A Solution to Executive Succession in UAE Family Businesses: The Board of Directors

Family-owned businesses, which are uniquely important to the United Arab Emirates, face the challenge of transitioning to the second or third generation. Conflicts around ownership and management of the business can result in destructive family disputes and even disintegration of the business. Proactive executive succession planning—a responsibility of the Board of Directors—is key to eliminating such conflicts and ensuring business continuity. This article[1] assesses the rules and regulations regarding corporate governance in the UAE, including the composition of the …/…

Les entreprises familiales, qui sont particulièrement importantes pour les Émirats arabes unis, sont confrontées au défi de la transition vers la deuxième ou la troisième génération. Les conflits autour de la propriété et de la gestion de l'entreprise peuvent entraîner des conflits familiaux destructeurs et même la désintégration de l'entreprise. Une planification proactive de la relève de la direction et une responsabilité du conseil d'administration est essentielle pour éliminer ces conflits et assurer la continuité des activités. Cet article évalue les règles et réglementations en matière de …/…

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1. This article is part of a series of publications. In a separate article, the issue of executive succession in UAE family businesses will be considered from a comparative law and practical perspective.

Board and its role in succession planning, undertaken by the Nomination and Remuneration Committee. Finally, it sets forth a series of recommendations on empowering the Board to facilitate smooth transition of power amongst family businesses.

gouvernance d'entreprise aux EAU, y compris la composition du conseil d'administration et son rôle dans la planification de la succession, entreprise par le comité de nomination et de rémunération. Enfin, il énonce une série de recommandations sur l'habilitation du conseil d'administration pour faciliter une transition en douceur du pouvoir entre les entreprises familiales.

1

Legislative Developments Pertinent to Family Businesses

Family-owned business ("Family businesses") account for the majority of commercial activities in the UAE,[2] from holding franchises of supermarket chains and car dealerships to agriculture, real estate, construction and manufacturing companies,[3] accounting for a 90% share of the country's private sector.[4] In 2021, the UAE accounted for the second-highest number of prominent family businesses in the Middle East, with 25 of the 100 top Arab family businesses in the Middle East, according to Forbes.[5]

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To ensure business continuity over successive generations, UAE authorities have committed to developing bespoke legislative structures to better organize the operations of family businesses and private wealth. Recent legislative developments include the introduction of trusts[6] and foundations[7] in financial free zones: Dubai International Financial Center (DIFC) under DIFC Law No. 4/2018 and Abu Dhabi Global Markets (ADGM) under Trusts (Special Provisions) Regulations 2016, the enactment of a federal law under which family businesses may establish trust structures in mainland UAE,[8] the issuance of waqf decrees[9] in the Emirates of Sharjah and Dubai as well as a federal law[10] containing specific modern provisions to organize awqaf for family businesses.

Further, the UAE government is encouraging family businesses to list on local exchanges, in an effort to increase liquidity on local stock exchanges as well as enable succession among family businesses.[11] Recent amendments to key federal laws move the needle in this regard. An amendment to Federal Law No. 2/2015 on Commercial Companies in the UAE (the "**2015 CCL**") reduced the free float requirement from 55% to 30% capital, encouraging family businesses to list on the local bourses. In addition, Federal Law No. 18/1981 (the "**UAE Commercial Agency Law**") was amended to permit family businesses not 100% owned by UAE nationals to register as commercial agents in the UAE, assuming they are structured as a Public Joint Stock Company (**PJSC**) with 51% national ownership or as a private company owned by such a

2. Bloomberg, "UAE Intends to Remove Monopolies of Some Family Businesses: FT", December 2021, https://www.bloomberg.com/news/articles/2021-12-26/uae-intends-to-remove-monopolies-of-some-family-businesses-ft.

3. Abu Dhabi Chamber, "Family Business in Abu Dhabi", November 2019, https://abudhabichamber.ae/-/media/Project/ADCCI/ADCCI/Media-Center--Publications/Research-and-Reports/2019/Family-business-sector-report_December-English.pdf.

4. Financial Times, "UAE pushes merchant families to open up to competition", December 2021, https://www.ft.com/content/116b083a-1811-4501-ad9b-2f6a3183db3e.

5. Forbes Middle East, "Top 100 Arab Family Businesses in the Middle East", https://www.forbesmiddleeast.com/lists/top-100-arab-family-businesses-in-the-middle-east-2021/.

6. DIFC Law No. 4/2018 in DIFC and ADGM Trusts (Special Provisions) Regulations 2016.

7. DIFC Foundations Law No. 3/2018, and ADGM Foundations Regulations 2017.

8. Federal Law No. 19/2020 Concerning Trusts.

9. Sharjah Law No. 8/2018 and Dubai Law No. 14/2017 Regulating Endowments and Gifts.

10. Federal Law No. 5/2018 on Endowment.

11. According to Dr. Ahmad Belhoul Al Falasi, UAE Minister of State for Entrepreneurship and Small and Medium Enterprises, *«Once you list that company, the level of data that goes into the processes makes it easier as well for succession, for inheritances, because you are now being listed, you're reporting and auditing, you're in a shareholder structure that makes it much more friendly for succession as well»*. He added that *«It is difficult to understand that you can still be a family business and listed...when you list you are not giving away your company, you are becoming much better structured.»* Source: The National, 'UAE urges family-owned businesses to list on local bourses', May 2022, https://www.thenationalnews.com/business/2022/05/19/uae-urges-family-owned-businesses-to-list-on-local-bourses.

PJSC.[12] The broadened scope for commercial agents also facilitated family businesses to list on the local bourses without losing their status as registered commercial agents.

> *Under the Dubai Family Ownership Law, family members, who are bound by common ownership of movable or immovable property [...] may opt to enter into a legally binding and notarized family ownership contract.*

Emirates are also devising legal frameworks to promote ownership and succession among family businesses, most notably by enacting family business-specific laws such as Dubai Law No. 9/2020 Regulating Family Ownership in the Emirate of Dubai (the "**Dubai Family Ownership Law**") and Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses in the Emirate of Abu Dhabi (the "**Abu Dhabi Family Business Law**"). Under the Dubai Family Ownership Law, family members, who are bound by common ownership of movable or immovable property—including stocks and shares in commercial companies, civil companies and assets of sole proprietorship with the exception of PJSCs[13]—may opt to enter into a legally binding and notarized[14] family ownership contract (a "Family Ownership Contract"). The law regulates the articles of the Family Ownership Contract with respect to disposition of shares, formation of board of directors, appointment of a manager to manage the family property and functions and obligations thereof.

Additionally, the UAE is in the process of drafting a new federal decree-law on the regulation of family businesses in the UAE, under the Ministry of Economy, that seeks to institutionalize a "Family Business Register" to be established and supervised by the Departments of Economic Development of the various emirates. The draft law includes provisions for management of family business assets before or after the passing of a founder, and may mandate the clear provision of succession plans.[15] The anticipation of this law has sent a positive signal in the ecosystem.[16]

Further, free zones—over 40 of which exist in the UAE and which were originally created to permit 100% foreign ownership of companies in addition to other tax and infrastructure benefits—are enhancing dispute resolution institutions for family businesses. In Dubai, the Dubai Courts' Center for the Amicable Settlement of Disputes, the Dubai Chamber of Commerce and Industry, and the Dubai International Arbitration Center are proposing an ADR scheme to Dubai Courts to provide more efficient and confidential dispute resolution, and in DIFC Courts, litigating parties in family business disputes may request judge-led mediation.[17] In Abu Dhabi, ADGM Courts are developing tailored mediation services to family businesses, providing a Sharia-compliant and confidential platform for dispute resolution, which family businesses will be able to access regardless of incorporation in ADGM. In August 2022, DIFC announced plans to launch a global Family Business and Private Wealth Center on 1 September 2022. The Center aims to provide a range of services, from advisory, and education services to networking opportunities, to support family businesses with succession planning.[18]

2

Definition of a Family Business

Until recently, there was no clearly defined legal concept of family businesses in the UAE, with the exception of niche references, for instance in the DIFC Single Family Office Regulations.[19] A definition for family businesses was clearly formulated for the first time in the UAE under the Abu Dhabi Family Business Law, published in the Official Gazette of Abu Dhabi on 30 September 2021. Under the law, a family business is defined around ownership of capital, starting with a standard definition for family based on lineage or affinity:

> *"A company shall be deemed as a Family Business, regardless of its legal form, in case it meets the following:*
>
> *1- The members of the same Family own the whole capital of the company.*
>
> *2- The members of the same Family own a company owned by many juristic entities which are totally owned by the members of such Family.*
>
> *3- The Founder solely owns a single shareholder company and allocates all or some of its benefits to the members of his Family.*
>
> *4- The Family owns the majority of the capital or keeps the majority of votes in case of involvement of new partners from outside the Family to the extent stipulated in this Law.*
>
> *5- The Family Business allocates a part of its profits to the Beneficiaries as agreed by the Founders or as prescribed in the regulations of the company."*[20]

12. Federal Law No. 11/2020, art. 2.

13. Dubai Law No. 9/2020, art. 4.

14. Under Article 6 of Dubai Law No. 9/2020), the Family Ownership Contract must be ratified by a notary public, in accordance with the rules and procedures set out in Dubai Law No. 4/2013 on Notaries Public in the Emirate of Dubai.

15. Financial Times, "Succession dramas add impetus to UAE's draft family business law", March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d.

16. According to Omar Alghanim, Chair of the Family Business Gulf Council, *"successful family businesses thrive across generations, so any law that can support families to manage their generational transfer is welcomed and could arguably, resolve many disputes within families."* Source: Financial Times, 'Succession dramas add impetus to UAE's draft family business law', March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d.

17. FBCG, "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United" (May 2020), 10, https://www.fbc-gulf.org/mediafiles/articles/doc-1578-2020_06_17_06_52_13.pdf.

18. DIFC Press Release, "DIFC Launches First Global Family Business and Private Wealth Center", August 2022, https://www.difc.ae/newsroom/news/difc-launches-first-global-family-business-and-private-wealth-centre/.

19. DIFC Single Family Office Regulations, art. 2.4.5.

20. Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses, art. 3.

The owners, founder or family members who jointly own a family business established in any legal form recognized under the 2015 CCL may opt into the provisions of the Abu Dhabi Family Business Law.

The Abu Dhabi Family Business Law provides that the family business ceases to be entitled to the capacity and benefits granted to it by virtue of its provisions when new shareholders from outside the family own over 40% of the shares. The owners, founder or family members who jointly own a family business established in any legal form recognized under the 2015 CCL may opt into the provisions of the Abu Dhabi Family Business Law.[21] Article 5 of the Abu Dhabi Family Business Law states that the founders may prohibit sale of shares or dividends to parties outside the family in the Articles of Association and Article 6 stipulates prior approval of family business partners before shareholders sell their respective equity stake to outsiders.

It is to be noted that the laws regulating family businesses and ownership are silent on shareholder nationality, making no distinction between Emirati versus non-Emirati shareholders. Notwithstanding the influence of cultural sensibilities, the cosmopolitan demography of the UAE has paved the way for foreign businesses, including family businesses from the Gulf, the Arab world in general, India, the UK and elsewhere, to succeed. Currently, UAE Federal Decree-Law No. 32/2021 on Commercial Companies (**CCL**)[22] provides that any company incorporated in the UAE shall hold UAE nationality, although this shall not necessarily entail that the company enjoys rights limited to UAE nationals.[23] It is yet to be seen whether the anticipated federal-level law regulating family businesses and establishing a special registry for such businesses will make a distinction based on national ownership of family businesses.

3

Corporate Governance Requirements

Transmission of power is a critical issue for all businesses, particularly family businesses in which disputes may arise between one or multiple members of the family business over the ownership or management and controls rights of the business. Such instances include the question of valuation of a member's stake in the business, the desire of certain members of a family conglomerate to "cash out" by selling their stake elsewhere, poor business performance, the identification of assets previously a part of the family business, or when the apportionment of family wealth, including assets and business profits, upon the death or retirement of the founder, is perceived as unfair.[24]

[...] in the UAE, courts, mediation centres and arbitration centres do not generally differentiate family business disputes from other commercial disputes.

To resolve disputes, family businesses may then seek litigation or ADR mechanisms. However, in the UAE, courts, mediation centres and arbitration centres do not generally differentiate family business disputes from other commercial disputes.[25] Article 23 of the Dubai Family Ownership Law somewhat addresses this gap by providing that all disputes arising from the Family Ownership Contract shall be heard by a special judicial committee composed of financial and legal experts, and with exclusive competence in Dubai to consider such disputes.

A business can avoid business disruption and expensive litigation by proactively implementing robust corporate governance structures. In the UAE, corporate governance standards are included in the CCL, free zone regulations for companies incorporated in any of the over forty free zones in the country, and in the federal securities law promulgated by the Securities and Commodities Authority (**SCA**).

A. CORPORATE GOVERNANCE FOR MAINLAND COMPANIES

Under the CCL, family businesses may exist in the mainland in any of the following permissible forms,[26] each with its own corporate governance provisions:

- Partnerships: Joint Liability Companies, and Limited Partnership Companies;
- Limited Liability Companies (LLCs);
- PJSCs;
- Private Joint Stock Companies; and
- Holding Companies and Investment Funds

Historically, family businesses in the UAE have often been incorporated as sole proprietorships; however, with growth in scale and sophistication, LLCs have become increasingly common. The CCL sets forth the default option for the specific corporate structure adopted by the family business,

21. Abu Dhabi Law No. 10/2021 on the Governance of Family Businesses, art. 2.

22. The CCL was published in the Official Gazette of the UAE, issue no. 712 on 26 September 2021, and replaced the 2015 CCL, as amended by Federal Decree Law No. 26/2020.

23. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 8.

24. P. Smith, "Building the Case for Family Business Arbitration in the GCC Region", Kluwer Arbitration Blog, Charles Russell Speechlys LLP, June 2022, http://arbitrationblog.kluwerarbitration.com/2022/06/17/building-the-case-for-family-business-arbitration-in-the-gcc-region/.

25. One recommendation laid out by the FBCG (in the same report cited in footnote 47) is to enforce mandatory alternative dispute resolution in family business disputes, which would require parties to move directly to mediation at the outset as a pre-condition of instigating formal court proceedings. A mandatory arbitration provision may also be considered as an alternative to litigation if mediation fails to conclude the dispute.

26. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 3.

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whose detailed framework is determined by the articles and bylaws of the business. With its stated objective[27] of advancing regulation of companies, especially that related to governance to protect the rights of shareholders, support foreign direct investment and enhance the social responsibility of companies, the CCL places the responsibility for compliance on the Board of a company.[28] To ensure compliance, the law permits penalties of up to AED 10 million on a company, its Chairman, Board Members, managers and auditors for contravention of corporate governance rules issued within it.[29] The CCL repealed its 2015 equivalent and amended a few key aspects of corporate governance for LLCs and PJSCs.

(i) LLCs

The CCL describes the management requirements, including corporate governance for LLCs under Articles 83-91. Article 83 of the CCL states that in the case of multiple managers as determined by company partners in the Memorandum of Association, a Board of Directors[30] may be appointed. Further, the Board may extend its term for a period up to six months post term expiration and in case a new Board is not reappointed. The CCL also increased the number of shareholders necessitating appointment of a "Supervisory Board" to 15 partners[31] up from seven in the 2015 CCL. The Supervisory Board must consist of at least three partners for three years and is responsible for supervising the balance sheet, annual report and profit distribution of the company, and is required to submit its report to the general assembly.

(ii) PJSCs

Articles 143-172 of the CCL enlist the management stipulations for PJSCs. In the event of a vacancy in the Board of Directors, a replacement director must be appointed within 30 calendar days for the remaining term of the former director.[32] On the matter of remuneration, a director may be paid remuneration of up to 10% of the company's net profits for that fiscal year. The CCL added an exception to the 2015 version, stating that a Board Member may be paid a lump sum fee not exceeding AED 200,000 as remuneration at the end of a financial year in which the company fails to achieve profits or if the Member's share in those profits is less than AED 200,000.[33]

B. CORPORATE GOVERNANCE FOR FREE ZONE COMPANIES

Article 5 states that the provisions of the CCL do not apply to companies incorporated in the free zones. A special provision is stipulated to this effect in the regulations of the concerned free zone and to the extent that free zone companies do not conduct their activities in mainland UAE. Family business structures in the UAE commonly include operating and holding companies in the DIFC and ADGM, among other free zones. The corporate governance of DIFC companies is monitored under DIFC Law No. 5/2018 (the "**DIFC Companies Law**") and that of ADGM companies under the regulatory regime of Companies Regulation and Commercial Regulations 2020 (the "**ADGM Companies Law**"), which sets out the key duties and liabilities of directors of companies incorporated in ADGM.

The DIFC Companies Law recognizes two types of entities: private and public companies.[34] It mandates at least one director for private companies and two directors for public companies, and sets out an extensive set of duties on directors based on the provisions of the UK Companies Act 2006. Directors are obliged to exercise independent judgment and are required by law to promote the success of the company.

Similarly, the ADGM Companies Law requires private and public companies[35] to have one and two directors respectively, setting out an extensive set of duties and responsibilities for the directors.

C. CORPORATE GOVERNANCE FOR LISTED COMPANIES

Corporate governance in the UAE is primarily focused on publicly listed companies and regulated under the Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual[36] (the "**SCA Code**"). The SCA Code aims to promulgate key principles of corporate governance: company accountability towards shareholders and stakeholders, equity or protection of shareholders' rights, transparency and timely disclosure of matters related to the company's affairs, and responsibility towards ensuring business continuity.

The SCA Code sets out binding requirements for listed companies to enforce shareholder protection for its securities and financial regulators, namely the SCA and the Central Bank of the UAE (CBUAE). The SCA Code applies to all local PJSCs, i.e., all public shareholding companies listed on financial markets regulated by SCA (the Abu Dhabi Securities Exchange or the Dubai Financial Market)[37] excluding foreign companies listed on local markets. Additionally, banks and

27. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 2.
28. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 6.
29. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 7.
30. It is to be noted that in the original publication in Arabic, the terms for "Manager" and "Director" are the same. Therefore, in the English translation of the CCL, these terms are often used interchangeably.
31. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 88.
32. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 145.
33. Federal Decree-Law No. 32/2021 on Commercial Companies, art. 171.
34. DIFC Law No. 5/2018, arts. 27(1) and 27(2). In addition, foreign companies may be registered as "Recognized Companies" subject to meeting certain conditions.
35. As understood under Article 3 of the ADGM Companies Regulations 2020.
36. The SCA Code was published on 27 February 2020 and in effect from 28 April 2020, repealing the 2016 CG Rules (Security and Commodities Authority Decision No. 7/RM/2016 concerning the Standards of Institutional Discipline and Governance of Public Shareholding Companies).
37. It might be noted that companies listed on NASDAQ Dubai are regulated by the Dubai Financial Services Authority (DFSA) under DIFC Regulatory Law.

financial institutions are subject to separate rules issued by the CBUAE.

4

Board of Directors in Listed Companies

The Board is far from a commonly used corporate governance mechanism among private UAE family businesses, with less than half UAE family businesses reporting a formal Board.

The Board is the custodian of corporate governance responsible for governance of companies.[38] Should the Board fail to exercise appropriate corporate governance over a family business and its subsidiaries, financial and reputational risk can ensue, as was the case when the Dubai Financial Services Authority (DFSA), DIFC's financial regulator, imposed sanctions against Damas International Limited in 2010.[39] However, the Board is far from a commonly used corporate governance mechanism among private UAE family businesses,[40] with less than half UAE family businesses reporting a formal Board.[41]

The SCA Code sets out the requirements and terms of establishing a Board in a listed company. Article 6 of the SCA Code states that the Company shall be managed by a Board whose method of formation, membership number, and membership terms are specified within the Articles of Association. The Board members are elected by the general assembly, or if the UAE government holds 5% or greater capital, it may appoint its representatives in the Board pro rata to such percentage from the number of Board members. At least one member must be appointed if the percentage required for appointing a member exceeds that percentage.

Under the UAE's laws, the overarching role of the Board is to approve the company strategy, oversee management, and ensure that a robust corporate governance framework is in place.[42] The second function, i.e., executive management oversight, entails monitoring executive management to ensure that the company strategy is implemented and Key Performance Indicators are met, electing and dismissing or replacing the CEO, electing other key executives or setting out guidance for the CEO to elect other key executives, and finally, succession planning.

38. "The Financial Aspects of Corporate Governance" (Cadbury Report), the Cadbury Committee, 1992, at 14.

39. "DFSA Takes Action Over Damas Failures", DFSA Media Release, 21st March 2010, https://dfsaen.thomsonreuters.com/rulebook/21-march-2010-dfsa-takes-action-over-damas-failures.

40. R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020, https://www.researchgate.net/publication/339172085_Family_Business_Ecosystem_in_UAE.

41. *Ibid.*

42. "Board Best Practices in the Middle East", Hawkamah Institute for Corporate Governance and Diligent, (December 2019), https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_15122019.pdf.

5

Board's Role in Succession for Listed Companies: Nomination and Remuneration Committee

Pursuant to Article 58 of the SCA Code, all publicly listed companies in the UAE are required to establish two permanent committees, namely a Nomination and Remuneration Committee (**NRC**) and an Audit Committee.[43] Each committee must be formed in accordance with procedures established by the Board and must be composed of at least three non-executive Board members, at least two of whom must be independent. The committees must be chaired by an independent Board member who is not the Board Chairman.

The NRC is entrusted with preparing policies relating to remuneration, benefits, and incentives of the Board and company employees as well as the succession of company executives and the Board.

The NRC is entrusted with preparing policies relating to remuneration, benefits, and incentives of the Board and company employees as well as the succession of company executives and the Board. It is a permanent committee required to hold its meetings once during the year or whenever the need arises. The responsibilities of the NRC include developing and implementing a membership policy for directors and executives, ensuring independence of independent directors on an ongoing basis, and preparing and reviewing remuneration for directors and executives.

Pursuant to Article 54 of the SCA Code, the NRC is responsible for identifying the company's competency needs at the level of senior executive management and for identifying the basis of selecting senior executive management. With regard to succession, the NRC is entrusted with the following responsibilities:

43. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 58.

- to develop (and report to the SCA) a policy to apply for Board membership and executive administration, considering gender diversity and encouraging women through incentives and training programs;
- to identify the company's needs of competencies at the level of senior executive management and staff (executive succession) and the basis of selecting them.[44]

6

Requirements for Board Structure and Composition for Listed Companies

A. BOARD STRUCTURE IN THE UAE

For publicly listed companies, the UAE permits a two-tier board in addition to a unitary board. Under Articles 54-57, the SCA Code[45] introduced provisions for a PJSC, if it so chooses, to implement a dual governance structure under which the management and supervisory functions are separated from each other, by virtue of establishing two distinct Board committees (hence "dual structure") as follows:

- a **Control Committee (CC)** i.e., composed of Non-Executive Members responsible for supervising the Executive Committee and appointing or dismissing its members; and
- an **Executive Committee (EC)** composed of Executive Board Members and responsible for day-to-day operations of the company and for developing and implementing the company strategy as approved by the CC.

In order to adopt the dual management structure, the Board of the listed company must approve the change by majority votes. A change to the company's Articles of Association is required and disclosures concerning the changes must be published on the company's website once adopted. The two committees are expected to maintain close cooperation and coordination (Article 57) for instance, the EC must submit reports on the company strategy and its implementation to the CC on a quarterly and annual basis, and the CC must be in regular contact with the Chairman of the EC to discuss topics around strategy, planning, business development, risk situation, risk management and compliance.

B. INDEPENDENT DIRECTORS

Director independence is considered in terms of a director's independence from corporate management and in terms of employment, family, and significant economic or personal connections to the company. The SCA Code requires that the Chairman of publicly listed companies be independent.[46]

Under the SCA Code, the Articles of Association will determine Executive Board members, Non-Executive Board members and Independent Board members, provided that the majority of Board members are non-executive Independent Board members.

Under the SCA Code, the Articles of Association will determine Executive Board members, Non-Executive Board members and Independent Board members, provided that the majority of Board members are non-executive Independent Board members. A majority of Board members must be Non-Executive Board members with the technical skills and experience required to serve the interests of the Company. In all cases, when selecting Non-Executive Board members of the Company, it must be taken into consideration that a Board member must be able to dedicate adequate time and effort to the role and that such role is not in conflict with the candidate's other interests.[47]

The SCA Code also specifies the independence requirements under Article 19(1). A Board Member is not deemed independent in the event of any of the following circumstances during the two years prior to nomination date:[48]

- employment of self or of a second-degree relative as an executive of the company, its parent company, or any of its sister companies, associate companies or subsidiaries ("associated companies");
- direct or indirect interest of self or of a first-degree relative in contracts above five percent of the company paid-up capital or the amount of AED 5 million, concluded with the company or its associated companies, unless under natural business circumstances or without preferential conditions;
- employment at the company or its associated companies;
- employment or partnership with a company that performs consulting services for the company or its associated companies;

44. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, arts. 59, 41.

45. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 54:"[...] 2. *The company may opt to adopt a dual governance structure consisting of internal committees composed of its Board members, in the form of two committees, one of which is the control committee and the second is the executive committee. 3. A decision of dual governance structure adoption shall be issued by majority votes of all Board members and shall be approved by the Annual General Assembly. The chairman shall inform the Authority and Market about the decision, and disclose the same in the company website. 4. Both the control committee and the executive committee shall be responsible for the company governance and compliance to this regulation."*

46. SCA Code attached to Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 9(5).

47. *Ibid.*

48. Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 19.

- personal service contracts with the company or its associated companies;
- direct link to a non-profit that is recipient of a huge amount of funding from the company or its associated companies;
- kinship or partnership of self or of relatives with an employee of the company's auditor;
- over 10% ownership of company's capital by self, by minor children of self, or by both;
- selection for a fourth consecutive term.

C. NATONALITY OF DIRECTORS

The SCA Code, under Article 6 requires that the Chairman and majority of Board Members for publicly listed companies be UAE nationals. Furthermore, Article 151 of the CCL states that requirements for Board formation under the SCA Code must be considered for PJSCs. In the event the percentage of UAE nationals in the Board falls short of the required percentage, such deficiency must be rectified within a maximum of three months, otherwise any decisions of the Board will be deemed null and void upon expiry of this period.

> *The provision for a UAE national majority on the Board deviates from what is observed under international corporate governance standards when it comes to Board composition requirements.*

A strong Board reflects diversity of thought, backgrounds, skills, experiences and expertise and a range of tenures amongst its members, in order to enable effective oversight of the company and its executive management.[49] The provision for a UAE national majority on the Board deviates from what is observed under international corporate governance standards when it comes to Board composition requirements. Instead, what is more frequently observed is the requirement for "resident directors" on the Board of the company, i.e., directors who have stayed in the country for a stipulated period of time in the previous calendar year.[50]

D. THE CASE FOR FEMALE DIRECTORS

Until 2021, the SCA Code (Article 9, Clause 3) required publicly listed companies to have at least 20% of Board membership.[51] However, pursuant to an amendment (Securities and Commodities Authority Decision No. 8/RM/2021 concerning Amendment to the Joint Stock Companies Governance Guide issued on 28 March 2021, Boards of PJSCs must have at least one female member and this must be disclosed in the annual governance report.

> *"3. The company's articles of association shall define the method of forming the board of directors, the number of its members and the term of membership, provided that the representation of women shall not be less than one member in the formation of the board of directors. Moreover, the company shall be obligated to disclose this representation in the annual governance report."*[52]

7 Recommendations on Future Direction

An examination of UAE's laws in comparison with international standards is the adoption of a "hard law" approach to regulate the Board, whereby requirements and composition for the Board are mandated by statutory requirements.

A. A QUOTA FOR FEMALE DIRECTORS?

> *In June 2022, the European Union agreed on a Directive to ensure women have 40% seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges.*

One of the recommendations in this regard is to implement a quota for female directors up to at least 30% of the Board and clarifying penalties upon violation, in line with international standards, particularly the UK and the European Union. EU benchmarks have mandatory female quota ranging from one third in countries including the UK, Belgium, Greece, Italy and Portugal[53] to 40% of Directors on the Board in countries such as France,[54] Norway, Denmark, Sweden and Iceland,[55] for

49. Harvard Law School Forum on Corporate Governance, "Principles of Corporate Governance" (September 2016), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/.

50. For instance, under the Indian law, there are no restrictions with regard to the nationality of the director. However, under Article 149(3), there must be at least one resident director on the Board of every company. A resident director is defined as **"director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year"**. The (Indian) Companies Act 2013, Chapter XI, Article 149 (6), 98. Available at: https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf.

51. "3. ***[...] Females shall represent at least 20% of the Board membership.*** *The Company shall disclose the reasons behind not achieving this percentage and disclose the percentage of female representation in the Board in its Annual Governance Report."*

52. Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies' Governance Manual, art. 9.

53. The Corporate Governance Codes of Belgium, Greece, Italy, Portugal and the UK set a quota of 33% for women Directors on Boards.

54. Law n° 2011-103 of 27 January 2011, on balanced representation of men and women on boards of directors and supervisory boards and on gender equality in the workplace, https://www.legifrance.gouv.fr/jorf/id/JORF-TEXT000023487662.

55. "Board Best Practices in the Middle East", Hawkamah & Diligent (December 2019) at 21, https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.

corporate Boards. In June 2022, the European Union agreed on a Directive to ensure women have 40% seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges.[56]

Although there are differing opinions on the implementation of quotas for women on boards in the UAE, academics have cited unfavourable cultural attitudes and family laws influencing economic regulations as further complicating the business environment for women.[57] Therefore, an institutional approach that attempts to facilitate and support women's leadership—which could include board position that could facilitate smooth transition of power among family businesses—may be a way forward.[58] The UAE has witnessed key initiatives in this direction, for instance with the Aurora50, co-founded by H.E. Sheikha Shamma bint Sultan bin Khalifa Al Nahyan and Diana Wilde in 2020.[59] We expect such initiatives to contribute towards further discussion on the issue and mandatory female representation on Boards to be potentially integrated into the law.

B. BOARD INDEPENDENCE: RATIO AND REQUIREMENTS

With regard to independence, the SCA Code for public companies sets out independence requirements in line with international practices such as those in the UK, which requires that independent non-executive directors constitute at least half of the Board.[60] In fact, the most prevalent voluntary standard is for the Board to be composed of at least 50% independent directors with countries such as the United States, India, Hungary, South Africa and Korea having binding requirement of at least 50% or more independent directors, and with at least 30% of the Board subjected to legal requirements for independence in jurisdictions including the Kingdom of Saudi Arabia.[61]

While independence requirements apply exclusively to publicly listed companies in the UAE, soft law guidelines, such as those promulgated by the Family Business Council Gulf (**FBCG**), a leading platform to strengthen governance among family businesses, and Hawkamah Institute, a Dubai-based non-profit think tank that advises regional governments and companies on corporate governance solutions, also advocate for independence within the Board of family businesses. The **GCC Corporate Governance Code** promoted by the

The GCC Corporate Governance Code promoted by the FBCG recommends a Board with qualified family members, non-family executives and at least a third of its members completely independent, provided the members have required expertise and key skills.

FBCG recommends a Board with qualified family members, non-family executives and at least a third of its members completely independent, provided the members have required expertise and key skills.[62] It also outlines two alternatives: one being the Board in family businesses being entirely composed of external directors rather than family members, while another being the majority of the Board being composed of independent directors.

The UAE can further push the independence agenda among family businesses through education and awareness initiatives as well as by encouraging family businesses to clearly define independence requirements, ideally within the family charter. The requirements for independence could also be promulgated under the CCL itself, with a clear definition and criteria for independence, as seen in other jurisdictions.[63]

The OECD has noted that some jurisdictions link the independence requirement of the Board with the ownership structure of the company.[64] Specialized research[65] has indicated that the optimal composition of the Board in a UAE family business is a combination of non-executive directors in proportion to the shareholding structure and independent non-executive directors, such that the majority of the Board is independent.

C. BOARD MEMBER NATIONALITY

As noted in section 6(C) of this article, the requirement around nationality of Board Members may be reconsidered and revised with a residency condition i.e. relevant experience, understanding of the country's rich culture and business sensibilities, and contribution to the economy that comes with having lived in the UAE, even if the individual is from a different nationality. Permitting non-UAE nationals to sit on Boards of UAE family businesses as directors will bring international experience and expertise to family businesses, many of which also operate outside the UAE. Such appointments could be given for shorter periods to reduce risk.[66]

56. On 7 June 2022, the EU agreed on a Directive to ensure women have 40% of seats on a corporate Board. The Directive sets a share of 40% of the under-represented sex among non-executive directors and 33% among all directors, for EU companies listed on the EU stock exchanges.

57. Hawkamah Institute, "UAE Women Board Directors: Careers, Board Experiences and Recommendations for Change" (2013) at 138, https://www.hawkamah.org/uploads/1469026449_578f909163a4b_UAE_Women_Board_Directors-Research_Report.pdf.

58. *Ibid.*

59. Aurora50 led a successful initiative to increase the number of women on boards in the UAE through the Pathway20 accelerator programme and Manarat, invite-only club for regional women who are independent board directors. See https://aurora50.com/about-us/.

60. UK Corporate Governance Code, Chapter (2) Division of Responsibilities, Provision (11) *"At least half the board, excluding the chair, should be non-executive directors whom the board considers to be independent."*

61. OECD Corporate Governance Factbook 2021, OECD, 14, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

62. *See* the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBGC, 2021, at 42., *"Ideally, a board of directors will have well qualified family members, non-family executives and at least a third of the members should be completely independent - provided they have the required expertise and key skills."*

63. Examples include India: The (Indian) Companies Act 2013, Chapter XI, Article 149 (6), 98. Available at: https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf.

64. OECD, OECD *Corporate Governance Factbook* (2021) at 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

65. These solutions and associated considerations were discussed with experts in the field (lawyers, wealth advisors, government officials, research institutes etc.) over a series of interviews.

66. Hawkamah Institute, "UAE Women Board Directors: Careers, Board Experiences and Recommendations for Change" (2013) at 88, https://www.hawkamah.org/uploads/1469026449_578f909163a4b_UAE_Women_Board_Directors-Research_Report.pdf.

Abolishing the nationality requirement is in line with the UAE's broader economic agenda to bring highly skilled talent to the country. Various measures that the UAE has introduced for international talent attraction and retention, notably the introduction of the "Golden Visas" or long-term residency visas starting in late 2020, remote work visas, and the establishment of the Abu Dhabi Resident's Office by the Abu Dhabi Department of Economic Development, a government initiative to support the attraction, onboarding and retention of expatriates in Abu Dhabi.

D. INTRODUCTION OF A NATIONAL CORPORATE GOVERNANCE CODE OR SET OF PRINCIPLES

While corporate governance standards are included in the CCL and the SCA Code, which set out additional binding requirements for listed companies, there is perhaps an opportunity for the UAE to formulate a national corporate governance code or set of principles. Dubai SME, a division within the Dubai Department of Economy and Tourism responsible for supporting small and medium enterprises, co-developed with Hawkamah Institute the Corporate Governance Code for SMEs in 2011.[67]

The UAE may also explore—similar to other jurisdictions which have some variation of the "comply or explain" approach[68] — developing its own national corporate governance guidelines, applicable to all companies, including family businesses.

67. Dubai SME, "Corporate Governance Code for SMEs" (2011), https://sme.ae/SME_File/Files/Code_of_Corporate_Governance_for_Dubai_SMEs.pdf.

68. OECD, OECD *Corporate Governance Factbook* 2021, Table 2.2. at 47, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

تواجه الشركات المملوكة للعائلة، والتي تعتبر ذات أهمية فريدة لدولة الإمارات العربية المتحدة، تحدي الانتقال إلى الجيل الثاني أو الثالث. يمكن أن تؤدي النزاعات حول ملكية الشركة وإدارتها إلى نزاعات عائلية مدمرة بما ذلك تفكك الشركة. إن التخطيط الاستباقي للتعاقب الإداري هي مسؤولية من مسؤوليات مجلس الإدارة وهي المفتاح للقضاء على مثل هذه الخلافات وضمان استمرارية الأعمال. تقيّم هذه المقالة القواعد واللوائح المتعلقة بحوكمة الشركات في دولة الإمارات العربية المتحدة، بما في ذلك تكوين مجلس الإدارة ودوره في تخطيط التعاقب الذي تقوم به لجنة الترشيحات والمكافآت. أخيراً، تحدد سلسلة من التوصيات حول تمكين مجلس الإدارة لتسهيل الانتقال السلس للسلطة بين الشركات العائلية

APPENDIX

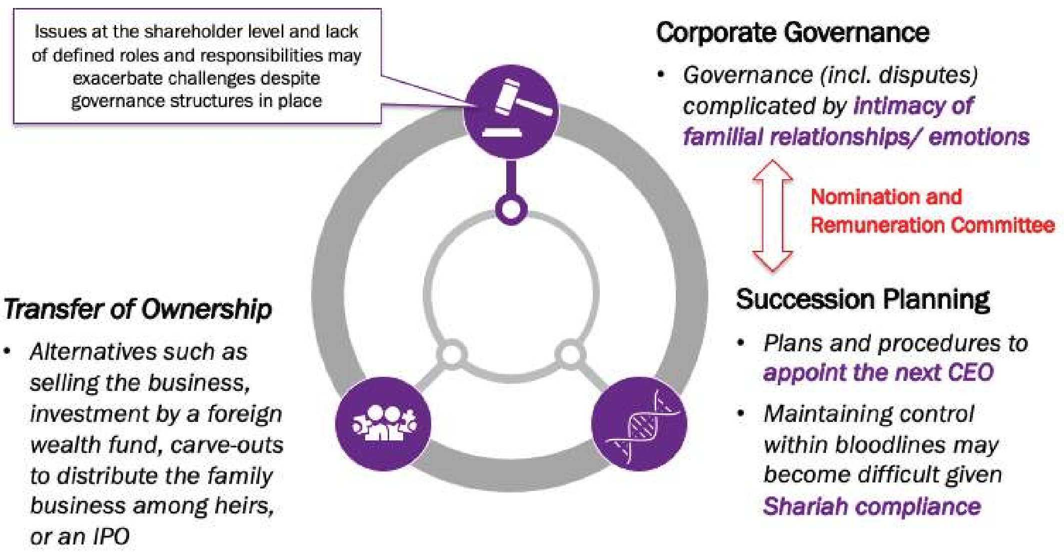

Figure 1: Range of options available to family businesses on succession.
Source: the authors.

AREA	RELEVANT LAWS AND REGULATIONS REGARDING CORPORATE GOVERNANCE		
Commercial Mainland	Federal Decree-Law No. 32/2021 on Commercial Companies (**“CCL”**)		
Capital Markets	Securities and Commodities Authority Decision No. 3/RM/2020 on the Approval of the Public Joint Stock Companies’ Governance Manual (**“SCA Code”**)		
Trusts and Foundations	DIFC Law No. 4/2014 on Trusts	ADGM Trust Regulations of 2016	
	DIFC Law No. 3/2018 on Foundations	ADGM Foundations Regulations 2017	
Free zone laws(2)	DIFC Law No. 5/2018	ADGM Companies Regulation 2020	RAK International Corporate Center
Industry-specific laws	Central Bank of UAE Circular No. 83/2019 Corporate Governance Regulations		
Family-business specific laws	Dubai Law No. 9/2020 (**“Dubai Family Ownership Law”**)	Abu Dhabi Law No. 10/2021 (**“Abu Dhabi Family Business Law”**)(3)	

Legend: *Federal* | *Emirate-level* | *Free zone*

Non-exhaustive

(1) Repeals Federal Law No. 2/2015, which was amended by Federal Decree-Law No. 26/2020
(2) There are various other free zones e.g., DMCC, KIZAD, JAFZA etc., that are self-regulated
(3) Under amendment; additionally, there is a federal law currently being drafted

Figure 2: Relevant laws and regulations regarding corporate governance in the UAE.
Source: the authors’ review and analysis.

BIOGRAPHY

DAVID CHEKROUN is Professor of International Business Law at ESCP Business School, Paris, France. David received his Doctor of Law from Sorbonne Law School, and Master in European Business from ESCP Business School (UK & France). He is Adjunct Professor of Law at Paris Sorbonne Abu Dhabi, Former Visiting Professor of Law at NYU Abu Dhabi, and has taught at several other institutions across the Middle East, Europe and the United States. His research interests are mainly, International Business Law, Law & Business, FDI screening, and Corporate governance. He has published a number of articles in the field of international Business Transactions and he is one of the editors-in-chief of the International Business Law Journal.
David is admitted to the Paris Bar and worked in the Litigation and Arbitration department of Herbert Smith LLP. In addition, he was Scholar-in-Residence to the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP in the London office. He has also advised law firms and companies in international business transactions and corporate governance.

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