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Acquiring shares in a KSA LLC – key legal issues

By Phil O'Riordan

This article looks at some of the key legal issues that a foreign investor should consider when acquiring shares in a Kingdom of Saudi Arabia (KSA) Limited Liability Company (LLC).

Planning the deal

In addition to carrying out due diligence and negotiating the key legal documents, foreign investors (i.e. those from outside the GCC) should thoroughly research the current practices and legal requirements required to successfully complete the transfer of shares in a LLC.

Foreign Direct Investment restrictions

The Foreign Investment Act (and related Executive Rules) permits up to 100 percent foreign ownership in a KSA entity unless the activities of the KSA entity appear on a 'negative list' which restricts any foreign ownership. Certain activities which do not appear on the negative list may still fall into a sector where foreign ownership is restricted in amounts ranging from 25 percent to 75 percent. The foreign investor should therefore undertake a thorough examination of the proposed activities of the LLC to ascertain if any of these restrictions apply. In general, foreign investment is permitted in most manufacturing, technical services and trading activities.

The KSA share transfer process

In essence (assuming the LLC activities do not require further approvals from government bodies such as SAMA in the case of insurance business) the share transfer process can be broken down into the following four stages:

1. Execution of the main share sale and purchase agreement (SPA): The SPA should, in addition to including the agreed commercial terms, annex to it as an agreed form document a short form share transfer agreement in English and Arabic (Share Transfer Instrument).

2. Application to the Saudi Arabian General Investment Authority (SAGIA): If a LLC has no foreign shareholders prior to the transaction in question, then a foreign investment licence will need to be obtained from SAGIA. If there is already a foreign investment licence in existence then this will need to be amended in order to reflect the new shareholding.

3. Application to the Ministry of Commerce and Industry (MoCI) and execution before the Notary: Following SAGIA and MoCI approval, all parties are required to attend the Notary to sign the Share Transfer Instrument and shareholder resolutions to amend the articles and waive any pre-emption rights. A copy of the shareholder resolutions will then be published in the Official Gazette and one daily newspaper.

4. Receive evidence that the buyer is the registered owner: Upon the expiry of the publication period, a request should be made to MoCI for it to issue an amended commercial registration certificate, evidencing the buyer as the registered owner of the shares in the target company.

The foreign investor should expect stages 2 to 4 above to take at least two months to complete. During this process the foreign investor will need to submit various supporting documents to SAGIA and MoCI (e.g. powers of attorney, board resolutions and copies of its constitutional documents). It is advisable that these are notarised, legalised and authenticated for use in the KSA as early as possible.

Summary

The share transfer process in KSA can be a complex and time consuming process. In order to limit the buyer's exposure during this period the SPA should (as a minimum) include: the steps and responsibilities of each party in this process; covenants to ensure continuity of the LLC business during this process; a repetition of the warranties at completion; an option to terminate the SPA (e.g. if the transfer is not completed by a long stop date); and an escrow account mechanism for release of purchase monies on completion of the process.

Abdulaziz A. Al-Bosaily Law Office
in association with Clyde & Co LLP
PO Box 16560, Riyadh 11474
Kingdom of Saudi Arabia
Tel: (966) 1 200 8817 Fax: (966) 1 200 8558
Email: philip.oriordan@clydeco.ae
Tel: (971) 4 384 4000
www.clydeco.com