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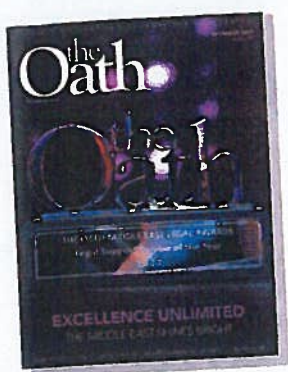


THE OATH MIDDLE EAST LEGAL AWARDS
Legal Support Service of the Year
2017

EXCELLENCE UNLIMITED

THE MIDDLE EAST SHINES BRIGHT

PLUS: >> INTELLIGENCE >> INTERVIEWS >> APPOINTMENTS >> EVENTS >> INDULGE



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CONTINUED STRENGTH...

It is difficult to believe another year is coming to an end. 2017 is definitely one to remember. It was a year that was complex, strange and tumultuous, yet remained resilient. We witnessed political upheavals, devastating natural disasters, terrorist attacks, rising intolerance and widespread misconduct allegations. But it is not all gloom and doom for the economy. The World Bank's Global Monthly December edition cited that global growth remained solid in Q3, and incoming data suggested continued strength in Q4. There's been a recovery in major advanced economies and emerging market and developing economies, thereby, providing a substantial boost to global trade. It has been interesting to see the impact of positive disruption in the region as well by way of introducing new laws, adopting technology and reinventing the way we work. Each new year marks a chance for renewal, let us continue to rise above challenges and see beyond uncertainties to deliver sustainable change.



Last month, we hosted the third edition of **The Oath Middle East Legal Awards** and were humbled by the response. This year came with its own unique challenges but we are proud to have pulled off a successful event, one that has become a leading awards initiative for the legal profession in the region. Our heartfelt thanks to the strong support of the attendees, panel of judges and sponsors, you have enabled us to raise the bar year after year.

It'd be great to hear from our readers on topic suggestions for 2018's editorial calendar, do drop me an email with your feedback.

Enjoy your read...

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Considerations for M&A transactions

Tribonian Law Advisors discusses some of the main employment issues that investors should take into account in a mergers & acquisitions transaction in the UAE.



Various elements influence the final decision of an investor contemplating the acquisition of a business in the United Arab Emirates (the UAE), whether the acquisition is made through a share purchase or an asset purchase. One important consideration for a potential buyer contemplating an acquisition (the Investor) relates to the employment aspect of the targeted business. In this respect, an ad-hoc legal due diligence exercise conducted on the targeted business will flag the employment-related risks and liabilities which will later on have to be addressed in the relevant transaction documents.

This article will discuss some of the main employment issues that investors

should take into consideration in a Merger & Acquisition (M&A) transaction in the UAE. The main piece of legislation relevant to our analysis is Law No. 8 of 1980 and its subsequent amendments (the UAE Labour Law) which govern employment relationships in the UAE, as well as the recent Ministerial Decrees issued in 2015 and 2016 (the New Regulations) namely, Ministerial Decree 764/2015, Ministerial Decree 765/2015, Ministerial Decree 766/2015, Ministerial Decree

739/2016. The labour law applicable in the Dubai International Financial Center is outside the scope of this article.

FOCUSING ON EMPLOYMENT MATTERS IN THE COURSE OF THE DUE DILIGENCE

As one of the first steps in an M&A transaction, the Investor will generally conduct a legal due diligence exercise in respect of the targeted business whereby various documents and information should be carefully reviewed. This exercise will allow the Investor to identify the risks and liabilities that should be addressed in the M&A definitive documents.

One of the main novelties introduced by the New Regulations concerns the inception of an employment relationship

In particular, Ministerial Decree 764/2015 requires an employer to sign a standard form of employment contract with its employees (the Standard Contract) and to register said contract at the UAE Ministry of Human Resources and Emiratization (the Ministry). Yet, it is a common practice for employers in the UAE to also sign side employment contracts with their employees, mainly with the senior employees of the company, by virtue of which additional rights and benefits are granted to said employees, noting that such side contracts are not registered at the Ministry. In this respect, while conducting the due diligence exercise, it is important to check both the Standard Contracts and the side employment contracts (if any) in order for the Investor to determine what liabilities are imposed on the target company (as the employer). Given that employers are now legally required to adopt the Standard Contract, the enforceability of side employment contracts by UAE courts has become less certain. However, in general terms, it seems fairly safe to agree that in case of a dispute, a court would uphold a side agreement if its provisions are more favourable to the employee compared to the provisions agreed in the Standard Contract.

Another area of due diligence concerns the wage protection system regime (the WPS). In fact, Ministerial Decree 739/2016 extends the scope of penalties to which employers can be subject to if they do not comply with the WPS. In particular, in case of non-compliance by an employer with the requirements set forth by the WPS regulations, sanctions might extend to the employer's other establishments, even without notice. Some practitioners and scholars in the UAE have interpreted this provision in an extensive way, arguing that the "other establishments" that will be affected are not only the establishments of the corporate employer in breach, but also the establishments of the shareholders of the breaching employer. This interpretation, if adopted in practice by the authorities, would have far-fetched consequences in term of liability exposure of a company's shareholders. However, until the time there will be precedents that will shed light on how the provision is interpreted, it will be difficult to assess its overall implications.

Another investigation point on a target's compliance with UAE Labour Law concerns

the Ministerial Decree 766/2015, whereby new conditions are required in order to obtain work permits for foreign employees who were previously employed by a different UAE employer. Failure to fulfill such conditions can result in sanctions being imposed on the employer including fines, suspension of the commercial license and, as a last resort, the closing-down of the business. Therefore, during the due diligence process, the Investor should ensure that the work permits of all foreign employees of the target company have been validly issued.

Pursuant to Ministerial Decree 765/2015, an employee bound by a fixed term employment contract, with a term of no more than two years, will be required to notify and indemnify the employer in case he/she terminates his/her employment contract prior to the expiry of its term. The indemnity obligation of the employee is limited to the amount agreed upon between the employer and the employee, noting that said amount cannot exceed the equivalent of three months of gross salary of the employee. With respect to unlimited term contracts, the employee may terminate such contract after notifying the employer of such termination without the payment of compensation. In this respect, it is important to check the term of the employment contracts of the employees of the target company, notably when the employees of the target, given their skills, expertise and experience, are a determinant factor in the Investor's decision to make the acquisition. In light of the above, it is clear that an employer has very little leverage to lock-in key employees for an extended period of time. Therefore, the appropriate mechanisms for mitigating this risk should be considered. One of said mechanisms could be the signature of ad hoc employment contracts (with adequate incentive plans) with the key employees of the target company at completion of the acquisition with the purpose of ensuring the continuance of their employment.

Another issue to be considered in relation to the termination of an employment contract is the payment of the end of service gratuity to which employees are entitled to under the UAE Labour Law. In this respect, the Investor should, during the due diligence exercise, ensure that the target company has sufficient adequate provisions in its balance sheet covering the liability for



However, in general terms, it seems fairly safe to agree that in case of a dispute, a court would uphold a side agreement if its provisions are more favourable to the employee compared to the provisions agreed in the Standard Contract.”

accrued end of service gratuity of its current employees, noting that, under UAE law, there is no requirement for the employer to fund such provisions.


Finally, in the UAE, unlike other jurisdictions, there are no transfer mechanisms by virtue of which employees are automatically transferred from one employer to another in case of the transfer of a business through an asset deal. Therefore, in case of a business sale, the employment contracts entered into with the current employer will have to be terminated and new employment contracts will have to be entered into with the new employer. This "termination and re-hire" process raises various concerns, notably with respect to the entitlements of employees resulting from the termination of their employment contracts. In this respect, said entitlements should be identified during the due diligence phase in order to know what obligations will be transferred to the target company post completion of the acquisition. For example, upon termination of an employment contract, the end of service gratuity of the concerned employee will become due and payable by the employer. Given that the amount of the end of service gratuity is based on the length of the employment (capped by the UAE Labour Law at a certain amount), employees prefer that the payment obligations of said entitlements be "rolled over" to their new employer rather than them collecting said entitlements upon the termination of their first employment. In order for the "roll over" to become effective, an ad-hoc tri-partite agreement needs to be entered into among the former employer, the new employer and the employee which will provide for the continuation of all entitlements of the employee under the new employment contract.

REORGANISING THE EMPLOYEES OF THE TARGET POST-COMPLETION

Following the completion of the acquisition, the Investor may want to reorganise the employment aspect of the acquired target in order to avoid any redundancies between the employees of the target and the employees of the Investor or its group. In this respect, the issue of termination of employments for redundancy reasons may be raised when the Investor will consider terminating some of the existing employment contracts.

The concept of redundancy is not recognised under the UAE Labour Law and hence, the employer, when proceeding to make certain employees redundant as part of its restructuring process will have the burden of proof to demonstrate, in case of dispute, that the relevant employment contracts have been terminated for valid cause. In this respect, it is to be noted that UAE labour courts have generally recognised the right of an employer to restructure its business and have considered redundancy as a valid and non-arbitrary reason to terminate an employment contract. However, it is important for the employer to have proper and reasonable justification for considering a certain employee as redundant in order for the employer to raise such defense in case the employee decides to claim arbitrary dismissal upon the termination of his/her employment.

CONCLUSION

The issues discussed in this article should be thoroughly considered by the Investor contemplating the acquisition of a business, whether through an asset or share purchase. This would allow the Investor to be in a position to make a well-informed decision and, when necessary, implement the adequate mechanisms to manage and mitigate the risks and liabilities emanating from employment-relating matters. 



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