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

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Abstract

Family businesses, which are uniquely important to the United Arab Emirates (UAE), face the challenges of transitioning to the second or third generation. Conflicts around ownership and/or management of the business can result in destructive family disputes and even disintegration of the businesses. Proactive succession planning is the key to eliminating such conflicts.

Both internationally and regionally, there is a growing push to promote good corporate governance, through regulatory intervention and policy initiatives, as a means of ensuring smooth succession. This article assesses the rules, regulations, and guidelines, including those in relation to corporate governance, as applicable to family businesses in the UAE. A review of UAE legislation and insights from comparative law suggests that the Board of Directors, through a well-defined Nomination Committee, adequate female representation, and independent directors, is the effective solution to resolve executive succession in family businesses.

Keywords

Board of directors; corporate governance; executive succession; intergenerational transfer; family business; succession planning; United Arab Emirates

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Table of Contents

Introduction

Family-owned businesses (family businesses) in the UAE are the driving engines of the regional economy, believed to contribute in excess of 80% of non-oil gross domestic product, 90% of the private sector and generate over 70% employment in the Gulf Cooperation Council (GCC).[1] Historically, cultural preferences prevalent among Arab tribes and strong political connections vital for success in the relatively closed economies (that is, prior to the broad economic reforms and liberalisation which demarcated the 2000s[2]) led to family businesses to grow in scale and power.[3] Most family businesses in the GCC started out as small trading companies and over time, expanded into large diversified conglomerates, spanning diverse industries including real estate, construction, retail, manufacturing, and travel and leisure.[4] Against this context, it is noted that GCC family businesses are now entering the second or third generations, with an estimated USD 1 trillion of assets set to be handed over to the next generation in the next five to ten years[5].

At the brink of intergenerational transitions, unique family dynamics inherent to the Arabian Gulf shape succession.[6] GCC family businesses are mostly private companies and double in size compared to their peers in the United Kingdom (UK) and the United States (US).[7] Arguably, GCC family businesses are facing complexities typical of families in their third and fourth generation cycles with a large number of family shareholders, resulting in a higher likelihood for conflict. The relatively large size of the family places pressure on GCC family businesses to grow rapidly; specialised research has concluded that in order to maintain the same level of wealth, the average GCC family business must expand by 18% a year.[8] Therefore, it is possible that decisions which should be solely linked to business management are focused on competing goals such as personal wealth impacts, emotional attachment to companies and properties, or personal prospects for jobs.[9] Add to that, divergent views about the management of the family business in the absence of formalised family governance structures such as the family council and the family constitution, and lack of corporate governance mechanisms such as a functional and well-structured Board of Directors, and you end up with shareholding conflicts.[10]

Similar to their GCC counterparts, UAE family businesses represent roughly 90% of the private sector.[11] A UAE-specific study of the family business ecosystem identified these family businesses to be relatively young, with an average age of thirty-three years, and over half of the sample of firms surveyed, to be in the first generation, a factor attributed to the foundation of the country in 1971.[12] As these family businesses mature

[1] S. Kohli, "UAE: Experts share insights on why some family businesses fail, yet some survive", Khaleej Times, 17th October 2021, https://www.khaleejtimes.com/business/uae-experts-share-insights-on-why-some-family-businesses-fail-yet-some-survive.

[2] S. Darwish, A. Gomes & V. Bunagan, "Family Businesses (FBS) in Gulf Cooperation Council (GCC): Review and Strategic Insights", Academy of Strategic Management Journal, 2020, vol. 19, issue 3, p. 6, https://www.researchgate.net/publication/343224258_FAMILY_BUSINESSES_FBS_IN_GULF_COOPERATION_COUNCIL_GCC_REVIEW_AND_STRATEGIC_INSIGHTS.

[3] W. Al Awadi & H. Koster, "Corporate Governance and Sustainability of Family Businesses in the UAE", 2017, p. 2, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084378.

[4] Family Business Council Gulf and McKinsey & Company, "Family businesses in the Gulf Cooperation Council: The journey to long-term Sustainability, Findings from the Inaugural GCC Family-Owned Business Survey", 2015, https://www.fbc-gulf.org/mediafiles/articles/doc-1362-20171117034009.pdf.

[5] PwC, "Understanding family dynamics and family conflicts", 2020, p. 5, https://www.pwc.com/m1/en/publications/documents/understanding-family-dynamics-conflicts.pdf.

[6] B. Augustine, "Middle East's family businesses get serious on sustainability: Governance and empowering generations key to business continuity and success", Gulf News, 7th November 2015, https://gulfnews.com/how-to/your-money/middle-easts-family-businesses-get-serious-on-sustainability-1.161450.

[7] PwC, "Middle East Family Business Survey 2019, Future-proofing Middle East family businesses, Achieving sustainable growth during disruptive times" 2019, p. 10, https://www.pwc.com/m1/en/publications/documents/family-business-survey-2019.pdf.

[8] R. Bakar, S. Ahmad & R. Buchanan, "Trans-generational success of family businesses", Journal for International Business and Entrepreneurship Development, 2015, p. 4, https://www.researchgate.net/publication/282239326_Trans-generational_success_of_family_businesses.

[9] S. Darwish, A. Gomes & V. Bunagan, "Family Businesses (FBS) in Gulf Cooperation Council (GCC): Review and Strategic Insights", Academy of Strategic Management Journal, 2020, vol. 19, issue 3, p. 9.

[10] In addition, less than a quarter of GCC family businesses disclose their financial records and fewer than 10% have any formal forum that is responsible for oversight of governance matters. Please see W. Awadhi and H. Koster, "Corporate Governance and Sustainability of Family Businesses in the UAE", 2017, p. 3, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084378.

[11] Abdel & Katsioloudes, "SMEs Capital Structure Decisions and Success Determinants: Empirical Evidence from the UAE", Journal of Accounting, Ethics and Public Policy, 2017, Vol. 18, No. 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997348.

[12] 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.

into the next stage, succession becomes one of the dominant issues.[13] (Annex, Figure 1 for more details around key issues faced by the family business at each life cycle stage.) Several studies have established the lack of robust governance in family businesses, and where such systems do exist, they are not well implemented in practice. In a survey of family firms across the UAE, the Arab region and the rest of the world, published in 2020 via the Successful Transformation Entrepreneurship Project (STEP Project),[14] UAE family businesses were found to have rudimentary family governance structures and a low adoption of Board of Directors.[15] 32% of family firms surveyed in the UAE were found to have a formal family council (similar to Arab peers and the rest of the world), only 17% implemented a family constitution in their firms (lower than Arab peers at 22%), and only 43% had a formal Board of Directors.[16]

Similarly, in the collaborative survey conducted by McKinsey & Company and Family Business Council Gulf (FBCG), two-thirds of the participants reported having started to put the building blocks of governance in place but only one-third reported that the practices were fully adopted and working effectively[17]. The survey further noted that one of the most challenging tasks for families was managing family dynamics, particularly in relation to preparing the next generation and managing conflict.[18] Given the importance of family businesses to the UAE's economy, ensuring their sustainability has been recognised as a crucial component of national policy directives.

Section 1 of this article highlights the key laws governing the organisation of family businesses in the UAE, extracting from the commercial law, trust and foundations laws and more recent regulations for ownership among family businesses. Section 2 details the challenges around succession and introduces the different solutions to potentially remedy these issues. Section 3 identifies corporate governance as the legal solution, and drills down on the UAE's corporate governance requirements, including both hard and soft law initiatives promulgating corporate governance, and how these might apply to bolster succession planning. Next, Section 4 makes a case for strengthening a critical aspect of corporate governance, namely the Board of Directors. It does so by investigating the extent to which the UAE's laws support a robust Board of Directors structure and compares the legal requirements of the Board of Directors with those of international benchmarks. Finally, the conclusion puts forth recommendations that the UAE could take into account when it revises its legislative framework to regulate succession planning among family businesses. While such a development may seem obvious from a legal perspective, it may be perceived as less optimal from a business perspective, as it may lead family businesses to change their values around privacy by appointing more independent directors or incur higher costs in recruiting, maintaining and monitoring Boards. Here, the authors recommend an optimal Board structure and argue for the merits of more independent directors and more women, through hard law intervention similar to the hard statutory mandates of European examples such as France[19].

1. Family businesses in the UAE

This section highlights the key laws governing the organisation of family businesses in the UAE, extracting from the commercial law, trust and foundations laws and more recent regulations for ownership among family businesses.

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[13] Governance Handbook, International Finance Corporation Family Business (IFC), 2018, p.16, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE.

[14] STEP Project Global Consortium is a global applied research initiative that explores family and business practices within business families and generates solutions that have immediate application for family business leaders.

[15] Please see R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020.

[16] *Id.*

[17] FBCG and McKinsey & Company, "Family businesses in the Gulf Cooperation Council: The journey to long-term Sustainability, Findings from the Inaugural GCC Family-Owned Business Survey*"*, 2015, https://www.fbc-gulf.org/mediafiles/articles/doc-1362-20171117034009.pdf.

[18] *Id.*

[19] 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 "law Copé-Zimmermann", https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023487662.

1.1 Organisation of family businesses

Family businesses in the UAE were often incorporated as sole proprietorships and as they grew in scale and sophistication, increasingly as mainland Limited Liability Companies (LLCs).[20] Family businesses in the UAE are therefore, organised in accordance with Federal Decree-Law No. 32/2021 on Commercial Companies (New Commercial Companies Law) that entered into force on 2 January 2022.[21] Under the New Commercial Companies Law, a family business could structure in any of the permitted legal forms for a company, viz. Joint Liability Companies, Limited Partnership Companies, LLCs, Public Joint Stock Companies (Public JSC), and Private Joint Stock Companies (Private JSC). Paragraph 3 of Article 8 provides that any company incorporated in the UAE shall hold the nationality thereof, although this shall not necessarily entail that said company enjoys rights limited to UAE nationals.

Given the significance of free zones in the UAE[22], it is noted under Article 5 that the provisions of the New Commercial Companies Law do not apply to companies incorporated in the free zones where a special provision is stipulated to this effect in the laws or regulations of the relevant free zone and to the extent, the free zone companies do not conduct their activities outside the free zone in mainland. The undertaking of commercial activities in the UAE is conditional on a business obtaining an appropriate licence, and the nature of the economic activity defines the legal form of the company and the type of licence required[23]. Family businesses in the UAE would therefore have an array of licences and entities within their corporate structure, and by virtue of carrying out activities in free zones, be governed by the relevant free zone regulations. The implementation of an appropriate corporate structure is a necessary precursor to the success and continuity of family businesses.

In the UAE, notwithstanding the unique requirements of each family business and the influence of varying factors such as the complexity of family arrangements, geographical scope and the nature of assets, businesses are typically recommended to have a holding company in the form of an LLC which consolidates the collective family assets and business under a holding structure which facilitates management, accountability and reporting.[24] Holding companies incorporated in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM) financial free zones are identified as vehicles of choice in structuring the family businesses in the UAE.[25] In DIFC, a family holding structure[26] also qualifies to take the form of a "Prescribed Company", which is categorised as a Private Company under the DIFC Companies Law No. 5 of 2018 (DIFC Companies Law), but is exempted from certain requirements such as to audit or file its accounts

[20] This insight is based on expert interviews conducted with leading law firms, members of family offices, and family business advisors in the UAE. LLCs continue to be the most common structure for family businesses.

[21] The New Commercial Companies Law was published in the Official Gazette of the United Arab Emirates, issue no. 712 on 26th September 2021, and replaced, in its entirety, the Federal Law No. 2 of 2015 on Commercial Companies in the UAE, as amended by Federal Decree Law No. 26 of 2020. The provisions of the New Commercial Companies Law apply to commercial companies established in the UAE, as well as to branches and representative offices in mainland UAE, notwithstanding certain exceptions mentioned under Articles 4 and 5 of the decree. Please see LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.

[22] Deloitte LLP, "Doing Business Guide, Understanding the UAE's tax position", 2022, https://www2.deloitte.com/xe/en/pages/tax/articles/doing-business-guide-uae.html. The UAE offers two types of locations for establishing business presence, viz. mainland including the seven Emirates, and any of the over fifty free zones across the UAE. The Emirates have passed decrees to establish free zones, typically designed for specific industries (e.g. there are dedicated free zones in Dubai for companies in the technology, media, finance, and trade industries), are largely self-regulated, and their authorities responsible for licensing and registration matters for entities established in the given free zone.

[23] In order to carry out business activities in either mainland or a free zone location, a company is required to be appropriately licensed. For details on licensing aspects, please see the Ministry of Economy website, https://www.moec.gov.ae/en/establishing-business-in-the-uae.

[24] N. Hadi, "Legal Structuring for Families in Business", Al Tamimi, 2019, https://www.tamimi.com/law-update-articles/legal-structuring-for-families-in-business/. The article also recommends that subsidiaries should be further separated into focused business units also in the form of LLCs. A structure consisting of a holding company consolidates the management of a business and other assets of the family under one group umbrella and provides the flexibility to facilitate sell-downs of, or disposals of equity. Family-owned holding companies are widely acknowledged as functional instruments in the management and transmission of enterprises and assets held by family shareholding structures, both in relation to intergenerational transfers and rationalisation of corporate assets.

[25] This insight is based on expert interviews conducted with leading law firms, members of family offices, and family business advisors in the UAE.

[26] Under the DIFC Prescribed Company Regulations (2019), a "family holding structure" is defined as a structure of one or more persons established for the sole purpose of consolidating the holdings of a specific family member, their spouse and/or bloodline descendants in a Family Office, a Holding Company or a Proprietary Investment Company.

with the register and subject to lower administrative fees and more flexible office space options. Amongst the different legal holding company structures available in ADGM, "Special Purpose Vehicles (SPVs)"[27] are prevalent. They may be established as Private Companies Limited by Shares and licensed to conduct SPV activities or "Restricted Scope Companies (RSCs)" for more limited disclosure on the public register.

In addition, trusts are increasingly being used to hold family business interests, given their inherent flexibility compared to LLC structures.[28] A trust entails separation of the legal and beneficial ownership of an asset, allowing ownership rights to be shared between trustee and beneficiaries; for family businesses this important characteristic is key for creating an arrangement which can protect the many interests of a widened family ownership whilst at the same time insulating the governance of the business by incorporating a management structure that is distinct from ownership.[29] Trusts in the UAE may be established in the DIFC under DIFC Law No. 4 of 2018[30] (DIFC Trust Law), in ADGM under Trusts (Special Provisions) Regulations 2016 and more recently, in mainland UAE under Federal Decree-Law No. 19 of 2020 (Federal Trust Law). The Federal Trust Law governs the formation of a trust, its purpose, operation and dissolution as well as setting out the rights and obligations of the settlor, beneficiaries and trustee. However, in a departure from common law trusts, a UAE onshore trust has a separate legal personality and is required to be registered.[31] Further, under English law, the legal interest in the trust property is held by the trustee, while the UAE Trust Law provides that the trust itself, as a separate legal person, holds the trust property. Notably, the Federal Trust Law excludes from its scope trusts created within the DIFC and ADGM which shall be governed by their own laws.[32] The DIFC Trust Law, which replaced the DIFC Law No. 11 of 2005, is largely based on the American Uniform Trust Code, with specific and significant adaptations designed to address local issues; for instance, it provides for the role of the "advisory trustee" who can be empowered to advise the actual trustee on particular matters set out in the trust without becoming a trustee, particularly useful for matters concerning Shariah compliance.[33]

In the UAE, family businesses also have the option of setting up foundations in ADGM under ADGM Foundation Regulations 2017, in DIFC under Foundations Law No.3 of 2018 (DIFC Foundations Law) or alternatively, in Ras Al Khaimah under RAK ICC Foundations Regulations 2019. In order to address the problems associated with the lack of precedents in the DIFC Trust Law and DIFC Foundations Law, a request for interpretation was made by the DIFC Authority (DIFCA) and heard by the Court of Appeal, following which the Court of Appeal published its judgement (Judgement), thereby providing greater certainty on several specific areas and serving as guidance on the approach of the DIFC Courts.[34]

The judgement alludes to the concept of *waqf* (*plural: awqaf*), the Islamic analogue of the common law trust, as a structure for family businesses to organise their inheritance. A *waqf* traditionally describes a legal endowment of assets for religious or charitable causes with no intention of reclaiming said assets. A *mutawalli* (translated as, wealth manager) would be expected to preserve the property by protecting the terms of agreement, including decisions in relation to any additional income derived from the property.[35] A *waqf* is treated as irrevocable, remains in detention and is separated from the asset owner; traditionally considered exclusively for charitable purposes, some Islamic laws believe that family support counts as the same[36]. *Awqaf*

[27] Please see ADGM, "Guidance Note for Special Purpose Vehicles", March 2020, https://www.adgm.com/documents/setting-up/guidance/guidance-notes/adgm-ra-special-purpose-vehicles-guidance-note.pdf. The key feature of an SPV is its separate legal personality, enabling the isolation of financial and legal risk from the assets and liabilities of the SPV's shareholders or any of its sister companies.
[28] R. Catling, "Trusts in Family Business Structures", Al Tamimi, 2020, https://www.tamimi.com/law-update-articles/trusts-in-family-business-structures/.
[29] *Id.*
[30] A. Glover & J. Ellis, "Shifting Sands: Wealth Structuring Developments in the UAE", IFC Review, 2021, https://www.ifcreview.com/articles/2021/june/shifting-sands-wealth-structuring-developments-in-the-uae/.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] The Dubai International Financial Centre Authority [2020] DIFC CA 002, Court of Appeal - Judgements, 18th January 2021, https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/dubai-international-financial-centre-authority-2020-difc-ca-002.
[35] Pearl Initiative & Outer Temple Chamber, "Best Practices in Waqf Management", 7th April 2020, https://www.pearlinitiative.org/gva_event/webinar-best-practices-in-waqf-management/.
[36] *Id*.

structures may be preferred to a foundation or corporate structures, as the latter tends to be complicated to establish, inherently inflexible in comparison to a *waqf* and do not always guarantee a stable platform for next generation leadership.[37] There are statutory provisions governing *awqaf* in the Emirates of Sharjah[38] and Dubai[39], and at the UAE federal level[40].

Lastly, family offices in the UAE are privately held companies for management of wealth, assets and legal affairs of families. Single Family Offices (SFO) may be established in DIFC, Dubai Multi Commodities Centre (DMCC)[41] or ADGM. A DMCC SFO is a standard free zone LLC company structure with a specific licence to allow wealth, asset and legal affairs management of a single family and provide other administrational or concierge services related to that same family only; whether to a family member, family business, family entity (that is, a corporate structure) or family trust or foundation.[42] The DMCC SFO must be owned 100% by that same family[43]. In the ADGM, there is no single structure or regulation encompassing a family office; rather, the term refers to an umbrella of a variety of structures established to manage family wealth, including RSCs, and hence a bespoke solution is required in each case.

Under the DIFC Single Family Office Regulations (DIFC SFO Regulations), a SFO is defined as any corporate or partnership established within the DIFC which provides services only to a single family[44]. Further, defines a "Family Entity" or a "Family Business" as follows:

> "a body corporate or partnership controlled by a Single Family, meaning if any of the following, acting alone or together, could exercise at least 75% of the voting control, or are otherwise able to exercise direct or indirect control over the affairs of the Family Entity or a Family Business: (a) one or more Family Members, or (b) one or more Family Fiduciary Structures, or (c) one or more Family Entities, or (d) by a combination of any of them".[45]

1.2 Specific family business regulatory framework

There have been several legislative developments in the UAE in the direction of creating a bespoke framework aimed at promoting family businesses and wealth management. As referenced in the previous section, these include the introduction of trust laws, foundations and enactment of wills for non-Muslims in DIFC and ADGM, the issuance of *waqf* decrees in Sharjah and Dubai, a federal *waqf* law containing specific modern provisions which organise *awqaf* for family businesses, and the reduction of the free float requirement to 30% capital under the Federal Law No. 2 of 2015 on Commercial Companies in the UAE (2015 Commercial Companies Law), thereby encouraging family businesses to list on the local bourses.[46]

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 SFO Regulations, and as such, no specific corporate governance code or definitive family business law by which family businesses were mandated to abide. Instead, legislation governing a particular family business depended on its corporate structure, legal form and location of incorporation. However, the UAE authorities have committed to developing the legislative structure to better

[37] *Id*.
[38] Law No 8 of 2018 (Sharjah Endowments Law), replacing Law No 4 of 2011.
[39] Law No. 14 of 2017 Regulating Endowments and Gifts in the Emirate of Dubai, https://dlp.dubai.gov.ae/Legislation%20Reference/2017/Law%20No.%20(14)%20of%202017.html.
[40] UAE Federal Waqf Law No. 5 of 2018.
[41] Under the DMCC Company Regulations 2003.
[42] DMCC, "*Guidelines for Single Family Office Licence"*, Single_Family_Office_Guidelines.pdf (dmcc.ae).
[43] *Id.*, p. 1. A family constitutes a single family when it includes individuals who are direct descendants of a common parent or their spouses, which can go up to three preceding generations, including adopted children.
[44] A family constitutes a Single Family either where it comprises one individual or a group of individuals all of whom are the bloodline descendants of a common ancestor or their spouses (including widows and widowers, whether or not remarried), or subject to such other limitations or conditions otherwise agreed with the Registrar. Please see DIFC SFO Regulations, Article 2(3)(1), https://www.difc.ae/application/files/9516/1241/5836/Single_Family_Office_Regulations_2011.
[45] Section 2.4.5, DIFC SFO Regulations. Please see https://www.difc.ae/application/files/9516/1241/5836/Single_Family_Office_Regulations_2011.
[46] F. Hammadeh, "A legacy of resilience", FBCG, 2020, issue 96, p. 2, http://fbc-gulf.org/mediafiles/articles/doc-1611-2020_09_24_01_04_41.pdf.

organise the operations of family businesses in the UAE and to ensure their continuity over successive generations.[47]

A legal framework to regulate the collective ownership and administration of family property in Dubai, and facilitate its smooth and easy transmission among successive generations, was clearly formulated in UAE for the first time under Law No. 9 of 2020 Regulating Family Ownership in the Emirate of Dubai (Dubai Family Ownership Law). Family members, who are bounded by common ownership of movable or immovable property, including stocks and shares in commercial companies, civil companies and assets of a sole proprietorship with the exception of PJSCs[48], may opt to enter into a legally binding and notarized[49] family ownership contract (Family Ownership Contract). The Family Ownership Contract specifies the share of each partner in the family property and is initially valid for a period of fifteen years, further renewable for a similar term subject to the agreement of all the concerned members. The provisions of the Dubai Family Ownership Law regulate 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.

Abu Dhabi thereafter followed suit and implemented its own law regulating ownership of family businesses, Law No. 10 of 2021 on the Governance of Family Businesses in the Emirate of Abu Dhabi (Abu Dhabi Family Business Law)[50]. The Abu Dhabi Family Business Law defines a family business in terms of ownership of capital, as follows:

> "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."[51]

The Abu Dhabi Family Business Law provides that the family business ceases to be entitled to the capacity and benefits granted thereto by virtue of the ownership law in case new shareholders from outside the family own over forty percent of the shares. The owners, founders or family members who jointly own a family

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[47] The Ministry of Economy made a public announcement on 4th January, 2021 on the formation of a technical committee represented by FBCG and advisors to the prominent family companies, on a roadmap for family businesses including good governance. It was noted that this should be achieved by considering the nature of these businesses and the rights of family ownership and in accordance with the established international best practices. Please see https://wam.ae/en/details/1395302899481.
[48] Article 4, Scope of Application, Dubai Family Ownership Law.
[49] Under Article 6, Conditions for a Family Ownership Contract, Dubai Family Ownership Law, in order to be valid, the Family Ownership Contract shall be ratified by the notary public, in accordance with the rules and procedures provided for in Dubai Law No. 4 of 2013 on Notaries Public in the Emirate of Dubai.
[50] The Abu Dhabi Family Business Law was published in the Official Gazette of the Emirate of Abu Dhabi, Issue No. 9 dated 30th September 2021. Please see p. 7-13 of the Official Gazette, available at https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx. Based on feedback received from public officials, we understand that this law is currently being amended and redrafted.
[51] Article 3, Family Business, Abu Dhabi Family Business Law, p.9, https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx.

business established in any of the legal forms recognised under the 2015 Commercial Companies Law, may opt into the provisions of the Abu Dhabi Family Business Law[52].

Limited examples are found in international comparative law when defining family business or legislation specific to family businesses. A specialised study conducted on behalf of the European Commission[53] pointed to the absence of legislative frameworks for family businesses in Europe; for instance, in some countries, family businesses are mentioned in different regulations without clarification of what is to be understood by the term. By means of Act No. XLVII of 2016, the Parliament of Malta enacted Chapter 565, Family Business Act (Maltese Family Business Act), which as the first legislation of its kind, aimed to encourage the regulation of family businesses, their governance and the transfer of the family business from one generation to the next. The term family business is defined and several business models established in Malta qualify to register under the Maltese Family Business Act, as provided under Article 3:

> "(a) in the case of a **public limited liability company whose shares are listed** on a regulated market or traded on a multilateral trading facility, the majority of the shares including the rights are held, whether directly or indirectly, by at least two owners who are family members within the same family;
>
> (b) in the case of a **limited liability company** constituted in a manner other than that referred to in paragraph (a): (i) all the shares of the company are held, directly or indirectly, by at least two owners who are family members within the same family; and (ii) at least one family member is formally involved in the general governance, its proper administration and management of the company.
>
> Provided that shares held directly or indirectly by individuals who are not family members shall be disregarded for the purposes of this paragraph if their aggregate issued value does not exceed five per cent of the issued share capital of the company:
>
> Provided further that shares held directly or indirectly by employees who have been in continuous, full-time employment within the family business for over three years and who are not family members shall be disregarded for the purposes of this paragraph if their aggregate issued value does not exceed ten percent of the issued share capital of the company:
>
> Provided further that where any business assets are held on lease, the family members are the majority of the lessees in the lease agreement;
>
> (c) in the case of **partnerships** en nom collectif and partnerships en commandite: (i) the full capital contribution to the partnership shall have been made, directly or indirectly, by at least two owners who are family members within the same family having, directly or indirectly, the right to receive the majority of distributable profits; and (ii) at least one of whom holds the majority of the decision making rights [..]
>
> (d) in the case of a family business where all the shares or the interest are being **held by a trustee under trust** for the benefit of members of a family as beneficiaries, and which has been established by a written instrument and all the beneficiaries are owners and family members within the same family:
>
> Provided that other beneficiaries who are not family members within the same family business trust shall be disregarded for the purposes of this paragraph if they do not in aggregate benefit from more than five per cent of the family business [...]
>
> (e) in the case of a business carried out by family members in **a form of partnership other than as indicated in paragraph (c)**, the business and the assets of such business are owned and controlled, directly or indirectly, by at least two owners who are family members within the same family [...]; and
>
> (f) **any other business** as the Minister may prescribe."[54]

The Maltese Family Business Act contains a comprehensive definition of a family business, indicating specific conditions under which different legal forms may qualify to register as a family business. In relation to LLCs, at least one family member is required to be involved in the family business's governance, administration and

[52] Article 2, Scope of Implementation, Abu Dhabi Family Business Law, p. 8, https://www.abudhabi.gov.ae/-/media/sites/adgov/gazettes/2021/en/9english2021.ashx.
[53] I. Mandl, "Overview of Family Business Relevant Issues, Contract No. 30-CE-0164021/00-51, Final Report", Austrian Institute for SME Research & Turku School of Economic, 2007, p. 16.
[54] Article 3, Maltese Family Business Act, 2017, https://legislation.mt/eli/cap/565/mlt.

management for it to qualify as such. And the definition of a family business under the above laws does not apply any aspects of the involvement of a representative of the family in the governance or management of the business. The aspect of active involvement of a family member in the Maltese Family Business Act is consistent with the definition formulated by the European Commission, which provides that "*a firm, of any size, is a family business if [...] at least one representative of the family or kin is formally involved in the governance of the firm*"[55].

The definitions of family businesses[56] under the Dubai Family Ownership Law and Abu Dhabi Family Law revolve solely around ownership. These laws start with a standard, and straightforward definition for family based on lineage or affinity.[57] Under the Maltese Family Business Act, the qualification of a business for registration as a family business is conditional on the prerequisite that it has been actively trading or in operation without interruption for a minimum period of three consecutive calendar years.[58] There is no such requirement for a company to be operational for a stipulated minimum period of time, in order to be considered a family business under the Abu Dhabi Family Business Law.

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 (MOE) that seeks to institutionalise a "Family Business Register" to be established and supervised by the Department of Economic Development (DED) of the various emirates.

For purposes of the Maltese Family Business Act, a "family member" takes the meaning of the family business owner's spouse, ascendants, descendants in the direct line and their relative spouses, brothers or sisters and their descendants or as the relevant Maltese authorities may prescribe. The definition of a family is similar across both Abu Dhabi and Dubai's laws. Under Article 1 of the Abu Dhabi Family Business Law, "*the spouse and the blood relatives up to the fourth degree*" and almost a verbatim definition under Article 2 of the Dubai Family Ownership Law. The draft federal law lays out a similar term, "*relatives by lineage and affinity*". "Relatives by lineage" refer to relatives by consanguinity or an individual's direct descendants, such as children, grandchildren etc., and "relative by affinity" refers to the kinship relationship created or one that exists between two individuals as a result of marriage.

Further, as indicated in Article 6 of the New Commercial Companies Law, the MOE is expected to issue a resolution regulating the governance of companies, including the rules, controls and provisions to be observed[59]; the Board of Directors or the Managers of a company, as the case may be, would be responsible for applying the rules and standards of governance.

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[55] "Final Report of the Expert Group: Overview of Family Business, Relevant Issues: Research, Networks, Policy Measures and Existing Studies", November 2009, p. 10, https://ec.europa.eu/docsroom/documents/10388/attachments/1/translations. The definition is based on the one formulated by the Finnish Working Group on Family Entrepreneurship, which was set up by the Ministry of Trade and Industry of Finland in 2006.

[56] The definition of a family business under UAE laws is agnostic to shareholder nationality (i.e., Emirati versus non-Emirati). Despite the interplay of cultural sensibilities, the cosmopolitan demographic in the UAE has paved the way for the success of foreign businesses, including family businesses from the Gulf, the Middle East more broadly, India, the UK and elsewhere. The law does not distinguish between Emirati and non-Emirati (or non-Arab) family businesses and this article accordingly does not attempt to make the same distinction. However, it remains to be seen whether the amended Abu Dhabi Family Business Law or the upcoming federal law will seek to classify family businesses as purely Emirati businesses.

[57] As noted under A. Drake, "Understanding Family Business", Institute for Family Business, there has been no single, universal definition of family businesses in legal or public policy discourse. Family businesses have been defined in a variety of ways around three key pillars: ownership i.e., the family owns a majority of the voting shares or effectively controls the business, management i.e., one or more family members (or their spouses) are involved in the management of the business, and legacy i.e., more than one generation is, or will in future, become involved in the business. Arguably, the final pillar differentiates a family business from an owner-managed business, which is not necessarily passed down to the next generation.

[58] Article 10, Disqualification, Maltese Family Business Act, 2017, https://legislation.mt/eli/cap/565/mlt.

[59] See Article 5, Federal Decree-Law No. 32/2021 On Commercial Companies, p. 5, LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.

2. Succession among family businesses

As noted earlier, UAE family businesses account for 90% of the private sector. Succession and inheritance transitions particularly come to fore when a patriarch passes unexpectedly, without a succession plan in place. The death of Majid Al Futtaim in December 2021, left succession of his eponymous business to his ten heirs unresolved.[60] Recently, the UAE has also witnessed the passing of highly influential patriarchs of large family-owned UAE conglomerates, including Saif Al Ghurair, leader of the Al Ghurair Group in 2019 and Easa Saleh Al Gurg, Chairman of the Easa Saleh Al Gurg Group, one of UAE's most eminent family businesses with twenty-seven companies in its portfolio, in 2022. However, despite its significance, there is a low adoption and implementation of formal succession plans by UAE family businesses; only one-third of family firms in the UAE have a formal succession process, lower than 37% for other Arab peers.[61]

This section details the causes and repercussions of succession in subsection 2.1, introduces some of the solutions to address succession in 2.2 and outlines factors to consider regarding executive succession planning in 2.3.

2.1 Causes of succession issues and family disputes

In the absence of consensus, the UAE's courts are left to distribute the family business' financial assets. Else, family disputes may arise between one or multiple members of a family business over the ownership and/or management and controls rights of the business. Such instances include the question of valuation of a given 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 that were 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 are perceived as unfair.[62]

Compared to litigation, alternative dispute resolution mechanisms offer greater flexibility, confidentiality, and ease of cross-border enforcement[63]. However, in the UAE, courts, mediation and arbitration centres do not generally differentiate between family business disputes and other commercial disputes.[64] This gap is somewhat addressed under Article 23 of the Dubai Family Ownership Law, which provides that all disputes arising from the Family Ownership Contract shall be heard by a special judicial committee (such as in the case of Majid Al Futtaim, wherein ten heirs have claim to the USD 6.1bn estate[65]), composed of financial and legal experts, and with exclusive competence in Dubai to consider such disputes[66]. This committee shall be formed by a decision of His Highness the Ruler of Dubai; the constitution decision would determine the method of selection of its members, the specification of its competences, the binding force of its decisions and their

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[60] Financial Times, "Succession dramas add impetus to UAE's draft family business law", March 2022.

[61] R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020. Basco, Omari & Abouchkaier attribute this failure to anticipate succession to an informal relationship between the family and the business in UAE family firms. Another estimate by Michael Chahine, CEO of NexGen Desert Green and a subject matter expert, is even lower at 15-20% of family businesses that are planning their succession. *'UAE research centre to help family businesses prepare for the next generation'*, The National, March 21, 2017.

[62] 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/.

[63] *"Arbitration awards are often more portable than court judgments: they can be employed in a greater number of foreign jurisdictions for enforcement against assets, and are normally simpler, faster and cheaper to process."*. Please see "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United", FBCG, May 2020, p. 9.

[64] 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. Further, a mandatory arbitration provision may also be considered as an alternative to litigation if mediation fails to conclude the dispute.

[65] S. Kerr, "Succession dramas add impetus to UAE's draft family business law", Financial Times, 1st March 2022, https://www.ft.com/content/d8e60a80-559c-4558-8a15-a78fc880800d. Also see "Billionaire's abrupt death leaves Dubai ruler to untangle messy inheritance", Business Standard, 22nd April 2022, https://www.business-standard.com/article/international/billionaire-s-abrupt-death-leaves-dubai-ruler-to-untangle-messy-inheritance-122042200019_1.html.

[66] See Dubai Law No. 9/2020 Regulating Family Ownership in the Emirate of Dubai Article 23 - Settlement of Disputes, *"All disputes arising from the Family Ownership Contract shall be heard by the Committee which shall be formed, by decision of the Ruler, of members from among experts and specialists in the legal and financial fields and in family business management. The Committee shall have exclusive competence in the Emirate to consider such disputes. Its constitution decision shall determine the method of selection of its members, the specification of its competences, the binding force of its decisions and their implementation method."*, p. 6.

implementation method. In fact, a majority of family businesses in the UAE, particularly in Dubai, are already believed to be dealt with either directly by the Ruler's Court or through a mediator or arbitrator appointed by the Ruler's Court.[67]

In addition to new laws to cater to family disputes, free zones in the UAE are enhancing dispute resolution institutions for family businesses. In Dubai, the Dubai Courts' Centre for the Amicable Settlement of Disputes, the Dubai Chamber of Commerce and Industry and the Dubai International Arbitration Centre are proposing an alternative dispute resolution (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. In Abu Dhabi, ADGM Courts are developing tailored mediation services for 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.[68]

2.2 What is the range of options to address succession?

Different strategic options a family business may consider to minimise the disruption and anxiety caused by power transmission. Succession planning, specifically executive succession which will be the focus of this article, via a clearly defined corporate governance mechanism, not only facilitates the transmission of management from one generation in a progressive and non-disruptive manner but also ensures the systematic development of talent within the company[69]. A family business in transition to multiple owners may also consider selling parts of its group holding, an investment by a sovereign wealth fund, and a public listing via an initial public offering (IPO)[70]. (Annex, Figure 2). This article focuses on succession planning.

2.3 Factors for succession planning

Succession planning is not a straightforward exercise. At the *level of the family business*, shareholding may be divided into several sections, the founder may have a tendency to hold on to the business, there might be a mindset clash between generations, or the family business may not have full control over apportioning its business due to compliance with the Islamic rules of Shariah.[71]

Further, the UAE's legal framework does not enable institutionalisation of corporate governance within family businesses. First, the role and composition of the Board of Directors is not defined for any form of business other than publicly listed companies, a category under which few UAE family businesses fall. Moreover, current legal requirements do not support the formation of a high quality Board of Directors or mandate certain stringent characteristics of the Board such as UAE citizenship.[72] Finally, there are issues around the framing of the laws, including definitional issues. For instance, the Arabic term *majlis 'iidara* is used to refer to 'Manager' and 'Director' often interchangeably in the New Commercial Companies Law.[73] Interpretation might also be a concern as there are no official translations of several UAE federal legislation from Arabic into English, resulting in multiple unofficial translations for non-Arabic speaking advisors or practitioners to resort to.

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[67] P. Smith, "Family Business Disputes in the GCC: A Snapshot", Al Tamimi, 2019, https://www.tamimi.com/law-update-articles/family-business-disputes-in-the-gcc-a-snapshot/.

[68] "Dispute Resolution for Family Businesses in the GCC: Keeping the Family United", FBCG, May 2020, p. 10.

[69] "Board Best Practices in the Middle East", Hawkamah and Diligent, December 2019; https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.

[70] 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 and will be elaborated upon in a separate public policy paper. Options of divestment, investment by a sovereign wealth fund (SWF), and IPO were also identified for Majid Al Futtaim Holding, a prominent Dubai family business that controls USD 1.6tn in assets. (*'Billionaire's abrupt death leaves Dubai ruler to untangle messy inheritance'*, Business Standard, 22 April 2022).

[71] The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.

[72] SCA Code, Chapter 2, Article (6) Board Formation, *"[...] 4. The Chairman and the majority of the Board must hold the* ***nationality of the State****."*

[73] O. Khan & K. Hussain, "Managers and directors in the spotlight!", Al Tamimi, May 2020, https://www.tamimi.com/law-update-articles/managers-and-directors-in-the-spotlight/.

3. Corporate governance to address succession in the UAE

The corporate scandals[74] that erupted in the early 2000s in the US and the UK prompted policymakers and legislators to create codes to improve ethical standards in business.[75] In the US, this resulted in the Sarbanes-Oxley Act to improve auditing and disclosure among public companies[76], and in the UK, the Cadbury Report, which proposed a 'Code of Best Practices' for companies[77], and the Smith Report, which proposed changes to provisions related to the audit committee in the then Combined Code[78]. The Cadbury Report defined corporate governance as the "system by which companies are directed and controlled"[79]. This section investigates corporate governance, i.e., setting up rules, policies, and procedures as the key solution to address the complexity of growing family businesses. Good governance not only helps foster transparency, accountability, and professionalism in the family business, but also helps create long-term family harmony by virtue of the process behind creating governance mechanisms.

Sub section 3.1 identifies the types of governance family businesses must take into account, while 3.2 peers into corporate governance regulations and soft law guidelines promulgating corporate governance, and explores how these might apply to bolster succession planning.

3.1 Types and components of governance for family businesses

Among various types of governance[80], *family governance* and *corporate governance* are the most relevant to address succession. Family governance refers to rules, policies, and processes that regulate the relationship of family owners with the family business and its wealth. There is a growing interest to formalise governance procedures by implementing a 'family charter' or 'family constitution', ideally one which makes reference to the Articles of Association or Memorandum of Association. The family charter (Annex, Figure 3) is a non-legally-binding document that sets out the vision, mission and values of the family business. Governing bodies include (i) the 'Family Assembly', which is the highest governing authority of the family, includes all family members and typically meets 1-2 times each year, and (ii) 'Family Council' which comprises a limited number of family members, meets 2-6 times each year, develops the family charter and provides a platform for conflict resolution[81]. Corporate governance encompasses rules, policies and processes that regulate the family business itself to balance stakeholder interests and is primarily undertaken by an informal 'Board of Advisors' composed of trusted advisors of the family and / or by a formal Board of Directors.

3.2 Corporate governance framework and guidelines in the UAE

In the UAE, corporate governance standards are included in (i) company law, namely the New Commercial Companies Law or where relevant, the legal regime of the selected free zone, as introduced in Section 1 of this article, and (ii) securities law, namely Chairman of Securities and Commodities Authority (SCA) Board Decision No. (03 R.M.) of 2020 concerning adopting the Corporate Governance Guide for Public Joint Stock Companies (SCA Code)[82] (Annex, Figure 4). The UAE's legal instruments are in line with the jurisdictions of the Organisation of Economic Cooperation and Development (OECD), most of which address corporate governance by using various combinations of legal and regulatory instruments on the one hand, and national codes or principles, following a "comply or explain" approach[83], on the other hand. The UAE does not currently have a national corporate governance code. However, there are voluntary corporate governance

[74] These scandals include Enron, WorldCom, Tyco, Adelphia, HealthSouth.
[75] E. Ravina, & P. Sapienza, "What Do Independent Directors Know?: Evidence from their Trading", The Review of Financial Studies, 962 (2010), p. 962.
[76] See Act, Sarbanes-Oxley. "Sarbanes-Oxley act." *Washington DC* (2002).
[77] See "The Financial Aspects of Corporate Governance", Cadbury Report, the Cadbury Committee, 1992.
[78] See R. Smith, "Audit Committees: Combined Code Guidance", London: Financial Reporting Council, 2003.
[79] See "The Financial Aspects of Corporate Governance", Cadbury Report, the Cadbury Committee, 1992, p. 14.
[80] Family businesses must consider various types of governance, including family governance, ownership governance, corporate governance, wealth governance, and public engagement strategies to manage growth and address challenges.
[81] See the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBGC, 2021.
[82] See the SCA Code, published on 27 February 2020 and in effect from 28 April 2020, repealed the previous 2016 CG Rules (Chairman of SCA Board Decision No. (7 R.M) of 2016 concerning the Standards of Institutional Discipline and Governance of Public Shareholding Companies).
[83] The vast majority of jurisdictions with national corporate governance codes establish these codes as voluntary recommendations coupled with mandatory disclosure of whether they follow them on a "comply or explain" basis. See OECD Corporate Governance Factbook 2021, OECD, p. 33.

codes developed by various corporate governance centres, think tanks and institutes for directors in the UAE, including Dubai SME (an agency of the Dubai Department of Economic Development), the Hawkamah Institute for Corporate Governance (Hawkamah), the Abu Dhabi Corporate Governance Centre, FBCG, Board of Directors Institute GCC (BDI GCC), Pearl Initiative, and the Tharawat Family Business Forum, to name a few.

3.2.1 Corporate governance under the New Commercial Companies Law

The New Commercial Companies Law sets forth the default option concerning the specific corporate structure adopted by the family business, whose detailed framework is determined by the articles and bylaws of the business. The New Commercial Companies Law amended a few key aspects of corporate governance for LLCs and PJSCs. For instance, for LLCs, it extended the term of the Board of Directors to a period of six months in the event of the expiration of the Board's term and in case a new Board of Directors is not appointed.[84] It also increased the number of shareholders obligating LLCs to appoint a "Supervisory Board" from seven to fifteen[85]. The New Commercial Companies Law also amended certain corporate governance provisions related to PJSCs. For example, in the event of a vacancy in the Board of Directors, a replacement director must be appointed within thirty calendar days for the remaining term of the former director. A director 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.[86] The New Commercial Companies Law places the responsibility for compliance on the Board of Directors of a company and to ensure compliance, levies penalties of up to AED 10 million on a company, its Chairman, Board Members, managers and auditors for contravention of corporate governance rules issued under this law[87]. The corporate governance of DIFC companies is monitored under the DIFC law No.2 of 2009 and that of ADGM companies under the regulatory regime of Companies Regulation and Commercial Licensing Regulation of Abu Dhabi Global Market.

3.2.2 Corporate governance under the SCA Code

Corporate governance in the UAE is primarily focused on publicly listed companies, under the SCA Code, which 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 local public shareholding companies listed on financial markets regulated by SCA (the Abu Dhabi Securities Exchange or the Dubai Financial Market[88]). Additionally, banks and financial institutions are subjected to separate rules issued by the CBUAE.

3.2.3 Corporate governance under "soft law" codes and principles

The Corporate Governance Code for Small and Medium Enterprises (Dubai SME Code), developed by Dubai SME and Hawkamah, and the GCC Corporate Governance Code (FBCG Code) formulated by the FBCG layout guidelines that family businesses may choose to adopt. Dubai SME Code is a voluntary framework that encompasses recommendations and best practices, applicable to all small and medium enterprises in Dubai, regardless of their size, management model, maturity, ownership structure, corporate governance practices and sponsorship requirements.[89] The FBCG Code codifies a set of best practices in family business governance, based on best practices globally and local wisdom, and covers five aspects of family business governance, namely, family governance, ownership governance, wealth governance, public engagement and

[84] O. Khan, "Highlights of Federal Decree No. 32 of 2021 concerning Commercial Companies repealing Federal Decree No.2 of 2015 concerning Commercial Companies and its amendments", Al Tamimi, 7th December 2021, https://www.tamimi.com/news/highlights-of-federal-decree-no-32-of-2021-concerning-commercial-companies-repealing-federal-decree-no-2-of-2015-concerning-commercial-companies-and-its-amendments/.
[85] Id.
[86] O. Momany, A. Jarrar, R. Eid & T. Shomar, "UAE: New Commercial Companies Law: What You Need to Know", Baker McKenzie, 6th January 2022, https://me-insights.bakermckenzie.com/2022/01/06/uae-new-commercial-companies-law-what-you-need-to-know/.
[87] Article 7, Breach of Corporate Governance Rules, New Commercial Companies Law. Please see LexisNexis translation, https://www.lexismiddleeast.com/law/UnitedArabEmirates/DecreeLaw_32_2021.
[88] It might be noted that companies listed on NASDAQ Dubai are regulated by the Dubai Financial Services Authority (DFSA) under DIFC Regulatory Law.
[89] 'The Corporate Governance Code for Small and Medium Enterprises', Dubai SME.

most importantly, corporate governance.[90] The FBCG Code is distributed as a handbook and includes a checklist for family businesses to refer to (Annex, Figure 5).

It is worthwhile to note that in KSA, the Saudi Arabian Ministry of Commerce and Investment (MoCI) issued a Guiding Charter for Family Owned Businesses (KSA Charter) on 02-08-1439H corresponding to 18-04-2018G.[91] The KSA Charter is intended for family businesses that are incorporated as closed joint stock companies in KSA while those listed on KSA's stock exchange (*Tadawul*) as open joint stock companies are subject to the Capital Market Authority's corporate governance regulations. A key objective of the KSA Charter is to advocate family businesses to put succession plans into place, for both ownership and management, to ensure smooth transition.[92]

4. The Board of Directors: The fundamental corporate governance solution

The Board of Directors is the primary mechanism and custodian of corporate governance. The Cadbury Report stated that the Boards of Directors are responsible for governance of their companies.[93]

The failure of the Board of Directors to exercise appropriate corporate governance over a family business and its subsidiaries could result in substantial financial and reputational risk for publicly listed family businesses. In March 2010, the Dubai Financial Services Authority (DFSA), DIFC's financial regulator, announced remedial action and sanctions against Damas International Limited (Damas), one of the few publicly listed family businesses in the UAE.[94] DFSA's undertaking[95] included the dismissal of its Board of Directors and a $7m financial penalty against Damas and its owners, namely the Abdullah brothers, who made unauthorised transactions of an estimated $96.6m of cash and nearly two tonnes of gold valued at $68m from Damas without shareholder approval[96].

This section investigates the mandate for the Board of Directors with respect to the legal responsibility of overseeing succession planning. (Annex, Figure 6). Subsection 4.1 extracts the legal backing for the Board of Directors to address succession, comparing the stipulations within the SCA Code with the principles, guidelines and codes of other jurisdictions. Once it is established that the Board is indeed entrusted with this particular mandate, subsection 4.2 looks at the legal requirements for companies to set-up and ensure an operational Board of Directors. Finally, subsection 4.3 delves into the composition of the Board of Directors, and investigates the factors most affecting the effectiveness of the Board of Directors, such as, its structure (unitary versus two-tier), the Nomination Committee, requirements for Independent Directors and last but not least, gender diversity on the Board of Directors.

4.1 Mandate of the Board of Directors to oversee succession

Under the UAE's laws, and insofar as international and national codes of corporate governance prescribe, the overarching role of the Board of Directors is to approve the company strategy, oversee management, and ensure that a robust corporate governance framework is in place.[97] The second function, that is, executive management oversight entails monitoring executive management to ensure that the company strategy is implemented and Key Performance Indicators (KPIs) are met, electing and dismissing or replacing the CEO,

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[90] The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, Family Business Gulf Council (FBGC), 2021. p. 11.

[91] The Guiding Charter for Saudi Family Businesses, Ministry of Commerce and Investment, KSA; https://mci.gov.sa/ar/Regulations/Pages/details.aspx?lawId=28c27281-c41a-44f4-aa47-acb0013c4d5b

[92] M. Chehab, "Guiding Charter for Family Owned Businesses in Saudi Arabia", Al Tamimi, July 2018, https://www.tamimi.com/law-update-articles/guiding-charter-for-family-owned-businesses-in-saudi-arabia/.

[93] 2.5.'The Financial Aspects of Corporate Governance' (Cadbury Report), the Cadbury Committee, 1992, p.14.

[94] "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.

[95] See 'Enforceable Undertaking, Article 89 Regulatory Law 2004 (DIFC Law No. 1 of 2004), DFSA, https://www.dfsa.ae/application/files/8616/3532/1377/261021_Final_DamasInternationalLimited.pdf.

[96] C. Ferris-Lay, "The rise and fall of Damas", Arabian Business, 17th May 2011, https://www.arabianbusiness.com/industries/retail/the-rise-fall-of-damas-399541.

[97] "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.

electing other key executives or setting out guidance for the CEO to elect other key executives, and finally, succession planning. A critical function of the Board of Directors is setting a succession policy and overseeing succession planning by management, reflected in the principles of corporate governance and national corporate governance codes of various jurisdictions including KSA, the OECD, the UK (UK Corporate Governance Code)[98], and France (Afep-Medef)[99].

Pursuant to Article 25 on oversight over executive management in the KSA Corporate Governance Code, *"the Board shall form the Executive Management of the Company, regulate its operating procedures, monitor and oversee it and ensure that it performs the duties assigned to it, and to achieve this, the Board shall: [...] develop succession plans for the management of the Company."*[100]

According to the OECD Principles of Corporate Governance (OECD Principles), Part (VI) on The responsibilities of the Board, D(3), *"The Board of Directors should fulfil certain key functions, including] Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning."*[101]

The UK Corporate Governance Code, states in Section 3, Principle J,

> "Appointments to the board should be subject to a formal, rigorous and transparent procedure, and an **effective succession plan should be maintained for board and senior management**. Both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths." The UK Corporate Governance Code clearly defines executive management as "executive committee or the first layer of management below board level, including the company secretary".[102]

The Afep-Medef (French Code) identifies the crucial role of the Nomination Committee in succession planning. Section 17 states that "*the **nominations committee plays an essential role in shaping the future of the company**, as it is responsible for preparing the future membership of the leadership bodies*."

The French Code also splits the duties of this Committee by Board succession (selection of new Directors) and executive succession (succession planning for company officers). Under Section 17(2).2, it identifies succession planning for company officers as one of the Committee's key tasks but also permits the Board to create a separate ad-hoc subcommittee to carry out this function. "*The nominations committee (or an ad hoc committee) should **design a plan for replacement of company officers**. This is one of the committee's most important tasks, even though it can, if necessary, be entrusted by the Board to an ad hoc committee [...]*"[103]

4.2 Set-up and existence of the Board of Directors in the UAE

For publicly listed companies, the SCA Code lays out the requirements and terms of establishing a Board of Directors and requires the set-up of a Board in accordance with the Articles of Association (AoA) as follows:

> "1. The **Company shall be managed by a Board**. Its Articles of Association shall determine the method of forming that Board, the number of its members, and its membership terms. 2. The **general assembly elects the Board members** by secret cumulative voting. 3. If the Government holds (5%) or more of the Company capital, it may appoint its representatives in the Board pro rata to such

[98] Some of the largest UAE family businesses such as Majid Al Futtaim have voluntarily adopted the UK Corporate Governance Code. See MAF Investor Presentation, February 2020, p. 32.
[99] See AFEP-MEDEF Code; https://www.alstom.com/sites/alstom.com/files/2020/03/27/Afep-Medef%20Code%20VUK%20Jan.%202020.pdf.
[100] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, KSA, p. 22, https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.
[101] G20/ OECD Principles of Corporate Governance, OECD, 2015, p. 47.
[102] See UK Corporate Governance Code, Financial Reporting Council, July 2018, p. 8.
[103] 17.2.2, AFEP-MEDEF Code, p. 14, https://www.alstom.com/sites/alstom.com/files/2020/03/27/Afep-Medef%20Code%20VUK%20Jan.%202020.pdf .

> percentage from the number of Board members. At least one member shall be appointed if the percentage required for appointing a member exceeds that percentage. The Government shall forfeit its right in voting in the percentage of its appointment, however, if it holds any balanced percentage not qualifying it to appoint another member, it may use that percentage in voting…"[104]

However, the Board of Directors is still not a commonly used corporate governance mechanism among private UAE family businesses.[105] Less than half (43%) of the sampled UAE family businesses have a formal Board of Directors - even though this percentage is higher than the rest of the world (40%)[106].

4.3 Factors impacting the effectiveness of the Board of Directors

4.3.1 Structure of the Board of Directors

The UAE permits a two-tier board for publicly listed companies, similar to the German system for listed companies, in addition to a unitary board. Under Articles 54-57, the SCA Code[107] 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"), i.e., (i) a **Control Committee ('CC')** i.e., composed of Non-Executive Members responsible for supervising the Executive Committee and appointing or dismissing its members; and (ii) 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 on Cooperation between the Control Committee (CC) and the Executive Committee (EC)); 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.

4.3.2 Nomination and Remuneration Committee (NRC)

All publicly listed companies in the UAE are required to establish two Permanent Committees[108], that are, (i) a NRC which is responsible for preparing policies relating to remuneration, benefits, and incentives of the Board and company employees, and (ii) an Audit Committee (AC) which is responsible for reviewing the financial and audit policies of the company and working closely with the external auditor to ensure compliance with the applicable law.[109] Each committee must be composed of at least three Non-Executive Board members, two of whom must be independent, and must be chaired by an independent Board member.

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[104] Chapter 2, Article 6 on Board Formation, SCA Code. Also see Article 54 on Dual Governance Structure, SCA Code.

[105] R. Basco, Y. Omari & L. Abouchkaier, "Family Business Ecosystem in the UAE: Survey Report", 2020.

[106] Family Business Ecosystem in the UAE, 2020.

[107] See SCA Code, Article 54 on Dual Governance Structure: *"[...] 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."*

[108] In addition, the SCA code encourages the establishment of two non-mandatory committees, a Risk Committee to set out and implement the company's risk management strategy and a Technology Committee to review, approve and drive the company's technology strategy.

[109] See SCA Code, Article 58 on Permanent Committees: *"1. The Board shall form **Permanent Committees** that subordinate directly thereto. 2. The Permanent Committees are the **Nomination and Remuneration Committee** and the **Audit Committee**. These Committees are composed of at least three non-executive board members, provided that at least two members of the Committee, whatever its number, of the independent members and that the Committee is chaired by an independent member. The Board Chairman may not be a member of any of such committees. The Board shall notify non-executive members in committees concerning with the functions that may result in conflicts of interest, such as ensuring the soundness of financial and non-financial reports, determining the remuneration of those members, and reviewing transactions with stakeholders. 3. Committees shall be formed in accordance with procedures established by the Board [...]".*

NRC is the permanent committee entrusted with the succession of the Board of Directors and company executives. The responsibilities of the NRC include but are not limited to developing and implementing a membership policy for Directors and executives, ensuring the independence of independent directors on an ongoing basis, and preparing and reviewing remuneration for Directors and executives. The SCA Code, under Article 54, explicitly bestows the responsibility of identifying the company's competency needs at the level of senior executive management as well as the basis of selecting senior executive management. In relation to the NRC, the SCA Code provides that:

> "The Board shall form a permanent committee called the Nomination and Reward Committee. The Committee shall hold its meetings once during the year or whenever the need arises, with the following tasks:
>
> 1. Develop a policy to **apply for membership of the Board and executive administration**, aiming to take into account gender diversity within the formation and encouraging women through incentive and training programs and benefits, and to provide [SCA] with a copy of such policy and any amendments thereto [...]
>
> 11. **Identify the company needs of competencies at the level of senior executive management and staff and the basis of selecting them**."[110]

This obligation in the UAE is in line with the principles and guidelines of other jurisdictions, such as KSA as reflected in the KSA Corporate Governance Code, and the UK, as reflected in the UK Corporate Governance Code and the Financial Reporting Council's Guidance on Board Effectiveness.

The KSA Corporate Governance Code, states under Chapter 4, Article 64 that "*the Company's Board shall, by resolution thereof, form a committee to be named the "nomination committee". Members of the committee shall not be Executive Directors, provided that there shall be at least one Independent Director among them.*"[111]

Further, under Article 65, the KSA Corporate Governance Code clearly identifies multiple tasks within succession planning as competencies of the Nomination Committee:

> "The competences of the nomination committee shall include the following:
>
> 1- suggesting clear policies and standards for membership of the Board and the Executive
>
> Management; [...]
>
> 3- preparing a **description of the capabilities and qualifications required for membership of** the Board and **Executive Management positions**; [...]
>
> 5- annually reviewing the **skills and expertise required of** the Board members and the
>
> **Executive Management**;
>
> 6- reviewing the structure of the Board and the Executive Management and providing
>
> recommendations regarding changes that may be made to such structure; [...]
>
> 8- providing **job descriptions for** the Executive, Non-Executive and Independent Directors
>
> and the **Senior Executive Management**;
>
> 9- **setting procedures to be followed if the position of** a member of the Board or **a Senior**

[110] See SCA Code, Article (59) p. 41.
[111] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, Kingdom of Saudi Arabia; p. 37 https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.

> **Executive becomes vacant** [...]"[112]

The UK Corporate Governance Code, states under Provision 17:

> "The **board should establish a nomination committee to lead the process for appointments**, ensure plans are in place for orderly succession to both the board and senior management positions, and oversee the development of a diverse pipeline for succession. A majority of members of the committee should be independent non-executive directors. The chair of the board should not chair the committee when it is dealing with the appointment of their successor."[113]

The UK Guidance on Board Effectiveness further reiterates the role of the NRC in taking into consideration diversity and inclusion aspects when developing the executive pipeline. It states in Chapter (3) Composition, Succession and Evaluation, Role of the Nomination Committee:

> "89. Developing a more **diverse executive pipeline** is vital to increasing levels of diversity amongst those in senior positions. Improving diversity at each level of the company is important if more diversity at senior levels is to become a reality. Greater transparency about the make-up of the workforce could support this. This might cover a range of different aspects of diversity, including age, disability, ethnicity, education and social background, as well as gender."[114]

The same Guidance also recommends considering succession planning along different time horizons, for example, contingency planning for sudden departures, medium-term planning to ensure the orderly replacement of senior executives, and long-term planning. The Guidance also recommends, under 101, formalising the succession plan in writing, *"Putting the succession plan in writing can help ensure it is followed through. Succession plans can also help to increase diversity in […] the executive pipeline."*[115]

4.3.3 Independent directors

The SCA Code requires that the Chairman of publicly listed companies be independent (Chapter (2) Article 9, Clause (5) on Board Formation).

> "5. The Articles of Association shall determine Executive Board members, Non-Executive Board members and Independent Board members; provided that the majority **of Board members shall be non-executive Independent Board members**. Majority of Board members shall be Non-Executive Board members who shall have 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 shall be taken into consideration that a Board member shall be able to dedicate adequate time and effort to his/her role and that such role is not in conflict with his/her other interests."[116]

While these independence requirements apply exclusively to publicly listed companies in the UAE, soft law guidelines, such as those promulgated by the FBCG and Hawkamah, also advocate for independence within the Board of Directors of family businesses. The GCC Corporate Governance Code promoted by the FBCG recommends a Board of Directors 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."[117] It also outlines two alternatives: one being the Board of Directors 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 independence of the Board of Directors that oversee executive management is a common theme in corporate governance guidelines such as the Sarbanes-Oxley Act and the Cadbury Report (Annex, Figure 7), developed in the West in response to corporate governance scandals.[118] The OECD noted that despite

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[112] Id.
[113] See UK Corporate Governance Code, Financial Reporting Council, July 2018, p. 8.
[114] See UK Guidance on Board Effectiveness, Financial Reporting Council, July 2018, p. 24.
[115] See UK Guidance on Board Effectiveness, Financial Reporting Council, July 2018, p. 26.
[116] See SCA Code, Article 9 (5) on Controls of Nomination for Board Membership, p. 9.
[117] See the GCC Corporate Governance Code, Governance Guidelines for Family Businesses, Family Business Gulf Council (FBGC), 2021, p. 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."*
[118] E. Ravina, & P. Sapienza, "What Do Independent Directors Know?: Evidence from their Trading". 23(3), The Review of Financial Studies, 962, 2010, p. 962.

differences in the structure of the Board of Directors, most jurisdictions introduced a requirement or recommendation on the minimum number or ratio of independent directors.[119] The most prevalent voluntary standard is for the Board of Directors to be composed of at least fifty (50) percent independent directors (binding requirement of at least fifty percent or more independent directors in countries such as the United States, India, Hungary, South Africa and Korea) while at least 30% of the board is subjected to legal requirements for independence (including KSA).[120] (Annex., Figure 8)

4.4.4 Nationality of directors

The SCA Code, under Chapter 2, Article 6 on Board Formation[121], requires that the Chairman and majority of Board members for publicly listed companies be UAE nationals. It is worthwhile to note this provision is unique to the UAE and that no such provisions related to the nationality of the Board of Directors were identified in the comparative law assessed, including that of its GCC peer, KSA.[122]

4.4.5 Gender diversity and the case for female directors

Until 2021, the SCA Code (Article 9 (Clause 3) on Controls of Nomination for Board Membership) required publicly listed companies to have at least twenty (20) percent of Board membership[123]. However, pursuant to an amendment (Chairman of SCA Decision No. (08 /R.M.) of 2021 concerning Amendment to the Joint Stock Companies Governance Guide) issued on March 28, 2021, the female representation requirement on Boards of PJSCs was revised to one female member on the Board of Directors, 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."[124]

There is a gap between the UAE and international best standards, particularly in the UK and the European Union (EU). European benchmarks have mandatory female quota ranging from one-third in countries including the UK, Belgium, Greece, Italy and Portugal[125] to 40% of Directors on the Board in countries such as France[126], Norway, Denmark, Sweden and Iceland[127], for corporate Boards. In June 2022, the EU agreed on a Directive to ensure women have 40% of seats among non-executive directors and 33% among all directors on the Board of Directors of EU companies listed on EU stock exchanges[128]. The new measures shall be enforced starting June 30, 2026, and apply to companies with 250 or more employees. The EU Directive 2012/0299 (COD), Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (EU Directive on Public Companies), originally proposed in 2021, states as following:

> "1. Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by

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[119] See OECD Corporate Governance Factbook 2021, OECD, p. 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.
[120] *Id.*
[121] *4. The Chairman and the majority of the Board must hold the **nationality of the State**."*
[122] Corporate Governance Regulations (English Translation of the Official Arabic Text), Capital Market Authority, Kingdom of Saudi Arabia, p. 17, https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CGRegulations_en.pdf.
[123] *"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."*
[124] Article 9, SCA Code.
[125] The Corporate Governance Codes of Belgium, Greece, Italy, Portugal and the UK set a quota of 33% for women Directors on Boards.
[126] Law n°2011-103 of January 27, 2011 on balanced representation of men and women on boards of directors and supervisory boards and on gender equality in the workplace. Please see https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023487662.
[127] "Board Best Practices in the Middle East", Hawkamah & Diligent, December 2019; p. 21, https://www.hawkamah.org/uploads/reports/Digital_Hawkamah_Board%20Best%20Practices_Report_12012020.pdf.
[128] On 7th 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 underrepresented sex among non-executive directors and 33% among all directors, for EU companies listed on the EU stock exchanges.

applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.

2. The number of non-executive director positions necessary to meet the objective laid down in paragraph 1 shall be the number closest to the proportion of 40 per cent, but not exceeding 49 per cent…"[129]

Conclusion and recommendations

The definition of corporate governance in the UAE's laws is in line with international standards.[130] The OECD defined corporate governance as: *"corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined"*.

A careful examination of UAE's laws in comparison with international standards is a "hard law" approach to regulate the Board of Directors via statutory requirements, increasing a quota for female Directors by up to 30%. The SCA Code for public companies sets out Independence requirements in line with international practices, such as in the UK, which requires that independent non-executive directors constitute at least half of the Board[131]. The UAE can push the independence agenda among family businesses through education and awareness initiatives as well as encourage family businesses to clearly define independence requirements, ideally within the family charter. The optimal composition of the Board of Directors in a 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. The OECD noted that some jurisdictions link the independence requirement of the Board of Directors with the ownership structure of the company.[132].

Given the private form of the majority of family businesses, one recommendation also propagated by the FBCG is for governments to make family charters legally binding via statutory presumption in favour of such documents being binding on their signatories.[133] Establishing a family charter with clearly defined principles and policies that the family and its business agree to subscribe to and clarifying the roles and function of the shareholders, the Board, management and employees, will help alleviate risk from misunderstandings.[134]

As the UAE is allegedly developing its own non-binding national corporate governance code, it might also be instructive to note a few takeaways from international standards, such as the UK Corporate Governance Code and the Deutscher Corporate Governance Kodex (German Corporate Governance Code), which describes legal regulations for the management and supervision of German listed companies. First, the "comply or explain" principle, which was first introduced under the Cadbury Report may be instructive. The German Corporate Governance Code also distinguishes between recommendations (indicated in the text by the use of the word "shall") and suggestions (indicated in the text by the use of the word "should"). Neither is mandatory; however, deviation from a recommendation has to be explained and disclosed with the annual declaration of conformity (comply or explain) while companies may depart from the suggestions without disclosure. The UAE may consider adopting a similar approach, through a mix of mandatory guidelines, departure from which must be explained and "suggestions" which are voluntary and allow companies flexibility to consider their industry-specific or business-specific characteristics when such departure is in the best interests of the business and its

[129] Article 4, Objectives with regard to non-executive directors. Please see https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0614&from=ES.

[130] The European Central Bank defines corporate governance as the *"procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making.";* European Central Bank, 2004, Annual Report: 2004, ECB, Frankfurt, Glossary.

[131] 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**."*

[132] OECD Corporate Governance Factbook 2021, OECD, p. 141, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

[133] "Dispute Resolution for Family Businesses in the GCC: Keeping the family united", FBCG, May 2020.

[134] J. Bladen, "Top 10 CG Recommendations", Hawkamah Journal.

shareholders. Second, the UAE may consider setting out a regular review and necessary revision of such a national corporate governance code in consultation with relevant stakeholders. For instance, the German Corporate Governance Code is reviewed by the Regierungskommission Deutscher Corporate Governance Kodex Commission as well as put up for public consultation. In line with the OECD's observation, national corporate governance codes are updated frequently, and the OECD noted that nineteen jurisdictions reported revised codes or equivalent changes in listing requirements or rules during 2019-20.[135]

[135] OECD Corporate Governance Factbook 2021, OECD, p. 33, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

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Annex: Figures and illustrations

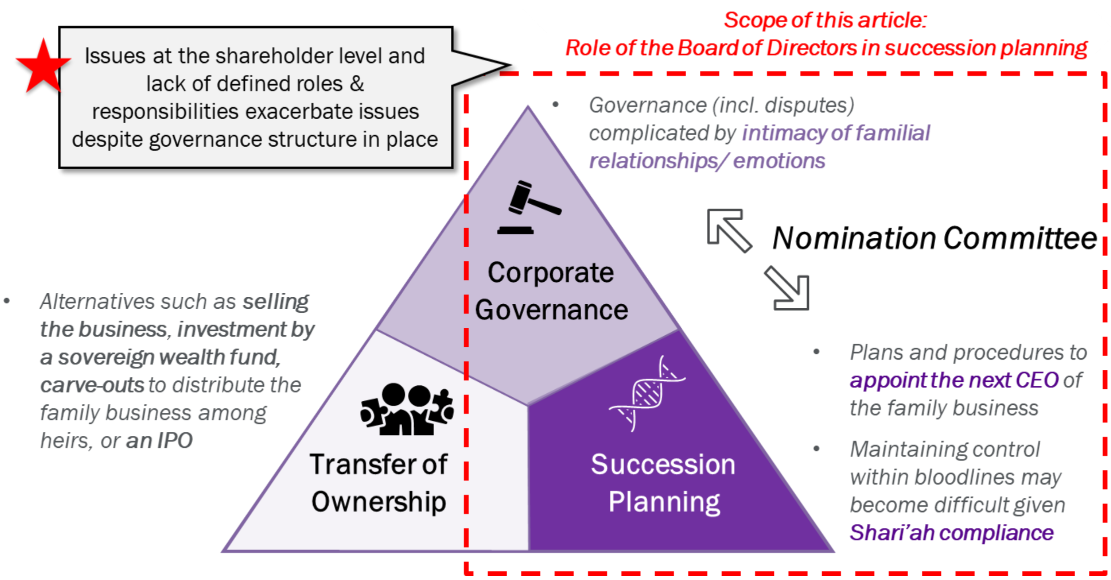
1. Figure 1: Key family governance issues faced by family businesses during their development cycle

Source: IFC Governance Handbook, 2018, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE.

Ownership Stage	Dominant Shareholder Issues
Stage 1: The Founder(s)	• Leadership transition • Succession • Estate planning
Stage 2: The Sibling Partnership	• Maintaining teamwork and harmony • Sustaining family ownership • Succession
Stage 3: The Cousin Confederation	• Allocation of corporate capital: dividends, debt, and profit levels • Shareholder liquidity • Family conflict resolution • Family participation and role • Family vision and mission • Family linkage with the business

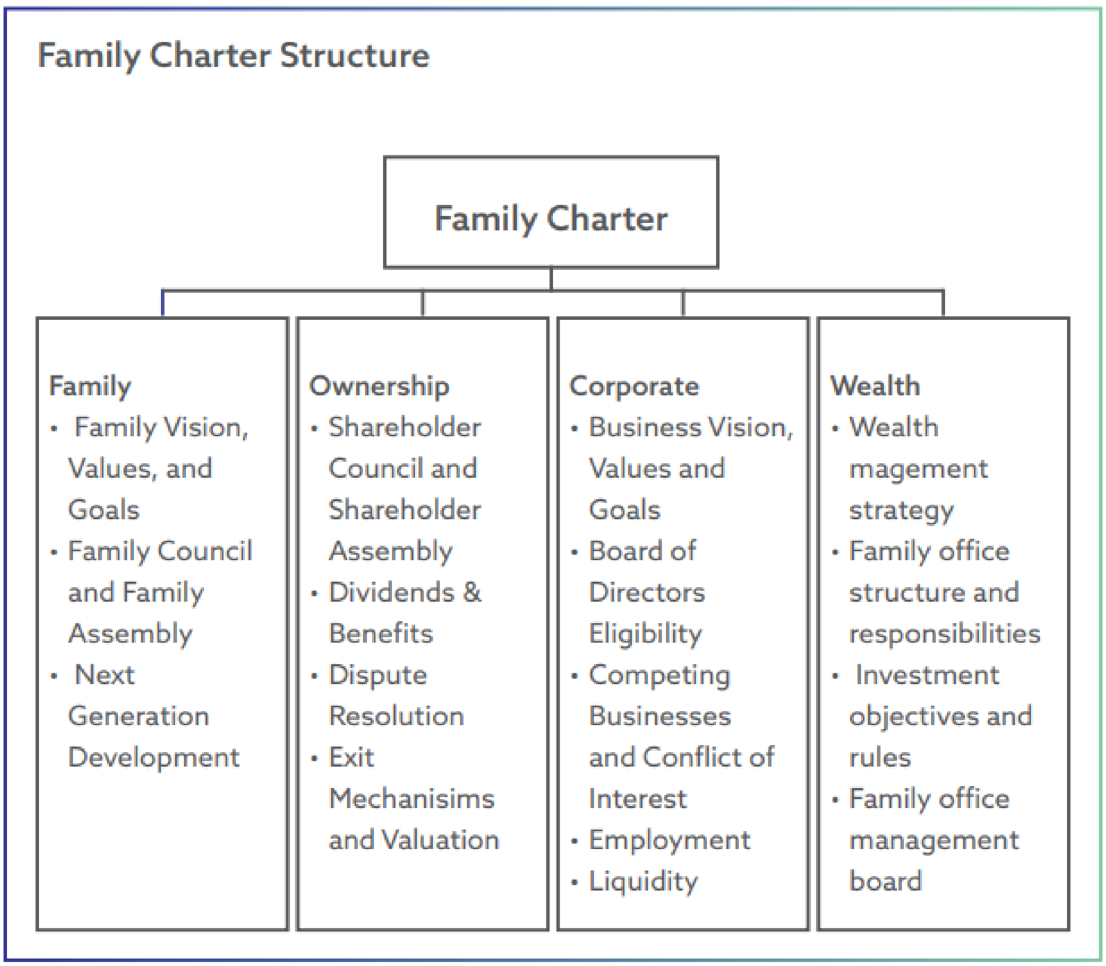
2. Figure 2: Range of options available to family businesses on succession

Source: The authors.



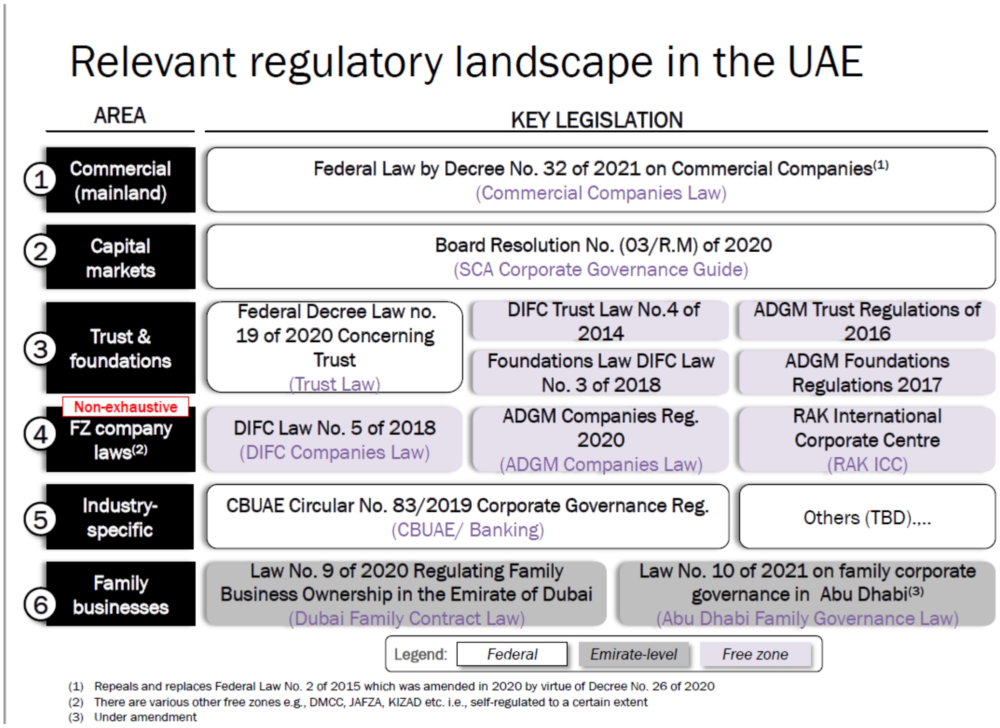
3. Figure 3: Family Charter Structure

Source: The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.



4. Figure 4: Relevant laws and regulations governing corporate governance in the UAE

Source: The authors.



5. Figure 5: Checklist for family business governance

Source: The GCC Corporate Governance Code, Governance Guidelines for Family Businesses, FBCG, 2021.

CHECKLIST

The checklist is provided as a guiding tool to assist family businesses in their journey of governance. As previously highlighted, each family business has its own unique properties and requirements, and should, accordingly, identify the specific factors that require its attention and work on implementing the mechanisms necessary. The checklist acknowledges that governance implementation is a journey; it lists the different stages your business might be at, providing you a clear direction on what is left to accomplish.

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
FAMILY GOVERNANCE				
Vision, Values, and Goals • Family members are aligned on the vision and core values, values are embedded in goals, governance and policies.	☐	☐	☐	☐
Family Communication • Regular family reports to document what was planned, send updates, and report achievements.	☐	☐	☐	☐
• Regular family meetings where family and business issues are discussed.	☐	☐	☐	☐
Governing Bodies • A family assembly that acts as a forum for communication between all family members.	☐	☐	☐	☐
• A family council that acts on behalf of the family assembly to manage family affairs.	☐	☐	☐	☐
Family Policies • A family charter/ constitution that identifies and enables shareholders to understand the main elements of the family and the business.	☐	☐	☐	☐
• Clear and fair policies that regulate matters of importance to the family and any processes pertaining to them.	☐	☐	☐	☐

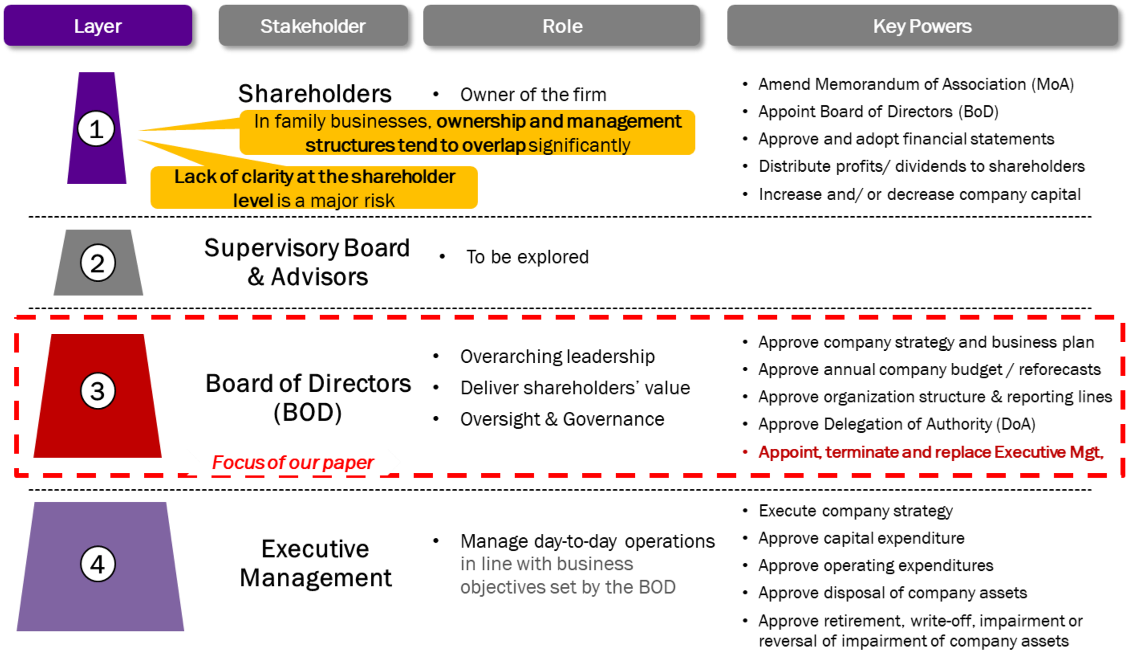
Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
Conflict Resolution • A clear conflict resolution strategy that sets out the means and processes for resolving conflict among family members, and between family members and the company.	☐	☐	☐	☐
Family Members • Family members with entrepreneurial spirits are identified and roles in the business are assigned.	☐	☐	☐	☐
• Family members' performance is regularly assessed and acted upon by an assigned party.	☐	☐	☐	☐
• Female family members are involved in the business, gender parity is minimized/ overcome.	☐	☐	☐	☐
• The next generation is prepared to join the business, equipped with adequate skills and knowledge.	☐	☐	☐	☐
OWNERSHIP GOVERNANCE				
Legal Structure • A coherent legal structure is in place with the necessary legal firewalls to protect the business and family.	☐	☐	☐	☐
Governing Policy • A shareholder agreement that summarizes the will of the shareholders, and sets forth their rights and responsibilities and regulates family matters.	☐	☐	☐	☐
Governing Bodies • A shareholder assembly that comprises of all shareholders and plays a role in business decisions by governing and assists the shareholder council.	☐	☐	☐	☐
• A shareholder council that comprises of a smaller number of shareholders and represents the shareholder assembly in respective business matters.	☐	☐	☐	☐

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
CORPORATE GOVERNANCE				
The Family and the Business • The relationship between the family and the business is assessed and properly identified.	☐	☐	☐	☐
Corporate Vision • A corporate vision that outlines the business's key values and sets out its primary goals.	☐	☐	☐	☐
Legal Structure and Governing Bodies • Separation of ownership from management.	☐	☐	☐	☐
• A clear distinction between the roles of shareholders, board members, managers and employees.	☐	☐	☐	☐
• The creation of different committees that assist the board of directors.	☐	☐	☐	☐
Corporate Policies • Clear policies that regulate important business matters and processes pertaining to them.	☐	☐	☐	☐
Plans for Non-Family Employees • A fair treatment to non-family employees in terms of appointment, assessment and development.	☐	☐	☐	☐
WEALTH GOVERNANCE				
Wealth Management Strategy • A robust strategy that allocates wealth to different fields of investment and sets out independent policies for each.	☐	☐	☐	☐
Family Offices • A family Office that supervises and manages the family business's private wealth through a separate operation	☐	☐	☐	☐
• Family engagement in the activity and periodical reporting to the family board on activity and performance	☐	☐	☐	☐

Governance Type	Not Addressed	Planning Phase	Application Phase	Completed (under testing & revision)
Investment Planning and Solutions				
▪ A clear set of investment objectives aligned with the vision, goals and wealth strategy.	☐	☐	☐	☐
▪ A clear set of investing rules that regulate family business's investments and ensures that they are	☐	☐	☐	☐
ENGAGING THE PUBLIC				
Philanthropy				
▪ A commitment towards philanthropy and an engagement in philanthropic activities.	☐	☐	☐	☐
▪ Setup of family foundations for large charitable causes.	☐	☐	☐	☐
▪ Creation of a family philanthropy committee to manage philanthropic activities.	☐	☐	☐	☐
Identity and Business Reputation				
▪ A clear and consistent business identity is established and maintained.	☐	☐	☐	☐
▪ A positive coherent business image is showcased.	☐	☐	☐	☐
SUCCESSION PLANNING				
Succession Plan				
▪ A clear carefully designed succession plan to facilitate the transfer of the family business from one generation to another.	☐	☐	☐	☐

6. Figure 6: Key powers for stakeholders in a family business

Source: The authors.



7. Figure 7: Key recommendations from the Cadbury Report, one of which is on the independence of directors.

Source: C. Boyd, "Ethics and corporate governance: The issues raised by the Cadbury report in the United Kingdom", Journal of Business Ethics 15.2 (1996): 167-182.

TABLE 1
Main recommendations of the Cadbury Report

Governance Issue	Cadbury Code Recommendation
Separate CEO and Chairperson	Recommended but not compulsory
Nomination of Directors	Formal board process via nomination committee dominated by outside directors
Outside Directors	Minimum of 3 non-executive directors
Independence of Directors	Majority of non-executives to be independent
Rotation of Directors	Directors to be appointed for specified terms with non-automatic reappointment
Pay and Bonuses	Annual Report to reveal disaggregated director's pay; remuneration committee of board to be dominated by outside directors
Independence of the Auditor	Audit committee of the board to be formed, comprised exclusively of outside directors
Flow of information to the Board	Board to have a formal schedule of decisions; directors to have paid access to outside advice
Greater Scope of Auditing	Auditors to review compliance to the Code, including directors' statements on going-concern and on internal audit effectiveness

8. Figure 8: Minimum number or ratio of independent directors on the (supervisory) Board

Source: OECD Corporate Governance Factbook 2021, OECD, p. 142, https://www.oecd.org/corporate/OECD-Corporate-Governance-Factbook.pdf.

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Blue denotes Rule/regulation *Black italic denotes Code*			No threshold	Minimum number		Minimum ratio		
				1 person	2-3 persons	20-25%	30-49%	50%+
One-tier board	CEO ≠ Board Chair	REQUIRED			Israel Greece	Colombia	*Israel* *Greece*	*Israel* *Sweden*
		RECOMMENDED			Belgium Costa Rica Hong Kong (China) New Zealand Malaysia		Hong Kong (China) Malaysia *Peru* Singapore *Turkey*	*Australia* *Ireland* *New Zealand* *Singapore* *United Kingdom*
				Chile	*Turkey* Canada Greece Saudi Arabia Spain	Mexico	Saudi Arabia India *Turkey*	India Korea United States
One-tier board or two-tier board (supervisory)	CEO ≠ Board Chair	REQUIRED			Norway	Brazil	Lithuania	*Denmark* *Netherlands* *Norway*
		RECOMMENDED	Slovak Republic				*Brazil*	*Finland* *Switzerland*
			Czech Republic Luxembourg				France	Hungary *France* *Slovenia*
Two-tier board (supervisory)			Germany		Russia *Poland*	Russia	Indonesia *China* *Russia*	*Argentina* *Austria* *Estonia* *Iceland* *Latvia* South Africa
Hybrid multiple options				Italy Japan (A)	Japan (C) (S) *Italy* *Japan*			*Portugal*

Note: Jurisdictions displayed in sections with blue background signify those with requirements or recommendations on split between CEO/Board chair applying to one-tier boards; jurisdictions in the white background areas have no provisions on CEO/Chair split. Jurisdictions in blue text signify provisions by "Rule/regulation" including requirements by listing rule. Jurisdictions in black italics signify code recommendations. Japan (A), (C) and (S) denote statutory auditors model, three committees model, and audit and supervisory committee model, respectively. The US requirement applies to listed companies without a controlling majority. See Table 4.6 for data.

9. Figure 9: The definition of an Independent Director

Source: IFC, Family Business Governance Handbook, 2018, https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE

Indicative Independent Director Definition[27]

"Independent Director" means a director who is a person who:

1. has not been employed by the Company or its Related Parties in the past five years;
2. is not, and is not affiliated with a company that is an advisor or consultant to the Company or its Related Parties;
3. is not affiliated with a significant customer or supplier of the Company or its Related Parties;
4. has no personal service contracts with the Company, its Related Parties, or its senior management;
5. is not affiliated with a non-profit organization that receives significant funding from the Company or its Related Parties;
6. is not employed as an executive of another company where any of the Company's executives serve on that company's board of directors;
7. is not a member of the immediate family of an individual who is, or has been during the past five years, employed by the Company or its Related Parties as an executive officer;
8. is not, nor in the past five years has been, affiliated with or employed by a present or former auditor of the Company or of a Related Party; or
9. is not a controlling person of the Company (or member of a group of individuals and/or entities that collectively exercise effective control over the Company) or such person's brother, sister, parent, grandparent, child, cousin, aunt, uncle, nephew or niece or a spouse, widow, in-law, heir, legatee and successor of any of the foregoing (or any trust or similar arrangement of which any such persons or a combination thereof are the sole beneficiaries) or the executor, administrator or personal representative of any Person described in this sub-paragraph who is deceased or legally incompetent,

and for the purposes of this definition, a person shall be deemed to be "affiliated" with a party if such person: (i) has a direct or indirect ownership interest in; or (ii) is employed by such party; "Related Party" shall mean, with respect to the Company, any person or entity that controls, is controlled by or is under common control with the Company.