**MENA**
Fact sheet

# Structuring M&A transactions in KSA

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This fact sheet looks at some of the key legal issues that should be considered before planning and executing M&A transations in the Kingdom of Saudi Arabia (**KSA**) where the target is a KSA Limited Liability Company (**LLC**).

## Planning the deal

It is vital that any proposed M&A transaction in KSA is carefully planned and appropriate steps taken to mitigate the risk of complications arising as a result of the local business law and practice.

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.

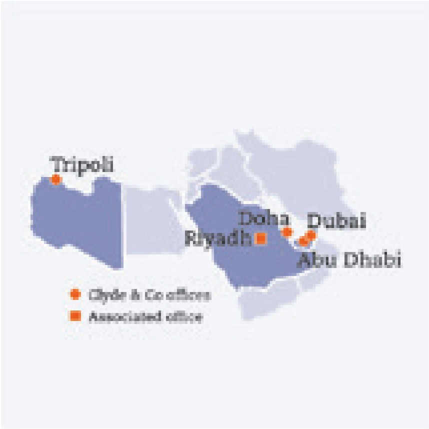
## Foreign direct investment restrictions

The Foreign Investment Act (and related Executive Rules) permits up to 100% 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% to 75%. 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




"The lawyers get straight down to the nitty-gritty details of a deal and are always willing to provide precise advice."
**Chambers Global 2010**

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 preemption rights. A copy of the shareholder resolutions will then be published in the Official Gazette and one daily newspaper; and

4. receipt of 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 LLC.

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.

## The SPA

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.

## Governing law, dispute resolution and enforcement

The laws of the KSA will generally be applied to contracts entered into in the KSA with KSA parties regardless of the parties' choice of governing law.

Unless from a country covered by relevant GCC or Arab League treaties, enforcement of a foreign arbitral award or court judgement can be very difficult in the KSA (despite the KSA having signed up to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1994). It will also not be possible to enforce a foreign arbitral award or court judgement in KSA unless a judgment from that country would be reciprocally enforced.

Due to the difficulties associated with enforcing awards, regardless of the dispute resolution forum, consideration should be given to other forms of security if there is a likelihood of a claim arising (e.g. the retention of part of the sale proceeds against warranty claims).

## Tax

Income tax on business profits and Zakat are levied by the Saudi Arabian Department of Zakat and Income Tax. In particular the following should be noted:

– any person that is not a national of one of the GCC countries (or a corporate entity that is not owned by nationals of one of the GCC countries) must pay tax at the rate of twenty per cent (20%) of the taxable income that is attributable to its shareholding in the KSA company;

– nationals of GCC countries pay Zakat at the rate of 2.5% of the proportion of the taxable income that is attributable to their shareholding in the KSA company; and

– the tax laws also provide for withholding tax, at varying rates, from 5% to 20%, to be charged on certain payments which are made by companies registered in the KSA to any company established outside the KSA.

### Further information

If you would like further information on any issue raised in this overview please contact:

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