

UNITED ARAB EMIRATES



Study reveals Middle East M&A and JV trends



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Across the Middle East, it is apparent that increasingly streamlined and sophisticated corporate legal regimes are being implemented by rulemakers to facilitate ease of doing business and make their respective jurisdictions more attractive to investors. This welcome trend is set to continue and, in the UAE, is buoyed by a healthy competition between the Emirates and their various Free Zones for attracting investment. This has no doubt contributed to MSCI's recent upgrade of Qatar and the UAE from 'frontier' to 'emerging' markets.

In the private sector, businesses are showing an appetite to engage in increasingly complex legal transactions. No longer content to rely on the 'basic' provisions seen in M&A and JV transactions, decision makers, guided by an increasingly sophisticated team of in-house counsel, are eager to explore ways and means to extract extra value from M&A transactions and JVs.

Mindful of these complementing trends, Clyde & Co LLP published its inaugural Middle East Deal Study earlier this year. The Study analyses data collected from 86 key M&A and JV transactions that the firm worked on in the Middle East during 2012 and provides a detailed analysis of the legal terms on which those JV and M&A transactions were carried out.

The Study is the first of its kind in the region and is a helpful tool for those negotiating their own M&A and JV transactions. It provides an insight into what could be considered current 'market practice' and helps the reader focus on important legal and practical issues to bear in mind when negotiating M&A or JV transactions.

A selection of high-level conclusions from the Study is set out below.

M&A

Consideration: 76 percent of deals were all cash (total: US\$6.9bn) whereas 21 percent comprised a mixture of cash and equity.

Purchase price adjustment: surprisingly, only 39 percent of M&A deals included a purchase price adjustment mechanism. Completion accounts were the most popular mechanism, with earn outs coming a close second. This is one area which is likely to see movement in coming years.

Security for claims: only 34 percent of M&A deals contained security for the buyer in the event of a claim for breach of warranty against the seller.

Limitations on sellers' liability: 52 percent of M&A deals had a cap of half or less than half of the purchase price, reflecting more of a US than UK model. There was also widespread use of 'de minimis', 'baskets' and other common limitations on liability.

Choice of law/forum: 41 percent chose courts and 59 percent chose arbitration as the forum to resolve disputes. (Interestingly, this differs significantly from JVs where arbitration was overwhelmingly the preferred choice of forum.) There was also a clear tendency towards the use of English law.

JVs

Offshore structures: 29 percent of JVs used a corporate vehicle from outside the region, such as the Cayman Islands or BVI, providing options such as different classes of shares (not generally available in Middle East jurisdictions).

Share transfers: 64 percent of JVs contained contractual provisions restricting transfer of shares, in addition to statutory pre-emption rights. 25 percent of JVs included lock-in periods on share transfers of between 1 and 5 years, 23 percent included tag along rights, 17 percent included drag along rights and 12 percent included put/call options.

Reserved matters: 69 percent of JVs included a schedule of contractual reserved matters. Note, however, that where a "local" corporate vehicle is used, a number of matters will in practice require the consent of all shareholders and this can provide an effective form of veto.

Deadlock resolution: 75 percent of all JVs contained deadlock resolution provisions. Where the agreement specified that the JV should terminate in the event of a deadlock which could not be resolved, various mechanisms were seen, including 'Russian Roulette' and 'Mexican/Texas Shootout' procedures.

Choice of law/forum: the preferred forum for dispute resolution was arbitration (93 percent) with DIFC/LCIA Arbitration Rules being the most popular governing rules (47 percent). In terms of choice of law, JV partners tend to prefer English law (48 percent) over other laws.

To request a copy of the Study, please email:

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