A question of authority?

An analysis by BonelliErede on the powers of UAE LLC Managers with a focus on M&A transactions and on what steps should be taken to fill in the existing gaps.

In the context of merger and acquisition (M&A) transactions, principals and their lawyers have to take into consideration multiple complex issues. One of the most basic but crucial matters to consider is how to execute the various agreements documenting the envisaged transaction (M&A Documents) by United Arab Emirates (UAE) based corporate entities party to such agreements.

This article will analyse the authority of the manager of limited liability companies (LLCs) in the UAE to execute contracts in light of the new Commercial Companies Law No. 2 of 2015 (the New CCL), and in particular will look at the best course of action to verify the signing authorities and avoid pitfalls and potential disputes on the validity and binding effect of M&A Documents due to the lack of signing powers.

SPECIFIC POWERS

The starting point of our analysis is to be found in article 83 of the New CCL governing LLCs, whereby the manager is authorised to exercise "full powers to manage the company" and "his/her acts shall be binding to the company, unless a separate contract appointing the manager (the Appointment Contract) or the articles and memorandum of association of the company (the MoA) include specific powers of the manager".

The mentioned provision of the New CCL deals with the manager's authority in general terms, i.e. by making reference to "full powers", rather than listing specific powers that fall by default within a manager's realm. Whereas the approach is useful to shed light on managers' authorities for ordinary matters (for which there is little doubt that they can always be handled by the manager, without any further corporate action), we are still left with questions on whether transactions falling outside the ordinary course (M&As being a typical example) fall within a manager's authority or, on the contrary, whether consent from directors or shareholders is required to create the authority for binding the company.

Some clues on the matter can be found in some other provisions of the New CCL. According to articles 23 and 25 (which are applicable to all kind of companies, not only LLCs), the company shall be bound by any act or thing by the person authorised to manage the company upon conducting the works of management in a "usual manner" and the company will be held liable towards third parties when the acts of the manager fall within his/her "usual limits" compared to persons having the same position in companies conducting similar activities. However, the terms "usual manner" and "usual limits" are not defined in the New CCL. In the absence of any known case law on the matter, it is difficult to determine what powers are actually considered as exercised by the manager in a "usual manner" and within the "usual limits" and if the execution of the M&A Documents falls within such powers. That said, it could be reasonably maintained that M&A transactions, especially when of material value, would most likely be considered an extraordinary transaction by any judge in the context of a litigation relating to a claim for lack of a manager's authority.

RELEVANT PROVISIONS

We can further analyse the powers of the manager of LLCs by way of analogy when looking at the relevant provisions of the New CCL in relation to powers of managers of joint liability companies (a type of partnership). According to article 49 of the New CCL, tasks exceeding the "ordinary management tasks" may not be conducted by managers of a joint liability company unless there is consent from all the partners or by virtue of express provisions in the MoA. These tasks include: donations; sale of company's real estates (if this does not fall within the objectives of the company); mortgaging the company's real estate or assets; securing the obligations of third parties, and; the sale, mortgage or lease of the company's premises. We note from the aforementioned list that transactions of high significance to a company are considered as "exceeding ordinary management tasks". Although M&A transactions are not explicitly mentioned in the list, it could be argued with a certain degree of confidence that they also fall within that category, and therefore they are outside the manager's power.

In light of this, and given the lack of any express provision in the New CCL listing powers of LLCs manager, it does not seem prudent to draw the conclusion that execution of M&A Documents falls within the authority of the manager. In fact, we note that the general market practice amongst legal professionals in the country is to expressly request adequate evidence of the necessary authorities from the relevant counterparty prior to signing M&A Documents.

IMPORTANT CORPORATE DOCUMENTATION

As a starting point, lawyers should ask for the MoA of the company as well as any additional contracts entered into with the manager, including the Appointment Contract (if any), in order to check if entering into agreements such as the M&A Documents falls within the authorities granted to the manager. When analysing such corporate documents, it has to be kept in mind that, generally, powers given to managers are limited not only by the nature of the transactions they can enter into, but also by monetary thresholds, above which they will need board or shareholders' approval. Therefore, there could be certain M&A transactions that, given their nature and value, fall within the powers listed in the MoA or the Appointment Contract, and others that fall outside the manager's authority. It follows that a thorough analysis of the manager's authority would require an assessment of whether the M&A transaction at hand (which is not necessarily always a straightforward share sale) and the consideration for it (which might include deferred payments, contingent and earn-out payouts, and so forth), when looked in its entirety, is a transaction that can safely be considered included in the manager's authority list set forth in the MoA or the Appointment Contract. To further complicate the matter, it would not be safe to simply rely on the copy of the MOA or Appointment Contract provided by the counterparty, as the relevant document might not be the latest version including all subsequent amendments. In fact, contrary to other jurisdictions, MoAs and other corporate documents of LLCs are not available for inspection by third parties in any public registry, and therefore there is no official way for a third party to determine what is the most recent version of the corporate document to be analysed.

To be on the safe side, it is best that lawyers always request a shareholders' or board resolution (as applicable according to the corporate documents of the company) by virtue of which the shareholders or board members of the company approve the entry into the M&A transaction and appoint the manager as the authorised signatory on behalf of the company for the purpose of said transaction. Such resolution should also be complemented with a notarised power of attorney signed by the shareholders of the company which specifically grants the power to the manager to execute on behalf of the company the M&A Documents.

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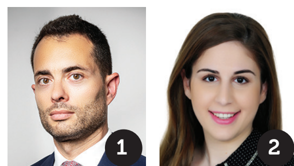

Text by:
1. CARLO PIANESE, *local partner, BonelliErede (Dubai)*
2. MARYLINE KALAYDJIAN, *associate, BonelliErede (Beirut)*