

Private Equity

Contributing editor
Bill Curbow



2017

GETTING THE
DEAL THROUGH

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Private Equity 2017

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Bill Curbow

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Preface

Private Equity 2017

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Saudi Arabia and the United Arab Emirates. The report is divided into two sections: the first deals with fund formation in 21 jurisdictions and the second deals with transactions in 25 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
February 2017

Saudi Arabia

James Stull and Nabil Issa

King & Spalding LLP in association with the Law Office of Mohammad Al Ammar

Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

A private equity fund in Saudi Arabia is a contractual entity formed between the fund manager and its investors upon execution of the terms and conditions (the form and contents of which are specified by the Saudi Arabian Capital Market Authority (CMA)). The terms and conditions are the equivalent of a limited partnership agreement for a fund established as a limited partnership or the articles for a fund established as a company. A Saudi Arabian fund may only be established by an entity licensed by the CMA as an 'authorised person' licensed to carry on 'management' activities.

The CMA considers a Saudi Arabian fund to have a separate legal personality and existence from its manager. However, it is unclear whether all Saudi courts and other governmental authorities take the same position. In the past, certain governmental and regulatory authorities have not seen a fund as an entity distinct from the fund manager. In particular, the Saudi Arabian Ministry of Commerce and Investment will not issue a commercial registration to a fund (which is a requirement to own shares in companies and other assets in Saudi Arabia such as real estate). Therefore, all actions of a Saudi Arabian fund must be performed by the fund manager and all assets in Saudi Arabia must be owned by the fund manager or custodian (or special purpose vehicle established by the foregoing).

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

The formation and private placement offering of a Saudi Arabian private equity fund is governed by the Saudi Arabian Investment Funds Regulations issued by the CMA. Under article 75 of the Investment Funds Regulations, the fund manager must submit the following:

- all offering documents, including at a minimum the fund's terms and conditions;
- the fund's compliance monitoring programme;
- details of the fund manager's authorities and decision-making procedures with respect to the fund;
- a certification to the CMA confirming the offering documents are complete, fair, clear and not misleading; and
- a short summary of the CMA fund's key terms.

In addition to a CMA-regulated fund manager, the fund must have engaged an independent auditor and independent custodian prior to applying to the CMA. The CMA reserves the right to charge registration fees but to date has not imposed an application, submission or registration with fees.

The CMA has a 15-business day period to review and comment upon the application and offering documents. If the CMA has no comments, the fund manager may begin offering the fund to investors. If the CMA has comments, the 15-business day review period will restart upon the date that the application is resubmitted. Once the 15-business day period elapses without comment from the CMA, the manager has up to one year to offer the fund.

There is no minimum capital requirement to establish the fund, provided that the minimum investment amount by any investor that is not deemed a 'sophisticated investor' shall be 1 million Saudi riyals.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

All private equity funds are required to maintain a local custodian licensed by the CMA to hold all Saudi-based assets. There is no requirement for a custodian for foreign-based underlying assets. There is no requirement for a local administrator. However, if a fund engages an administrator, such entity must be licensed by the CMA. The fund manager is responsible for acting as the registered office and corporate secretary and is also required to maintain books and records for up to 10 years (and must maintain these for longer in the case of actual or pending litigation). The fund manager is permitted to delegate such responsibilities to regulated or unregulated third parties but retains ultimate responsibility for the performance of such functions.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

The CMA maintains a register of all private funds, which is publicly available on the CMA's website at cma.org.sa/En/IME/Pages/Private_Investment_Funds.aspx. This register includes the name of the fund, the manager, the date the CMA was notified of the manager's intention to establish the fund, the dates of the offering period and the expected fund term. Per the Investment Funds Regulations, the CMA will also confirm that a private equity fund is in good standing. However, in practice, we are not aware of the CMA ever issuing such confirmation.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Investors in a private equity fund have limited liability up to the amount of their contributions to the fund. There are no examples of the CMA or local courts not respecting the limited liability of investors in a fund.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

Under the Investment Funds Regulations, the manager of a Saudi Arabian private equity fund has a fiduciary duty towards the fund's unitholders, which includes the duty to act in the best interests of the unitholders and a duty to exercise all reasonable care and skill.

Further under the Authorised Persons Regulations (which govern licensing of fund managers in Saudi Arabia), the manager of a Saudi Arabian fund also has the following fiduciary duties:

- loyalty: a manager must act in all cases in good faith and in the interests of the investors;
- conflict of interest: a manager must ensure that it safeguards at all times the interests of the investors and that no conflict of interest between its interest and the interests of the investors affects the services that the manager is carrying out;
- no secret profits: a manager must not an investor's property, information or opportunities for its own or anyone else's benefit unless full disclosure of such usage to the investor is made and a consent is obtained; and
- care, skill and diligence: a manager owes the investors a duty to exercise the care, skill and diligence that would be exercised in the same circumstance by a person having both the knowledge and experience that may reasonably be expected of a person in the same position as the manager and the actual knowledge and experience that the manager has.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

There is no definition of gross negligence applicable to the management of a private equity fund. Generally, such term has a specific meaning set forth in the fund's constitutional documents.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The Investment Funds Regulations do not contemplate redomiciliation of funds from foreign jurisdictions. Further, there is no concept of converting a different form of Saudi Arabian vehicle or entity to a regulated fund.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

The CMA's regulations are silent as to the consequences if a fund sponsor is deemed bankrupt or insolvent or if there is a restructuring or change of control of the sponsor. Such matters can be addressed as a matter of contract in the terms and conditions of the fund. Any change to the ownership of the sponsor requires the approval of the CMA.

Further, the CMA reserves the right to remove or replace the manager of a Saudi fund, or both, upon the following:

- failure of the manager to comply with CMA regulations (including the CMA's capital adequacy requirements);
- the death, incapacity or resignation of the portfolio managers responsible for the fund if no other registered person employed by the manager is capable of replacing such portfolio managers; or
- such other event determined by the CMA to be reasonable grounds for removal of the manager.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The financial services, asset management and funds industries in Saudi Arabia are regulated by the CMA. The CMA conducts regular audits on managers and on particular funds. The CMA has the right to inspect the books and records of the fund at any time upon request.

The manager must provide annual reports, including audited financial statements, to unitholders within 70 calendar days from the end of the year at no cost. The manager must provide a copy of the annual report to the CMA within five days after delivery to the unitholders. The manager must also provide short-form reports to unitholders promptly upon request.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

The manager of a private equity fund must be licensed by the CMA to engage in management activities. If the private equity fund is investing in Saudi Arabia, any advisers or custodians must also be licensed by the CMA. If the fund is investing outside of Saudi Arabia, the fund may appoint advisers licensed in a foreign jurisdiction. All funds are required to have a licensed independent custodian.

The manager must submit the offering documents to the CMA for approval prior to the establishment of the fund and the marketing of the fund in any jurisdiction. The CMA has a 15-business day period to review and comment upon the fund documents (and has the right to require the offering documents be prepared and submitted in Arabic). If the CMA does not object to the fund during the review period, the manager may launch the fund. There are no private placement exemptions from registration with the CMA.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

There are no requirements for a fund manager or any of its officers, directors or control persons to be registered as investment advisers in Saudi Arabia.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

The manager of a Saudi Arabian private equity fund must be licensed by the CMA as an authorised person to engage in management activities. The minimum share capital for a manager is 50 million Saudi riyals.

The following employees of the manager must register with the CMA:

- chief executive officer;
- chief financial officer;
- all directors;
- all senior officers and managers;
- compliance officer;

- money laundering reporting officer; and
- any employee involved in client-facing functions, such as sales representatives, investment advisers, portfolio managers and corporate finance professionals.

All registered persons must complete a registration examination and pay such registration fees determined necessary by the CMA.

Each registered person must carry out his or her duties with integrity, skill, reasonable care and diligence, with adequate risk management and financial prudence. The CMA does not otherwise provide criteria for each registered person.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund’s manager or investment adviser or their employees.

There are no restrictions or disclosure requirements in Saudi Arabia regarding political contributions. However, all contributions are subject to the Saudi Arabian Anti-Bribery Law.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund’s manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund’s investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are no restrictions or disclosure requirements in Saudi Arabia regarding placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. The fund manager and its employees are not required to register as lobbyists to market to public pension plans and other governmental entities.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

The Saudi Arabian Monetary Authority (SAMA) governs investments by regulated banks in Saudi Arabia. SAMA requires banks to maintain certain liquidity ratios but does not restrict banks from investing in or sponsoring private equity banks. In fact, the asset management divisions of banks in Saudi Arabia are among the most common fund sponsors in Saudi Arabia.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Tax in Saudi Arabia is administered by the General Authority of Zakat and Tax (GAZT). Under the Saudi Arabian tax regulations, private equity funds are treated as ‘capital companies’, meaning the following:

- they would be subject to a 2.5 per cent zakat (ie, a tax on wealth) to the extent the fund is owned by Saudi Arabian nationals or nationals of other countries of the Gulf Cooperation Council (GCC) (ie, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates);

- they be subject to a tax on profits of 20 per cent to the extent the fund is owned by non-GCC investors; and
- the fund would be required to pay a withholding tax of 5 per cent on payments of all dividends and capital gains to investors.

However, since 2006, the GAZT has not assessed any taxes on private equity funds in Saudi Arabia or the investors in those funds. This is not a formal exemption and GAZT has reserved the right to begin taxing funds at any point in the future (including on a retroactive basis).

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

As at this point, non-resident investors in Saudi Arabian funds are not subject to tax and payments by funds in Saudi Arabia to non-resident investors are not subject to withholding taxes.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

No tax rulings from GAZT or any other authorities are required to establish a private equity fund.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are no organisational taxes to be paid with respect to private equity funds in Saudi Arabia.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund’s sponsor.

Currently, payments of carried interest and management fees are not taxed. However, a Saudi-based manager or entity receiving such payments may be required to pay income tax or zakat on such payments.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Saudi Arabia has a relatively robust network of double taxation treaty partners, including Austria, Bangladesh, Belarus, China, the Czech Republic, France, Greece, Hungary, India, Italy, Japan, Korea, Luxembourg, Malaysia, Malta, the Netherlands, Pakistan, Poland, Romania, Russia, Singapore, South Africa, Spain, Syria, Tunisia, Turkey, Ukraine, the United Kingdom, Uzbekistan and Vietnam.

As Saudi Arabian private equity funds are not currently assessed for taxes by the GAZT, the treaties have a limited impact today. However, the treaties with several of the countries reduce payments of dividends and capital gains to zero per cent and so may be useful if the tax treatment of funds is altered in the future.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Investors and managers in Saudi Arabia should be aware that while funds are currently tax free, the GAZT has reserved the right to tax funds as if they were companies at any time and on a retroactive basis.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

The offerings of all private equity funds in Saudi Arabia must be registered with the CMA. There are no private placement exemptions to registration. A private equity fund will be subject to a 15-day review period by the CMA. If the CMA does not comment on the terms of the fund, the manager can offer units in the fund to investors for a period of up to one year.

An offer of units in a private equity fund (whether locally domiciled or foreign) will be deemed a private placement where the offerees are all sophisticated investors or the minimum amount payable per offeree is not less than 1 million Saudi riyals (or an equivalent amount).

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

Private equity funds may only be offered to investors who make a subscription of at least 1 million Saudi riyals or sophisticated investors.

Sophisticated investors include the following:

- other CMA-regulated authorised persons;
- clients of another CMA-regulated authorised person if all communications to the client are made through the other authorised person;
- the government of Saudi Arabia, the Saudi Arabian Stock Exchange and any other supranational authority recognised by the CMA;
- institutions acting for their own account;
- professional investors; and
- employees of a CMA-regulated authorised person who are registered with the CMA.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

The manager is required to report all investors in the private equity fund to the CMA upon each closing. Thereafter, the manager shall maintain books and records of the fund, which may occasionally be inspected and audited by the CMA, at its discretion.

The distributor of a foreign private equity fund must inform the CMA within 10 days of any subscription, transfer or redemption of units in the fund.

Shares in a CMA-regulated manager may only be transferred with the approval of the CMA. Similarly, a change of control of a CMA-regulated manager requires 30 days' advance notice and the approval of the CMA to become effective.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Yes. The offering of a private equity fund in Saudi Arabia must be registered with the CMA without exception. A local private equity fund may be offered following a 15-business day review period by the fund's manager or by any other authorised person holding a 'management' licence. Foreign private equity funds can generally be offered following a 10-business day review period by a promoter licensed by the CMA with an 'arranging' licence, provided that for certain private equity

Update and trends

The CMA is currently reviewing all financial services regulations and trends in Saudi Arabia and is in the process of a massive overhaul of the funds and asset management regulations. This is part of an effort to grow, modernise and diversify the Saudi Arabian economy and to spur foreign investment and new products in the kingdom. While the CMA is a stringent regulator, the funds industry in Saudi Arabia has been a success story compared with the rest of the GCC, and locally domiciled funds have flourished. The CMA and other regulators have encouraged this growth and stability, and have been revolutionising the structuring of private equity in Saudi Arabia. As such, it is expected that Saudi Arabian markets will continue to expand in the coming year despite some of the regional economic turbulence and slump in the price of oil.

funds, the promoter must be licensed by the CMA with a 'dealing as agent' licence.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

Saudi Arabian funds and their managers must comply with the federal Anti-Money Laundering Law as well as the CMA's Anti-Money Laundering and Counter-Terrorist Financing Rules. Managers must establish policies and procedures in general and for specific funds that they manage to prevent money laundering and terrorism financing. All investors in a fund must complete a know your customer form (in form and substance acceptable to the CMA) and provide supporting verification and identification. The manager must disclose to the CMA a list of all investors who subscribe for units in the fund. The manager must take a risk-based approach to investor due diligence provided that lower due diligence is required (ie, beneficial shareholding confirmation is not required) if the investor is as follows:

- regulated and licensed by a government authority;
- is based in a jurisdiction that complies with the Financial Action Task Force (FATF) recommendations; and
- applies requirements for anti-money laundering and counter-terrorism financing that are consistent with Saudi Arabia's regulations and the FATF recommendation.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Private equity funds are not currently permitted to list on the Saudi Arabian Stock Exchange. To date, only exchange traded funds and real estate investment traded funds are permitted to be listed.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

This is not applicable as private equity funds are not permitted to be listed in Saudi Arabia.

Participation in private equity transactions**31 Legal and regulatory restrictions**

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Funds in Saudi Arabia (as contractual entities) may not participate directly in private equity transactions. By law, assets must be held by the fund's manager or custodian. However, in general, the manager and custodian are not restricted from investing in private equity transactions in Saudi Arabia or in other jurisdictions, subject to foreign ownership restrictions and regulations relating to certain restricted sectors in Saudi Arabia (eg, investments in the holy cities of Mecca and Medina). In certain circumstances, investments may require additional licensing from the Saudi Arabian General Investment Authority (which regulates foreign investment in Saudi Arabia).

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Management fees may only be paid to a CMA-regulated authorised person who is licensed as a manager. As such, if there are multiple sponsors, all fees must be paid to the CMA-regulated sponsor by the fund who can then pay these fees onto other sponsors. There are no such restrictions on carried interest or other profit sharing, which can be paid directly to non-regulated entities.

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Both private equity buyouts and venture capital transactions occur in Saudi Arabia. Typical private equity transactions are structured as acquisitions of controlling interests or 100 per cent acquisitions, though there have been recent examples of private equity transactions for significant minority interests (eg, Investcorp's recent acquisition of an undisclosed minority interest in Bindawood Holding). However, venture capital transactions are typically structured as acquisitions of significant minority interest with options for additional share purchases.

Certain taxes are applicable in Saudi Arabia, including a zakat tax applied to Gulf Cooperation Council (GCC) nationals and corporate income tax applied to non-GCC nationals, as well as capital gains and withholding taxes. Accordingly, private equity transactions require tax structuring and such tax issues can drive overall transaction structuring.

In addition, there are a few foreign ownership restrictions that apply to parties establishing entities in Saudi Arabia. Such restrictions typically apply to non-GCC nationals but, in certain circumstances, also apply to non-Saudi Arabian nationals. Such foreign ownership restrictions are applicable in sectors including, but not limited to, security services, healthcare, education, logistics and wholesale and retail trade. As with tax issues, diligent structuring can reduce or eliminate the issues relating to foreign ownership restrictions in Saudi Arabia.

Non-Saudi Arabian national private equity investors often structure their transactions to include entities established in the Dubai International Financial Centre (DIFC), a free zone situated in the neighbouring United Arab Emirates. The DIFC has served in this role primarily because the DIFC courts that have been established within the free zone are independent common-law courts, which turn to English law in the event that an issue has not been legislated under DIFC law. Perhaps most importantly, self-help remedies, which are not available in Saudi Arabia, are available in the DIFC (eg, a party that has registered a pledge over the shares of a company incorporated in the DIFC can, subject to certain limitations, immediately transfer such shares in accordance with the pledge documentation, without a requirement for a separate court order).

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Private equity transactions to acquire listed companies are extremely rare. Notwithstanding this, a listing is one of the many exit options for private equity investors.

The Capital Market Authority of Saudi Arabia (CMA), which is the federal regulator responsible for regulating companies listed on the Saudi Arabian Stock Exchange (Tadawul), has issued its Corporate

Governance Regulations (www.cma.org.sa/En/Regulations/Pages/default.aspx), which apply to public joint stock companies. Among the detailed list of requirements set out in the Corporate Governance Regulations are the following:

General shareholder rights

A shareholder shall be entitled to all rights attached to the share, in particular, the right:

- to a share of the distributable profits;
- to a share of the company's assets upon liquidation;
- to attend the general assembly and participate in deliberations and vote on relevant decisions;
- of disposition with respect to shares;
- to supervise the board of directors' activities and file responsibility claims against board members; and
- to inquire and have access to information without prejudice to the company's interests and in a manner that does not contradict Saudi Arabia's Capital Market Law and the Implementing Rules.

General assembly issues

The requirements for a general assembly are as follows:

- the general assembly shall convene at least once a year within the six months following the end of the company's financial year;
- the general assembly shall convene upon a request of the board of directors;
- the board of directors shall invite a general assembly to convene pursuant to a request of the auditor or a number of shareholders whose shareholdings represent at least 5 per cent of the equity share capital; and
- the Tadawul shall be immediately informed of the results of the general assembly.

Voting rights

The following applies to voting rights:

- voting is deemed to be a fundamental right of a shareholder, which shall not, in any way, be denied. The company must avoid taking any action that might hamper the use of the voting right (a shareholder must be afforded all possible assistance as may facilitate the exercise of such right);
- in voting in the general assembly for the nomination to the board members, the accumulative voting method shall be applied;
- a shareholder may, in writing, appoint any other shareholder who is not a board member and who is not an employee of the company to attend the general assembly on his or her behalf; and
- investors who are judicial persons and who act on behalf of others (eg, investment funds) shall disclose in their annual reports their voting policies, actual voting, and ways of dealing with any material conflict of interests that may affect the practice of the fundamental rights in relation to their investments.

Dividends

The general assembly shall approve the dividends and the date of distribution. These dividends, whether they are in cash or bonus shares shall be given, as of right, to the shareholders who are listed in the records kept at the Saudi Arabian Securities Depository Center as they

appear at the end of trading session on the day on which the general assembly is convened.

Disclosure in the board of directors' report

The listing rules of the Tadawul mandate that a board of directors' report shall be appended to the annual financial statements of the company. Among other things, such report must include the following:

- a specification of which regulations have been implemented, and which regulations have not been implemented, and the justifications for not implementing them;
- names of any joint stock company or companies in which the company board of directors member acts as a member of its board of directors;
- formation of the board of directors and classification of its members as follows:
 - executive board member;
 - non-executive board member; or
 - independent board member;
- a brief description of the jurisdictions and duties of the board's main committees such as the audit committee and the nomination and remuneration committee, indicating their names, names of their chairpersons, names of their members and the aggregate of their respective meetings;
- details of compensation and remuneration paid to each of the following:
 - the chairperson and members of the board of directors; and
 - the top five executives who have received the highest compensation and remuneration from the company. The chief executive officer and the chief finance officer shall be included if they are not within the top five;
- any punishment or penalty or preventive restriction imposed on the company by the CMA or any other supervisory, regulatory or judicial body; and
- the results of the annual audit of the effectiveness of the internal control procedures of the company.

Formation of the board of directors

The specified requirements for boards of directors are as follows:

- the articles of association of the company shall specify the number of the board of directors members, provided that such number shall not be less than three and not more than 11;
- the general assembly shall appoint the members of the board of directors for the duration provided for in the articles of association of the company, provided that such duration shall not exceed three years. Unless otherwise provided for in the articles of association of the company, members of the board may be reappointed;
- the majority of the members of the board of directors shall be non-executive members;
- it is prohibited to conjoin the position of the chairperson of the board of directors with any other executive position in the company, such as the chief executive officer, the managing director or the general manager;
- the independent members of the board of directors shall not be less than two members, or one-third of the members, whichever is greater; and
- the articles of association of the company shall specify the manner in which membership of the board of directors terminates. At all times, the general assembly may dismiss all or any of the members of the board of directors even though the articles of association provide otherwise.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

While going-private transactions or private equity transactions involving public companies are rare, the issues that a board of directors would

have to consider for such a transaction relate to the announcement required to be made when a tender offer is put forward by a potential purchaser. By no later than the date of the announcement made by the board of the target company, the CMA must adopt a takeover timetable setting out a number of issues relating to the timing of the offer and the acquisition of the target shares. The board of the target company must obtain independent advice from a financial adviser in respect of the offer terms and price and must inform its shareholders of the substance of such advice.

If a related party is entering into the transaction, full disclosure of the related party's interest in the transaction must be disclosed to the affected shareholders prior to completion of the transaction. In addition, any such transaction must be on arm's-length terms, dealings by parties acting in concert must be disclosed and any party that owns 1 per cent or more of any class of relevant securities (whether in an offeror or an offeree) must report such interest and changes in such interest to the CMA.

In addition, members of the board of directors must disclose any direct or indirect interest they hold in a transaction otherwise an interested party can request the nullification of the relevant contract before a competent judicial body and claim any profits realised by the relevant director.

The board of directors must set up a committee of non-executive board members responsible for reviewing issues that may result in a conflict of interest for board members including verifying financials and the review of transactions concluded with stakeholders.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

This scenario is not likely to occur in Saudi Arabia, as public companies rarely go private. However, as set out above, certain disclosure regulations apply during a tender offer period.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

The timing to complete an acquisition of a private company incorporated in Saudi Arabia will vary depending on the nationality of the shareholders of the acquirer (ie, whether the shareholders are Saudi Arabian nationals, nationals of the countries of the GCC, or non-GCC nationals). Timing considerations are as follows:

Transfers of shares of limited liability companies

For this, the parties will need to prepare a resolution amending the articles of association of the target company to reflect the change in shareholding and, thereafter, arrange to execute such resolution before the competent notary public in Saudi Arabia. Following execution and notarisation of the resolution, the resolution will need to be submitted to the relevant authority in order to amend the commercial or trade licence of the target to reflect the change in shareholding. If the target is being acquired by a non-GCC national, they will need to comply with the foreign ownership restrictions relating to numerous commercial sectors as well as any regulatory requirements applicable to regulated sectors. Certain sectors prohibit non-GCC or even non-Saudi Arabian ownership. In the sectors where non-GCC nationals are permitted to own interests, the target entity will need to obtain a licence from the Saudi Arabian General Investment Authority, a process that is often difficult to navigate and coupled with numerous restrictions. Accordingly, non-GCC national parties that are acquiring Saudi Arabian limited liability companies will need to consider structuring alternatives that provide effective control over 100 per cent of a Saudi Arabian entity.

Parties are also typically required to provide legalised and attested documentation for the acquiring company. Having said that, the process to transfer shares in a limited liability company can run from two weeks to more than a month depending on the documents required, the pre-closing structuring that is required to be put in place and the regulatory approvals required prior to closing.

Transfers of shares of private joint stock companies

Parties will need to prepare a share transfer instrument and arrange to update the share register of the joint stock company to reflect the transfer of shares. The restrictions that apply to share transfers of limited liability companies also apply to private joint stock companies. The process to transfer shares in a private joint stock company can typically be completed in one business day.

6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Shareholders in limited liability companies have a statutory pre-emption right for new share issuances. In addition, in order to undertake a share transfer, in practice all shareholders in a limited liability company must attend the competent notary public in order to execute an amendment resolution that gives effect to the share transfer. However, no such statutory pre-emption right exists for private joint stock companies. Accordingly, to the extent that the constitutional documents of a joint stock company do not contain a pre-emption right, there is little risk that a dissenting shareholder will be able to block a transaction in respect of shares held by another shareholder.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

Typical provisions included in share purchase agreements include representations, warranties, conditions to closing, gap-period covenants and, in many transactions, restrictive covenants on the sellers. The provisions found in most share purchase agreements reflect international norms. However, depending on whether Saudi Arabian law is selected as the choice of law in the share purchase agreement, the enforceability of provisions will likely not be given the same meaning by a local court as under, for example, English law or New York law. In addition, the types of damages available under Saudi Arabian law are typically limited in most circumstances to actual damages incurred with consequential damages being unavailable. Accordingly, purchasers will have to give serious consideration to the choice of law and forum for settling disputes.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity buyer should discuss management participation following the completion of a going-private transaction?

Management of Saudi Arabian companies is typically incentivised through their employment agreements. Accordingly, private equity investors will typically put in place new employment agreements with key personnel as a condition to the closing of the acquisition of the shares in the target. Such employment agreements typically include restrictive covenants and details of performance-linked compensation. Employee share option plans are also utilised at times. The issue with employee share option plans for most entities incorporated in Saudi Arabia, for example, limited liability companies, is that the manner in which such employee share option plans are enforced is not entirely clear. In addition, the significant ability held by shareholders in a limited liability company to block a share sale or issuance of new shares by not attending the notary public to execute the amendment to the articles of association, which effects such share sale or new share issuance, places a significant disincentive to entrench management rights at limited liability company level.

9 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

The tax issues involved with private equity transactions will depend on the structure, as discussed in question 1. In particular non-GCC nationals are typically required to pay a capital gains tax of 20 per cent on any gains derived from the sale of an interest in a limited liability company. Notwithstanding this general rule, tax structuring can significantly reduce such a burden.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Senior secured debt can be put in place, post-acquisition, to fund the purchase price paid for the shares of the target. Existing indebtedness is typically settled prior to closing or soon after with a purchaser typically putting in place new debt facilities for the target entity. To the extent that pre-existing debt is not settled prior to closing, the sellers will typically be required to request and receive change-of-control approvals from lenders as a condition to the closing of the transaction.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements? What other documents typically set out the financing arrangements?

Typical financing documentation involves the relevant loan agreement as well as security documentation. It should be noted that while pledges can be registered over the shares of limited liability companies at the relatively recently founded Unified Centre for Lien Registration at the Saudi Arabian General Investment Authority, the process to enforce such a pledge is not entirely clear.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Private equity transactions do not typically raise fraudulent conveyance issues. However the directors and management of entities that are operating in the zone of insolvency will face additional scrutiny in respect of sale transactions that negatively impact creditors.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

Shareholders' agreements typically include provisions relating to, among other things, the following:

- contributions of the parties (including debt and equity funding and the timing of and conditions for such funding);
- board and shareholder approvals;
- compulsory transfer provisions (eg, drag-along and tag-along provisions and put and call options);
- restrictions on transfer and exit provisions; and
- restrictive covenants.

In addition, minorities typically entrench key protections in the relevant shareholders' agreement by, for example, agreeing on board representations and setting out voting thresholds that provide minorities with veto rights over an agreed list of reserved matters.

A number of statutory protections are given to all shareholders in a limited liability company. For example, the implementation of any amendment to the articles of association will require all shareholders to attend the notary public. Accordingly, a capital increase or decrease, which is implemented by amending the articles of association, effectively requires the approval of all shareholders of a limited liability company.

The enforcement of compulsory transfer provisions is quite difficult to achieve if shareholder arrangements are entrenched at limited liability company level. Accordingly, parties can interpose an entity incorporated in the DIFC between the shareholders and the limited liability company (ie, the entity that undertakes commercial operations). While such a structure does have negative tax consequences, such negative tax consequences should be weighed against the benefit of interposing a DIFC entity between the shareholders and the limited liability company. The DIFC has its own corporate regime and courts that use English common law for purposes of interpreting the DIFC laws. Accordingly, there is significantly greater certainty relating to the enforcement of the shareholder arrangements if parties structure such shareholder arrangements through the DIFC.

Another key issue that investors should consider is the extent to which it is possible to entrench provisions of the shareholders' agreement in the articles of association of the limited liability company. Certain provisions relating to voting thresholds can typically be entrenched in the articles of association to the extent they do not provide for lower voting thresholds than those set out in the Companies Law.

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

The CMA Mergers and Acquisitions Regulations set out the specific rules relating to mandatory and permissive tender offers. Mandatory tender offers can be triggered by the board of the CMA if a party or parties acting in concert acquire 50 per cent or more of a given class of voting shares listed on the Tadawul. The board of the CMA can order such a person to offer to acquire the shares of the same class that it does not own. In addition, if a party or parties acting in concert acquire 30 per cent or more of a given class of voting shares, such a party is permitted to make a tender offer to acquire the shares of the same class that it, or the person acting in concert with it, do not already own.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer?

To the extent a private equity firm acquires shares in a limited liability company, as a practical matter, approval of any other shareholders will be required before an exit can be implemented as, in practice, all shareholders must attend an appointment at the notary public in order to execute the articles of association that effects the transfer of shares. In addition, only joint stock companies are capable of listing on the Tadawul. Accordingly, all shareholders must approve the conversion of a portfolio limited liability company into a joint stock company prior to a listing. Such a conversion can take a number of months to complete.

In relation to post-closing recourse, private equity players typically negotiate into the relevant transaction documentation that all claims pursuant to the share sale agreement will be limited and capped at a pre-agreed percentage of the total purchase price. In addition, all claims are typically time-barred after an agreed time period (typically 18 months to three years after closing). While warranty and indemnity insurance is available in Saudi Arabia, it is not typically utilised by private equity firms when exiting portfolio companies.

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

In relation to joint stock companies listed on the Tadawul, following the statutory two-year lock-up period, founding shareholders would be permitted to sell-down their interest in the listed company through a secondary offering. The CMA can waive or increase such a statutory lock-up period.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Going-private transactions are not common in Saudi Arabia. We are not aware of any going-private transactions in recent memory. The procedures for a delisting are not well defined.

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18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

As described in question 5, limited liability companies and joint stock companies incorporated in Saudi Arabia that are not 100 per cent GCC owned must obtain a foreign investment licence from the Saudi Arabian General Investment Authority. The application for such a licence can come with significant regulatory and tax disadvantages including the requirement for a relatively high minimum share capital.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

There are no specific regulations in place in Saudi Arabia in relation to club or group deals.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

Private equity purchasers typically include detailed closing conditions and broad termination rights for their benefit while limiting the ability of sellers to terminate the purchase agreement. On the other hand, well advised private equity sellers typically restrict the list of conditions and the termination rights for a purchaser so that they maintain some modicum of certainty that the transaction will proceed to closing. While such trends are common, the terms of each deal will vary depending on the relative negotiating strength and sophistication of the parties to the purchase agreement.