be available under tort.

### 3.2 Sanctions

Furthermore, directors may be sanctioned for acts penalized pursuant to articles 212ff. KSA-CL. The most severe sanctions are provided for in article 211 KSA-CL, which stipulates that a director may be punished with incarceration of up to five years and/or fines of up to 5,000,000 Saudi Riyal for conduct listed in article 211 (a) through (e) KSA-CL. These are in particular misuse of fund and forgery of the company’s financial records. Notably, article 211 (d) KSA-CL sanctions the directors’ failure to call for an extraordinary meeting of the general assembly pursuant to articles 150, 181 KSA-CL. Somewhat less severe punishments for misconduct are provided for in article 212 KSA-CL, which sanctions making misrepresentations regarding the company to the public with imprisonment of up to one year and/or fines of up to 1,000,000 Saudi Riyal. Finally, certain lesser offenses may be sanctioned by fines of up to 500,000 Saudi Riyal pursuant to article 213 KSA-CL. These include, inter alia, not calling the regular annual general assembly or preventing a shareholder from participating in a general assembly.

While sanctions under articles 211, 212 KSA-CL shall be imposed by the public prosecution, fines according to article 213 KSA-CL are within the discretion of the Ministry of Commerce and Industry (وزارة التجارة والصناعة, wizārat at-tiǧāra wa-ṣiḥārā) or the Capital Market Authority (هيئة السوق المالية, haiʾat as-sūq al-māliya).

### 4. Management Liability under the Law of the United Arab Emirates

UAE law allows for a number of different forms of corporations to be established onshore in the so-called UAE-Mainland, or in one of the many free zones established in the UAE. Similar to the situation in Qatar most UAE free zone authorities passed individual corporate regulation, which differ from those applicable in the UAE-Mainland. Thus, the liability of a manager or director may differ depending on whether the relevant company is incorporated in the UAE-Mainland or in a free-zone and, if so, in which free zone. In line with the previous sections this section will, however, focus only on the regulations article 11 (c) KSA-CGR only requires the directors to act in “good faith and with due diligence”.

\textsuperscript{50} Article 11 (a) KSA-CGR only stipulates that the board of directors is “responsible” for the company and
applicable to JSCs and LLCs incorporated in the UAE-Mainland.51

Similar to Qatari and Saudi Arabian law, under UAE law most provisions relevant for the matter of management liability are comprised in a new comprehensive corporate law, the UAE Commercial Companies Law, Federal Law 2/2015 (UAE-CCL),52 which repealed the old UAE Commercial Companies Law, Federal Law 8 of 1984 (Old UAE-CCL).53 As under Qatari law Islamic law is much less influential in the UAE than in Saudi Arabia. While it remains a central source of UAE law,54 UAE courts will primarily rely on UAE codifications when deciding on a legal matter and consult principles of šariʿa law only where undefined legal terms need to be interpreted or gaps in the law have to be filled.55 Consequently, this section will rely largely on a review of the UAE-CCL as well as other codifications relevant in respect to management liability.

Like the QAT-CCL the UAE-CCL does not comprise separate provisions governing the duties and responsibilities of a manager of an LLC incorporated in the UAE, but rather stipulates that the provisions concerning JSC directors apply to LLC managers as well (article 84 (2) UAE-CCL). Thus, unless indicated otherwise, any reference made in this section to directors shall be understood as comprising both directors of a JSC as well as managers of a LLC.

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51 As in Qatar corporate law of UAE free zone largely follows the laws applicable in the UAE-Mainland. Thus, the analysis of management liability under the regime established in the UAE-Mainland, may serve as a guideline for such liability under the laws and regulations applicable in the UAE free zones. Some UAE free zones – such as the Dubai International Financial Center – have, however, passed corporate legislation that differs considerably from that applicable in the UAE-Mainland.


4.1 Directors’ and Managers’ Civil Liability

The principal legislation with respect to management liability is the UAE-CCL. Relevant regulations are, however, also found in other laws; most importantly the UAE Civil Code, Federal Law 5/1985 (UAE-CC) and the UAE Commercial Transactions Law, Federal Law 18/1993 (UAE-CTL)56. Furthermore, the directors of JSCs listed on the a UAE stock exchange57 will have to abide to the requirements and duties established by the UAE Securities and Commodities Authority’s Board of Directors’ Decisions 2/R of 2000 Concerning the Regulation of Market Membership (UAE-CGR)58.

4.1.1 Liability under the Commercial Company Law

While the old law did not comprise a separate provision establishing the liability of managers of an LLC, the new UAE-CCL chose a structure similar to that of the KSA-CL. Responsibility of managers is provided for in article 84 (1) UAE-CCL, while JSC directors may be held liable under article 162 (1) UAE-CCL, which applies to directors of public JSCs explicitly and those of a private JSCs by reference of article 265 UAE-CCL. Both article 84 (1) and 162 (1) UAE-CCL provide that a director shall be liable towards the company, its shareholders and third parties for damage or loss incurred due to the director’s (1) fraudulent acts, (2) abuse of authority, (3) infringement of the UAE-CCL, (4) infringement of the company’s articles or (5) gross error of management. Furthermore, article 84(1) UAE-CCL stipulates that an LLC’s manager shall be liable for damage or loss caused due to him infringing the provisions of the agreement by which he was appointed.

Liability as provided for in article 162(1) UAE-CCL applies to all the members of a JSC’s board of directors where the relevant misconduct is based in a decision passed unanimously by the board. However, in the event of the decision being passed by the majority, the members who object to it shall not be held liable provided they state their objection in writing in the minutes of the meeting. Absence from a meeting at which the decision has been passed shall not be deemed a reason to be relieved from liability, unless the relevant director(s) establish that they were not aware of the decision or could not object to it upon becoming aware thereof.

Unlike under Qatari or Saudi Arabian law the general assembly may relieve directors from their liability under article 84 (1) or 162 (1) UAE-CCL where possible claims of

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57 Thus far only the Emirate Abu Dhabi – with the Abu Dhabi Securities Exchange or ADX for short – and the Emirate Dubai – with the Dubai Financial Market or DFM for short – have set up a Stock Exchange.

the company or its shareholders are concerned. However, where the conduct of the directors constitutes a criminal act, the general assembly may only relieve the directors from their liability after the public prosecution has relieved them of their criminal responsibility (article 167 UAE-CCL). Such relief may either be specifically requested from the prosecution or is deemed to have been given where the public procedure abstains from indicting the relevant directors.

Any claim for management liability brought by the company or its shareholders is time barred after the lapse of one year as of the relevant misconduct being presented to the general assembly (article 167 UAE-CCL). A limitation period for claims brought by third parties or a general time bar for management liability claims is not specifically stipulated by the UAE-CCL. Thus, such claims will likely be time barred after the lapse of 15 years from the harming event in line with the general limitation period for civil claims under UAE law (article 473 UAE-CC). Still, no decisions of UAE courts that would support this interpretation are available.

### 4.1.1.1 Fraudulent Act

Directors may be held liable for loss or damage caused by them through fraudulent acts pursuant to articles 84 (1), 162 (1) UAE-CCL. Like the corresponding provisions of Qatari and Saudi Arabian law articles 84 (1), 162 (1) UAE-CCL do not define what constitutes a fraudulent act. UAE courts will likely consider any act whereby a person— in his capacity as the director of a corporation—causes the company, its shareholders or third parties to dispose over its/their assets or part thereof due to an error installed by the director through deception and thereby causes damage or loss to the deceived person. However, since no relevant jurisprudence of UAE courts is available, it cannot be said with certainty whether UAE courts would follow this understanding of fraud when interpreting articles 84 (1), 162 (1) UAE-CCL.

### 4.1.1.2 Abuse of Authority

UAE law does not define the term “abuse of authority” within the meaning of articles 84 (1), 162 (1) UAE-CCL. Similar to Qatari law the UAE-CCL, however, generally requires directors to exercise their powers in the best interest of the company and its shareholders. Thus, it is reasonable to assume that UAE courts will apply the “reasonable person” test or a similar assessment when determining whether a director abused his authority. Since no decisions of UAE courts that would support this assumption are available, UAE courts may take a different approach.

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59 This definition of fraud is comment to multiple jurisdictions, see e.g. for Austria: Köck: Wirtschaftsstrafrecht. Eine Systematische Darstellung, pp. 30 ff.; for Germany: Rengier: Strafrecht Besonderer Teil I. Vermögensdelikte, pp. 225 ff.; for England, Wales and Northern Ireland see Sections 2 et seq. Fraud Act of 2006 (c 35) (see above at n. 15).

60 Such a duty is not established in one specific article, but rather follows from management duties established in various provisions of the UAE-CCL (see e.g. articles 84, 86, 147, 150, 152, 162 UAE-CCL).
4.1.1.3 Infringement of the Commercial Company Law

The UAE-CCL establishes only few duties of LLC managers. Where the UAE-CCL does not comprise specific duties of a LLC manager, those provisions governing responsibilities of JSC directors will apply (article 84(2) UAE-CCL).

4.1.1.3.1 General Duty of Loyalty

The UAE-CCL does not explicitly establish a general duty of loyalty of a director towards the company or its shareholders. Still, such an obligation follows indirectly from a number of provisions establishing responsibility of directors and limiting their competences. This duty of loyalty towards the company will serve as a catch all clause to establish liability for conduct that does not constitute an infringement of duties specifically included in the UAE-CCL but is, nonetheless, regarded as management misconduct. As such it will have to be interpreted somewhat restrictively to ensure management liability is not excessive. For lack of relevant decisions of UAE courts, a clear line of how the UAE courts would interpret management liability under articles 84(1), 162(1) UAE-CCL for violations of the duty of loyalty, cannot be identified thus far. In the opinion of the author the infringement will, however, have to be of some severity for liability to attach. In particular, since UAE law, unlike Qatari or Saudi Arabian law, explicitly restricts the other catch all clause of its management liability regime: liability for errors in management.

4.1.1.3.2 Non-Competition

The UAE-CCL prohibits both directors of JSCs and LLC managers from entering into competition with their company (articles 86, 152(3) UAE-CCL). The relevant provisions do, however, differ somewhat.

Pursuant to article 86 UAE-CCL LLC managers may not assume a managerial role in two companies that are in competition to each other or have similar objects. Furthermore, managers may not for their own or the account of a third party engage in business activities at are in competition or are similar to those of the company employing them as managers. The company’s general assembly may, however, release the managers from this obligation. Article 86 UAE-CCL does not define the manner in which such consent shall be given. For the purpose of clarity an LLC should, however, only give such consent in writing and managers should only rely on written consent to avoid liability. Furthermore, article 86 UAE-CCL does not determine that such consent has to be issued for each individual transaction or activity and, thus, allows giving consent in form of a general release. Where LLC managers enter into competition with their company without consent of the company’s general assembly, they may be held liable for any damages or

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61 See e.g. articles 84, 86, 147, 150, 152, 162 UAE-CCL.

62 See below at 4.2.
loss caused to the company through such action (articles 84 (1), 86 UAE-CCL).

The corresponding provision for JSC directors – article 152 (3) UAE-CCL – differs in two relevant points. First, while the directors of a JSC may be released from their no-competition obligation by the company’s general assembly, such release is only valid for one year. Hence, it has to be renewed on an annual basis. Secondly, where directors infringe their non-competition obligation their company has the right to choose in which form it seeks compensation. It may hold the directors liable for any damages or loss caused by their – directly or indirectly – competing with the company (articles 162 (1), 152 (3) UAE-CCL). Where the directors acted for their own account the company may also consider the relevant transactions to have been made for the account of the company (article 152 (3) UAE-CCL) and demand that the director transfers any proceeds obtained through his competing commercial activities.

4.1.1.3.3 Self-Dealing

According to article 150 (1) UAE-CCL any director of a JSC shall notify the board of directors of any interest – common or conflicting – which he may have in a transaction presented to the board of directors for approval. The concerned director may then not vote on the decision relating to this transaction. Where the director fails to comply with his duty under article 150 (1) UAE-CCL, he may be held liable for any damage or loss incurred by the company, its shareholders or third parties (article 162 (1), 150 (1) UAE-CCL). Furthermore, the company or any of its shareholders may request the competent courts to void the transaction and compel the director to transfer to the company all profits and other benefits received through the transaction.

The UAE-CCL does not explicitly restrict self-dealing of LLC managers. Thus, in accordance with article 84 (3) UAE-CCL, the provisions on JSC directors shall be applied accordingly. Considering its procedure and regulatory scope article 150 (1) UAE-CCL, however, does not fit the position of an LLC manager under UAE law. This is in particular because the LLC does not have a body comparable to the JSC’s board of directors. Still, the regulatory tenor of article 150 (1) UAE-CCL may be applied to LLC managers.

Article 150 (1) UAE-CCL seeks to prevent persons who have the power to dispose of third party assets – the company’s assets – to use such authority for their personal gain. Since a JSC director could do so only by voting for or against a transaction being executed, the manager of an LLC could do so much more directly by concluding or rejecting the relevant contracts on behalf of the company. Thus, while the procedure of informing the board and abstaining from voting on the transaction do not fit the role of a manager in an LLC, the essence of article 150 (1) UAE-CCL – not to exercise one’s
power to make disposition on behalf of the company for personal gain – is very well transferable to LLC managers. Consequently, it may be argued that a manager of an LLC be liable for damages or loss caused through self-dealing pursuant to article 84 (1), (2), 150 (1) UAE-CCL.

Since the UAE-CCL came into force rather recently, no court decisions exist that would support this interpretation of articles 84 (1), (2), 150 (1) UAE-CCL. It can, therefore, not be ruled out that the competent courts would take a different position. If UAE courts would dismiss the application of article 150 (1) UAE-CCL to LLC managers pursuant to article 84 (2) UAE-CCL, they will, however, most likely consider LLC managers to be barred from self-dealing under different provisions. Liability for abuse of authority or infringement of the duty of loyalty may, for instance, be relevant in this regard. Thus, LLC managers will likely not be free to conclude transactions with their company where the managers hold an interest in the relevant transaction. Such transactions would have to be approved by shareholder resolution. Where managers violate this prohibition, they could be held liable for any damages or losses sustained by the company or its shareholders.

4.1.1.3.4 Use of Insider Information

Directors may not make use of information available to them specifically due to their position as managerial staff of the company for their personal gain or the gain of another person (article 152 (1) UAE-CCL). Where a director fails to comply with this obligation he may be held liable for any damages caused to the company, its shareholders or third parties by his action (articles 162 (1), 152 (1) or 84 (1), (2), 152 (1) UAE-CCL).

4.1.1.3.5 Duty to Call Extraordinary General Assembly

Where the losses of the company reach 50% of its capital – thus where the liabilities amount to at least the value of all company assets plus 50% of its share capital – the managers of an LLC shall call for an extraordinary general assembly, which will decide on whether to continue or dissolve the company (article 301 (1) UAE-CCL). Notably, article 301 (1) UAE-CCL does not set a timeframe during which the shareholder meeting has to be called or convened. Still, it is advisable for the managers to call the meeting without undue delay and in close proximity of their discovering the relevant losses. A similar duty exists for JSC directors pursuant to article 302 (1) UAE-CCL. This article requires the board of directors of a JSC, the losses of which reach 50% of its capital, to invite the shareholders of a JSC to an extraordinary general assembly within 30 days as of filing the periodical or annual financial statements showing such losses with the competent authority. Non-compliance with these provisions may not only entail civil liability of the relevant directors under articles 84 (1), 301 (1) or 162 (1), 302 (1) UAE-CCL, but also be sanctioned with punitive measures.64

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64 See below at 4.1.1.5.
4.1.1.4 Infringement of the Company’s Articles

Similar to Qatari and Saudi Arabian law UAE law allows for the additional duties and restrictions to be imposed on a director. Where a director of a JSC infringes such additional duties and restrictions of authority comprised in the company’s articles, he may be held liable for damages or losses caused to the company, its shareholders or third parties (article 162 (1) UAE-CCL). In addition to liability for damages and loss caused by a violation of a director’s duty imposed by the company’s articles, as established by article 162 (1) UAE-CCL, a manager of an LLC may also be held liable for damages or loss caused to the company, its shareholders or third parties due to an infringement of the agreement appointing the manager; thus his employment agreement (article 84 (1) UAE-CCL). Thus, investors will not have to rely on general contractual and/or tortious liability established by the UAE-CC to hold an LLC manager liable for violating his appointment agreement.

4.1.1.5 Error of Management

Neither article 84 (1) UAE-CCL nor article 162 (1) UAE-CCL give a clear definition of what constitutes an error of management that would establish liability of manage-

ment. Unlike the QAT-CCL and the KSA-CL, articles 84 (1) and 162 (1) UAE-CCL explicitly limit management liability to damage and loss caused due to “gross” (جسيم) management errors. Thus, under UAE law not every minor error of management will prompt management liability. However, the UAE-CCL does not give a clear definition of what constitutes an error of management that would establish liability of management.

4.1.2 Liability under the Civil Code

Book 2, chapter 1, part 3 of the UAE-CC comprises regulations governing companies. While this portion of the UAE-CC, in principle, applies to three specific types of entities, its first section includes general provisions on companies which are applied to companies under the UAE-CCL as well.

Under article 665 (3) UAE-CC, a director is liable for any loss sustained by the company as a result of his acting outside the scope of his authority as defined by agreement or custom. A director will be regarded as having acted outside of the scope of his authority where he overstepped the powers bestowed on him either specifically by agreement with the company or its shareholders or generally by business custom commonly accepted in the UAE. However, article 665 (3) UAE-CC does not require that

65 The professional service enterprise (articles 683 ff. UAE-CC), an establishment that may provide certain professional services, which does not constitute a separate legal entity from its owner(s). The speculative venture partnership (articles 691 ff. UAE-CC), which is a contract between two or more partners to purchase property on credit in order to sell it at a profit. The

mudaraba entity ([مضاربة, mudāraba] articles 693 ff. UAE-CC), which is a contractual agreement concerning profit sharing between an investor and a managing trustee under which the managing trustee invests the funds provided by the investor and returns to the investor the principal and a pre-agreed share of the profit.
the director specifically misuses his authority to take a specific action. Consequently, not all conduct that entails a director’s liability under article 665 (3) UAE-CC will necessarily constitute an abuse of authority within the meaning of articles 84 (1), 162 (1) UAE-CCL. Thus, liability under article 665 (3) UAE-CC is considerably wider than liability under articles 84 (1), 162 (1) UAE-CCL. Still, since the authority of a director will often be defined by the company’s articles or – in case of an LLC manager – the agreement appointing him, article 665 (3) UAE-CC will primarily be relevant as far as it concerns limitation of a director’s authority established by commercial custom as established in the UAE. Due to the nature of customary standards, these limitations are not clearly defined and subject to fluctuation and different interpretation. Yet, a director of a UAE corporation will generally be required to manage the company in the best interest of the company and its shareholders, act with due diligence, balance risks and rewards and abide by instructions given by the general assembly. For the sake of clarity, it is, nonetheless, advisable for any investor to provide concrete descriptions of the duties and responsibilities of managerial staff and bind such personnel to these standards by agreement.

Directors may also be liable for leaving the company at a time where their resignation is likely to cause damage to the company (article 667 UAE-CC). This will, for instance, be relevance where a company is in financial difficulties. In this situation directors might be tempted to resign to lessen their exposure to potential claims of shareholders or third parties. In particular, where an LLC is managed by a single person or where the member of a board of directors contemplating leaving is uniquely qualified to guide the company in time of crisis, resignation may produce liability under article 667 UAE-CC. Under article 667 UAE-CC directors may be held liable for loss incurred by the relevant company or its shareholders due to their leaving. In practice such loss will often be difficult quantify. Consequently, proving the amount of damages sought under a claim brought based on article 667 UAE-CC will – in most cases – be quite difficult.

4.1.3 Liability under the Commercial Transactions Law

The UAE-CTL comprises provisions on management conduct in respect of insolvency. Article 649 UAE-CTL requires the directors to file for bankruptcy within 30 days of the date of suspension of payments of debts. Where they fail to file for bankruptcy or to comply with the bankruptcy procedure, they may be sanctioned with fines pursuant to articles 881 ff. UAE-CTL. Furthermore, where the assets of the company are insufficient to satisfy at least 20 % of its debts, article 809 UAE-CTL provides that the court may order the directors either jointly or severally, to pay the debts of the company in cases where they are held responsible for misconduct in respect to bankruptcy; i.e. where they failed to file for bankruptcy in due time as provided for by article 649 UAE-CTL.
4.1.4 Liability under the Bankruptcy Law

In September 2016 the UAE federal legislator published the UAE Bankruptcy Law, which entered into force as Federal Law 9/2016 on 29 December 2016 (UAE-BL). This law not only introduced a much more formalized bankruptcy procedure in the UAE, but also established certain bankruptcy-specific liabilities of managerial staff. Most importantly, fraudulent conduct of directors leading to the bankruptcy of their company or fraudulent conduct following the entry into bankruptcy proceedings may be sanctioned with up to five years imprisonment and/or fines of up to 1 million UAE Dirham (article 103 UAE-BL). A sliding scale of punitive measures – again including potential prison sentences and substantial fines – may be imposed for other mismanagement or wrongful conduct, which the competent court finds has precipitated the failure of the company and caused losses to creditors including acts which occurred within the insolvency proceedings themselves. Such penalties may include an obligation to contribute to the losses of the company in whole or in part if the company’s funds are insufficient for creditors to recover at least 20% of their claim value.

Furthermore, failure to file for bankruptcy within the statutory period may be punished by disqualification of the relevant directors from playing any role connected with the administration and management of a company for a period of five years as well as fines (articles 106 UAE-BL). Whether these sanctions may be imposed in addition to those imposed by the UAE-CTL for failing to file for bankruptcy or not is not contemplated in the UAE-BL. It remains to be seen whether the UAE legislator will address this issue in executive regulations or whether it will be left up to the courts to resolve potential conflicts between those two laws.

4.1.5 Liability under the Corporate Governance Regulation of the Capital Market Authority

In addition, directors of a publicly listed JSC are obliged by the UAE-CGR, which establishes corporate governance duties and responsibility in addition to those deriving from the UAE-CCL, the UAE-CC and the UAE-CTL. The UAE-CGR inter alia compels the directors of a listed JSC to issue a code of professional conduct and provisions for monitoring compliance therewith (article 10 UAE-CGR) as well as setting up procedures for convening a general assembly (article 18 UAE-CGR). The UAE-CGR, however, does not include provisions that would allow for the directors to be held liable for breaching their obligations under the UAE-CGR. Consequently, recourse against a director for his breaching his duties under the UAE-CGR likely only be available under tort.

4.2 Sanctions

Similar to the QAT-CCL and the KSA-CL, the UAE-CCL, in addition to civil liability, provides for punitive sanctions for management misconduct. These punitive measures are governed by articles 339 f. UAE-CCL. In par-
ticular, the chairman of the board of directors of a JSC may be sanctioned by a fine of between 50,000 UAE Dirham and 100,000 UAE Dirham for failing to call for an ordinary general assembly required by law (article 342 UAE-CCL), directors and managers may be fined with up to 1,000,000 UAE Dirham for not convening an extraordinary general assembly required by articles 301, 302 UAE-CCL or fined with between 10,000 and 100,000 UAE Dirham for failing to cooperate with the company’s auditors.

5. Conclusion

While the civil and commercial laws of Qatar and the UAE are primarily based on codifications influenced by the continental European law tradition, Saudi Arabian law is still largely based on šarīʿa law. Nonetheless, the management liability regime of the three jurisdictions are – despite some particulars – very similar. All three legal systems comprise central provisions that establish liability for JSC directors and LLC managers. In particular, they hold managerial staff accountable for fraudulent acts, abuse of authority, errors of management and violation of their duties established by law or the company’s articles. Notably, Qatari and Saudi Arabian law somewhat restricts the company’s ability to deal with management misconduct by denying the general assembly the authority to release the concerned persons from their liability towards the company or its shareholders. Qatari law also explicitly prohibits the company from settling liabilities of management towards third party on behalf of management.

Furthermore, the three countries have passed specific legislation regulating the conduct of listed JSCs and imposing additional duties on the directors of such companies. Generally, the management liability regime established by the relevant regulations is comparable to management liability as provided for by western jurisdictions. A relevant difference is, however, the duty of LLC managers and JSC directors to convene an extraordinary general assembly where the losses of the concerned company amount to 50% of the company capital.

In addition, the corporate and commercial laws of the three jurisdictions provide for sanctions to be imposed on directors and managers for certain infringements and misconduct. Some of these sanction, in particular under Saudi Arabia law, can be quite severe and have no match in European legal systems. Quite stern sanctions can also be found in Qatari law. UAE law, on the other hand, is and has been considerably milder. Most importantly, neither the UAE-CCL nor the Old UAE-CCL provide for imprisonment as a sanction under management liability. Still, under the UAE-BL prison sentences may be imposed for specific bankruptcy related offenses.

Management liability is regulated quite similar among the three jurisdictions. How-

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66 Where losses of a company reach 50% of its capital the directors shall convene an extraordinary meeting of the general assembly to resolve over the dissolution of the company (articles 301, 302 UAE-CCL).
ever, due to the more cautious approach to sanctions chosen by the UAE legislator as well as UAE law allowing shareholders to release directors from management liability, UAE law appears more balanced. In particular, possible prison sentences under the general management liability regime of Saudi Arabia and Qatar appear to go beyond a reasonable deterrent of excessively risky behaviour and may negatively affect the way directors manage a company. Furthermore, since shareholders in a Saudi Arabian or a Qatari company cannot release management from liability, directors could be reluctant to engage their companies in transactions the risk of which would otherwise be considered adequate.

Finally, the management liability regimes of all three countries comprise considerable ambiguity. Certain terms used in the relevant statutes have not been defined by law or jurisprudence and standards for assessing thresholds and limits for care to be exhibited by managers are lacking. This ambiguity is first a concern for managerial staff. They will find it difficult to determine when they cross the line between permitted risk and behaviour that will trigger management liability. Such concerns will have to be addressed by the competent legislators by specifying existing provisions through additional regulations or further amendments of the existing laws, or by the courts by defining terms and introducing standards for interpretation. Moreover, ambiguity the rules on management liability is also relevant for the companies as well as their shareholders and investors. Due to the existing ambiguity, they are not able to precisely determine what they can demand from their managers and directors. Concerns of companies and shareholders may be addressed by the parties themselves. Specific parameters for management conduct could be set unilaterally by the companies – e.g. in their articles of association. In addition, restriction of the authority of managers and directors could be included in contracts concluded between a company and its managerial staff, e.g. in their employment agreements.

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