Global Private M&A Guide - Limited External Content - United Arab Emirates

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*This content was last reviewed around October 2023. Note: Given the significance of a new competition law that entered into force as of 30 December 2023, a brief summary has been included.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

In the United Arab Emirates (UAE), it is customary to finalize the due diligence exercise prior to the execution of the acquisition agreement(s). The main areas of review in the due diligence process vary from transaction to transaction, but generally include corporate, licensing and permits, financing, material contracts, real estate, employment, intellectual property, insurance, litigation and tax matters. Based on the due diligence findings, the parties may negotiate specific representations and warranties, pre-closing conditions, express indemnities and/or a purchase price retention/reduction. Due diligence findings may also give rise to a request from a buyer to carve-out certain assets/entities from the target group.

The amount and quality of due diligence documentation can vary quite widely, depending on the target (i.e., the approach to due diligence and flow of information from an early-stage founder run business is likely to be different to that from a large corporate, financial institution or financial sponsor operated target). The approach to due diligence requests will also need to be tailored based on the background of the target, as well as the industry sector.

Due diligence considerations in the UAE will be similar to other jurisdictions, however investors should be particularly mindful of the following matters: ownership structure, licensing compliance, related party arrangements, registration of real estate interests and compliance with employment laws. With the introduction of value-added tax (VAT) on 1 January 2018 and corporate income tax on 1 June 2023, tax is now an additional focus area that must be borne in mind when conducting due diligence.

**Pricing and payment**

The most common form of consideration is cash, however loan notes or equity may also be used. There are no legal requirements regarding pricing and payment of consideration. Payment does not need to be made locally in the UAE. Valuations are not required, except in limited circumstances (for example, pursuant to a statutory merger) or where there is an exercise of a buyer of shares under a pre-emption right (and where the target is an onshore UAE entity).

Electronic transfers of funds, including through the SWIFT international payment system, is the most common way of paying cash consideration. There are no foreign exchange controls or restrictions on repatriation of funds. Due to onshore local share transfer requirements, the use of escrow accounts to hold consideration payments is common where the target is an onshore UAE entity.

It is common for the initial purchase price to be stated on a "cash-free, debt-free" basis, based on either a "locked box" or completion accounts methodology.

While it is not common to provide for deposits or break fees, an escrow arrangement is relatively standard. Earn-out arrangements are also relatively common, allowing the buyer to defer the payment of part of the consideration, conditional upon agreed milestones or thresholds being achieved.

**Signing/closing**

*Share sale*

A share purchase in the UAE will have many commonalities with share purchases in other jurisdictions. The key transactional document will be the long-form share purchase agreement (SPA) that sets out the full terms of the transaction.

An SPA can be drafted in English, it does not have to be notarized and the parties can sign the signature page without having to sign or initial each page of the SPA. The SPA can be subject to either UAE, or foreign, law. English law is commonly used, particularly for cross-border transactions, transactions involving foreign parties, large corporates, UAE sovereign wealth funds, regional private equity institutions and large family offices, however UAE law is also often used, particularly between UAE parties. It is generally acceptable for SPAs to be signed in an electronic form under UAE law, provided that certain requirements are met with respect to verifying the signature.

An SPA is usually subject to the jurisdiction of the UAE courts (if the SPA is governed by UAE law), or the Dubai International Financial Centre (DIFC) courts, the Abu Dhabi Global Market (ADGM) courts or an arbitration tribunal that is based in a jurisdiction that is a party to the New York Convention (if the SPA is governed by a different governing law, e.g., English law). It can be problematic to enforce a court order or arbitration award in the UAE where the court order or arbitral award is granted in a jurisdiction other than the aforementioned options.

*Share transfer of an onshore UAE entity*

To implement the transfer of shares in an onshore limited liability company (LLC) (the form of entity that is most commonly used), a separate short-form Arabic language share transfer agreement is required. If the share transfer agreement is drafted in a bilingual form (i.e., in Arabic and any other language, usually English), it must be attested by a sworn translator in the UAE before the existing and new shareholders of the company can sign it before a notary public. The notary publics in certain Emirates have recently introduced the option/requirement to execute certain documents before a notary public via a videoconferencing facility rather than in person.

In addition to the share transfer agreement, a schedule of amendment to the entity's existing memorandum of association must be signed before a notary public (either in person or via videoconference). The attested, signed and notarized documents must then be submitted to the Department of Economic Development (DED) in the relevant emirate. The DED will update the commercial license of the company and issue a new license stating the names of the new shareholders with their respective shareholding. The share transfer agreement and the schedule of amendment of the articles of association may also be combined into one document if preferred.

If a buyer of shares is itself a corporate entity, the DED and notary public will require the constitutional documents of the buyer to be submitted to it for review, along with a shareholder or board resolution (as the constitutional documents of that company requires) resolving to acquire the shares and to appoint a signatory to sign the share transfer documents before the notary public, and any other relevant documents that may be required to obtain external approval from other regulators.

Where the buyer is a foreign entity, the buyer's constitutional documents, a certificate of good standing, an incorporation certificate or trade register extract and a power of attorney must all be legalized by the UAE Embassy in the country of incorporation of the buyer, attested at the Ministry of Foreign Affairs and International Cooperation in the UAE, and then translated into Arabic and attested by a sworn translator in the UAE. Where the buyer is an entity that is incorporated in the UAE, an original or attested copy is sufficient for the purposes of submission to the DED and the notary public.

For companies that are registered in one of the many free zones in the UAE (other than the ADGM and DIFC), similar documents are required to effect a transfer of shares, with the exception that: (i) the existing shareholders and the buyer must sign the transfer documents before the relevant free zone authority rather than signing the share transfer agreement before a notary public (although a number of free zone authorities will allow the share transfer documents remotely and delivered by courier where that free zone authority holds a legalized specimen signature on file for the relevant signatory); and (ii) the constitutional documents of the target company and the buyer and seller resolutions may not need to be translated into Arabic.

Shareholders of an onshore LLC have statutory rights of preemption on all transfers of shares in that LLC, which would need to be waived by any remaining shareholders to implement the share transfer.

*Share transfer of an entity in the ADGM or DIFC*

It is increasingly common for holding companies in the UAE to be structured through a financial free zone, such as the ADGM or the DIFC. As a result of this, the same formalities as apply to onshore UAE entities (as described above) would not apply.

Implementing a share transfer of an ADGM or DIFC entity involves completing and filing various standard form documents which detail the proposed transfer on the ADGM portal, or with the DIFC Registrar of Companies. The standard forms include updated register of members, corporate resolutions, the main transfer instrument, ultimate beneficial owner documentation and updated articles of association. Templates of these can all be found on the ADGM and DIFC websites. Similar to completing an onshore transfer, the articles of the association of the relevant entity will need to be updated to reflect the new shareholders. One of the key things to note when implementing a transfer in the ADGM or the DIFC, is that further legalization requirements typically associated with onshore transfers are not required. For example, there would not be a need for the updated articles of association to be signed before a notary.

From a timing perspective, it needs to be considered that from submission of the aforementioned documents on the relevant portal (ADGM) or Registrar of Companies (DIFC), the relevant authority can take one to three days to review the documents (and potentially make further enquiries with respect to the transferor or transferee) before issuing the updated the commercial license. The commercial license is the document that evidences the transfer of legal title. The mechanics of when completion takes place will, therefore, need to be considered in the purchase agreement.

*Asset sale*

An asset purchase in the UAE will share many features of asset purchases in other jurisdictions. The key transactional document is the long-form asset purchase agreement (APA). The APA does not need to be submitted before any authorities and, therefore, may be drafted in the language preferred by the parties. The APA may also be signed electronically if the parties prefer this approach.

As in the case of an SPA, in most cases, an APA may be subject to either the laws of the UAE or the laws of a foreign jurisdiction (with English law being the most commonly applied foreign law for an APA). For the transfer of certain assets (e.g., real estate, intellectual property, motor vehicles) there are likely additional formalities that will need to be followed, which should be addressed in the APA. It is generally acceptable for APAs to be signed in an electronic form under UAE law, provided that certain requirements are met with respect to verifying the signature.

An APA is usually subject to the jurisdiction of either the UAE courts (if the SPA is governed by UAE law), or the DIFC courts, the ADGM courts or an arbitration tribunal that is based in a jurisdiction that is a party to the New York Convention (if the SPA is governed by a different governing law, e.g., English law), as it can be problematic to enforce a court order or arbitration award in the UAE where the court order or arbitral award is granted in a jurisdiction other than the above.

Unless the assets to be transferred are of a type that is registered, there is no need to file any documentation with the relevant authorities. If the registered assets were to be transferred, the parties would typically execute a short-form document to that effect rather than filing the long-form APA that contains the full terms of the transaction with the authorities.

Certain types of registered assets may require a separate transfer agreement to be entered into or a procedure to be followed. Such assets include (without limitation) real estate, motor vehicles and registered intellectual property. Employees cannot be "transferred" under UAE law and, instead, will need to be terminated by the transferor and re-hired by the transferee. End of service benefits will accrue upon termination and accordingly any transfer of end of service benefits will need to be agreed with the relevant employees (see further commentary below in the Employment section).

## Approvals/registrations

**Foreign investment restrictions**

As of 1 October 2023, there is no general foreign investment screening procedure in the UAE.

In September 2021, the Commercial Companies Law  was amended to remove the requirement that at least 51% of the share capital in an onshore company be owned by a UAE national. Following the adoption of the amended Commercial Companies Law, 100% foreign ownership of onshore entities was permitted, though restrictions continue to apply for certain activities (e.g. security, defense and military activities; banking, exchange houses, financing companies and insurance; communications; etc.).

While onshore companies had traditionally operated with such a foreign ownership limitation, companies incorporated in freezones permitted 100% foreign ownership.

In addition to the foregoing, the UAE has implemented a policy that permits 100% ownership of UAE companies by individuals or companies from the Gulf Cooperation Council (GCC). This policy is widely adopted, although its precise scope is unclear and it is left to the discretion of the individual corporate registration departments of the relevant emirate to implement.

**Antitrust/merger control**

The UAE has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed. For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

The requirement for regulatory or government approvals varies depending on the sector, the industry and whether the target company or assets are located onshore in the UAE or within one of the UAE's many free zones. Approval will always be required from the relevant authority to transfer shares and such approval may be further conditioned on obtaining approvals from additional government departments.

## Employment

**Share sale**: All employees who are employed by the target group would remain employed by the target company upon closing of the transfer of shares, and all employment contracts and immigration permissions would, therefore, remain in place.

It may be the case that one or more employees of the seller's group are not technically employed by the target group but they perform certain employment functions in relation to the target group. If the parties intend to transfer any such employees as part of the share sale transaction, they would need to apply the same approach for transferring those employees as that of the asset sale arrangement referred to below.

**Asset sale**: Employees transfer from the seller to the buyer under an asset sale by way of termination and rehire. New employment contracts would need to be entered into with each of the employees and new immigration permissions would need to be obtained in order to obtain a visa under the sponsorship of the buyer. If any employees refuse to agree to the transfer of their employment, they would remain employed by the seller unless and until their employment contracts are terminated or the employee resigns.

There is no obligation on the buyer to replicate the terms and conditions of the transferring employees, subject to any contractual obligation to do so that might be imposed under the transaction documents. However, employees are likely to be reluctant to agree to the transfer if they deem their new employment contracts to be less favorable for them. Although termination triggers the obligation to make all termination payments due to the transferring employees, it is common for the seller, the buyer and the employees to contractually agree to the rollover of the accruals and benefits to the new employment arrangement. This may require an adjustment to be made to the purchase price to reflect the rollover of these benefits.

There is no formal obligation to inform and consult with employees in either a share sale or an asset sale. However, such consultation is required in practice in relation to an asset sale, as the employment arrangement cannot be transferred in that case without the cooperation of the employee.

There is little in the way of legal guidance regulating the transfer of employees pursuant to a corporate transaction. There is one reference in Federal Decree Law No. 33 of 2021 to current employment contracts remaining in place in the event of a "change in the form or legal status" of an establishment, and requiring the new employer to be liable for the employees. This provision is unlikely to apply in an asset sale (given the requirement to terminate and rehire the employees). Further, the proportioning of liability is normally dealt with in the transaction documents, which typically provide that the seller is liable for any breach that it incurs up to the date of closing, with the buyer becoming responsible for any breaches that are incurred thereafter.

## Tax

There is no stamp duty or capital transfer tax in the UAE. Registration fees are payable to the municipality on the transfer of real estate. The rate varies, depending on the emirate. In the emirate of Dubai, the rate is 4% of the value of the property.

Corporate income tax was introduced with effect from 1 June 2023. The applicable general tax rate is 9%. Companies established in free zones that undertake certain qualifying activities (subject to conditions specified in the tax legislation) are subject to tax at 0%. Government entities, government-controlled entities, qualifying Public Benefit entities, Qualifying Investment Funds, persons engaged in extractive business and persons engaged in non-extractive natural resource business are exempt from tax.

Income (including capital gains) from qualifying participations (5% or more ownership interest in a company) is exempt if certain conditions are met.

Transfers within Qualifying Groups can be made on a tax neutral basis and business restructuring reliefs are available if qualifying conditions are met.

Transfers between related parties are subjection to the application of arm's length pricing principles.

There is no personal income tax on individuals.

VAT is due at 5% on the transfers of assets in certain circumstances (but not on shares). The transfer of a business as a going concern is, however, outside the scope of VAT.

There is no withholding tax on the remittance of funds (within or outside the UAE).

The UAE has a network of tax treaties, which makes it a flexible tax efficient jurisdiction for structuring corporate holdings for acquisitions.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

In the UAE, transactions are usually concluded via either a share purchase or an asset purchase. Statutory mergers can also be concluded under UAE law, but are not commonly used.

Auctions are not uncommon in the UAE. Bid process letters are commonly used and often require binding offers to be submitted, although such binding offers are usually drafted to be highly conditional and are, therefore, unlikely to have a binding effect.

The UAE Commercial Companies Law, Federal Law No. 2 of 2015 (CCL), provides for the merger of UAE companies by way of amalgamation (where two companies merge by disappearing into one newly formed company) and absorption (where one company merges into another such that only the merged company survives). These provisions are complex, largely untested and, therefore, not generally used in the context of private company M&A transactions. However, mergers are increasingly being used in the context of restructuring transactions, where there is less likelihood of a dispute in the absence of clear regulations. Certain well-established free zones (such as the DIFC and the ADGM) also have fairly robust regulations regarding mergers and amalgamations, although this is not the case with all free zones (such as Dubai Airport Free Zone or Jebel Ali Free Zone, for instance).

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Corporate entities may be formed onshore in the UAE under either the CCL or the Civil Code.

The CCL provides for five different types of corporate forms: the LLC; the private joint-stock company; the public joint-stock company; partnerships; and foreign companies. In the context of private M&A transactions, the most common form of company incorporated onshore in the UAE is the LLC.

The Civil Code provides for an additional form of entity, being a civil company that undertakes "professional" or "consultancy" activities such as law firms, architecture, engineering and accounting firms. However, civil companies are rarely used for two reasons: (i) they do not have a separate legal identity and it is, therefore, not possible to ring-fence liability using such form of entity; and (ii) civil companies are not generally permitted to have corporate shareholders and are, therefore, not usually suitable for use as part of a multinational corporate group.

In addition to corporate entities formed onshore, corporate entities may be established in one of the many free zones in the UAE provided that the business activities of the company are of a nature that can be performed from within the confines of the relevant free zone. The DIFC and ADGM uniquely apply common law based on English law. The DIFC has been set up as a global financial center within the UAE as part of a broader Dubai strategy to increase its profile as a leading regional financial hub. The aim is to attract global and regional financial institutions, companies and service providers to operate in the DIFC. The ADGM was recently established and is broadly similar to the DIFC in many respects.

## What are the different types of limited liability companies?

The LLC structure offers limited liability to its shareholders. An entity of this nature can have between one and 50 shareholders.

The CCL does not prescribe a minimum capitalization for an LLC. However, there must be sufficient share capital for the realization of the objectives of the company and certain specific business activities have minimum capital requirements imposed by the DED. This will be judged by the relevant emirate-level authority that will regulate the incorporation of the company (for example, in Dubai it is the Dubai DED).

Onshore LLCs are not currently permitted to have different classes of shares (although a number of free zones now provide for different classes of shares, such as ADGM, DIFC and the Dubai Multi Commodities Centre). Government regulations can impose higher minimum capital requirements with respect to certain classes of company or types of activity.

The LLC structure does provide some flexibility in relation to setting out minority protections such as reserved matters but the level of protections do not match what is available in many common law jurisdictions.

In addition to certain limited statutory protections (e.g., preemptive rights on issues of new shares), minority protections can include versions of the following (though the protections will not be identical to those that can be crafted in common-law jurisdictions):

Supermajority voting

Management control

Disproportionate allocation of profits

Shareholder agreements being permitted to supplement the constitutional documents in some circumstances

## Is there a restriction on shareholder numbers?

There is a minimum of one, and a maximum of 50, shareholders for an LLC.

## What are the key features of a share sale and purchase?

A share purchase in the UAE will have many features familiar to those who have undertaken share purchases in other major economies. The key transaction document is the SPA, which will commonly follow the UK style of drafting. The SPA does not need to be submitted before any authorities and can, therefore, be drafted in the language preferred by the parties, but English is most common. SPAs will include terms commonly found in other jurisdictions, such as covenants, conditions, warranties and indemnities. For certain commonly utilized UAE corporate vehicles (e.g., onshore limited liability companies), title to shares will transfer upon submission to the Department of Economic Development of an executed and notarized amendment resolution revising the shareholders of the target entity. A similar, though not identical, procedure is utilized in many freezones.

The UAE introduced VAT on 1 January 2018 and, therefore, tax warranties and covenants are also being routinely included.

Other documents, such as a disclosure letter, transition service agreement or shareholders agreements will be similar to those used in other jurisdictions.

## What are the key features of an asset sale and purchase?

An asset purchase in the UAE will share many features of asset purchases in other jurisdictions. The key transactional document is the APA. This does not need to be submitted before any authorities and can, therefore, be drafted in the language preferred by the parties.

Unless the assets to be transferred are of a type that are registered (e.g., registered trademarks, motor vehicles, real estate), there is no need to file any documentation with the relevant authorities. If registered assets are to be transferred, the parties would typically execute a short-form document to that effect rather than filing the long-form APA that contains the full terms of the transaction with the authorities.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is customary to prepare a letter of intent (commonly also referred to as a term sheet/memorandum of understanding). The main commercial terms are commonly not legally binding, however certain boilerplate provisions (e.g., costs, confidentiality, exclusivity, assignment, governing law and jurisdiction) are usually legally binding.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: It is customary to include provisions on exclusivity.

**Break fee**: Break fees are not commonly included in private M&A transactions.

**Confidentiality**: It is customary to include provisions on confidentiality.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Exclusivity, break fee(s) and confidentiality can be either dealt with in separate agreements or included in the term sheet. There is no specific legal reason for this; it is usually a question of timing.

## Is there a duty or obligation to negotiate in good faith?

**Existence of a contract**

In the absence of a contractual relationship, there is no duty on the parties to negotiate in good faith under UAE law.

However, even if a purchase agreement has not been entered into, a contract may be deemed to have already been entered into if the following are true:

The essential elements of the contract are agreed between the parties

The details of the contract are defined or capable of being defined at a later stage

The purpose of the contract is lawful (Article 129 of the Civil Code)

If these elements are established, a contractual relationship can be inferred between the parties even if the contract has not been executed. If the parties do not want their contract to be qualified as binding, it is important to make an express stipulation to that effect.

**Duty of good faith in UAE contracts**

If the existence of the purchase agreement can be inferred subject to the above conditions, the parties have a duty to conduct themselves in a manner that is consistent with the principle of good faith under UAE law. Generally, the principle of good faith is defined as a negative obligation, i.e., a party should not act in bad faith or in a way so as to seek unfair advantage or to exploit the other. Conversely, a party would be seen to be acting in good faith if it is cooperative and, if possible, seeking to avoid conflict.

While the principle of good faith is certainly recognized, it may be difficult for a party to demonstrate that failure to sign a purchase agreement is an act of bad faith (or a lack of good faith), as there may be a number of other considerations at play. UAE courts will have ultimate discretion in determining whether damages commensurate with the time and money expended in connection with the purchase agreement can be awarded.

**Termination for misrepresentation**

Parties have the right to terminate a contract if the other party makes a misrepresentation and the contract has been entered into by a "gross cheat" (Article 187 of the Civil Code). Deliberate silence about a fact or circumstance will be treated as a misrepresentation if it is proved that the person misled the other and thereby would not have agreed to the contract if aware of that fact or circumstance (Article 186 of the Civil Code).

Although the courts are not bound to adhere to case precedents under UAE law, they do have persuasive value and, in the past, UAE courts have established the following factors as to how liability should be determined under Article 187:

It is necessary to prove that there has been both a "misrepresentation" and a "gross cheat."

For a "gross cheat" to be found, there must be a serious discrepancy between the true value of the thing sold and the price for which the buyer is buying it, to the extent that the victim would not have entered into the contract if the "gross cheat" had not occurred.

The burden of proving that there has been a "gross cheat" lies with the party making that allegation.

Depending on the facts of the case, the above provisions could be used to imply an obligation to disclose material information even where the seller has not specifically been asked to confirm the same as part of the due diligence process.

However, as this is ultimately at the discretion of the courts, it is recommended that buyers do not rely solely on this provision and try to make the due diligence questionnaire process as comprehensive as possible.

Sellers, on the other hand, should be cautious of this provision and note the risk that there may be liability issues if any relevant facts are not disclosed that they might be obliged to disclose under this obligation of good faith.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Very common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Locked box adjustments are very common, particularly for private equity, sovereign wealth fund or financial sponsor clients. Completion accounts (with a net debt and working capital adjustment) is also very common, particularly for corporates, or if the transaction involves a carve-out from a larger group.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Sometimes, but not often.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: It depends on the negotiating strength of the parties, but it is usually prepared by, or on behalf of, the buyer.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Not usually, although it will depend upon timing of the transaction in the audit cycle. It is typically special purpose accounts that are utilized for a locked box transaction, rather than statutory accounts.

## Is an earn-out common?

Frequency/market practice: Fairly common, particularly where a valuation gap exists.

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: Fairly common.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Very common, particularly when there is a long gap between signing and completion. Any MAE provision will typically be heavily qualified and limited to very specific (measurable) triggers/events.

## Is the MAE general or specific?

Frequency/market practice: Typically specific

## Is the MAE quantified?

Frequency/market practice: Yes, particularly by reference to a percentage downturn in revenue or earnings before interest, tax, depreciation and amortization, the commencement of material litigation, or a significant legal/regulatory investigation against the target.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Very common, but not from private equity sellers.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: The blue pencil doctrine/method is fairly common (particularly in agreements governed by English law). Commonly agreements will include an express provision to this effect and is commonly applied on restrictive covenants (e.g., non-compete provisions).

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Very common, usually in conjunction with non-compete.

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Very common, usually in conjunction with non-compete.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common. The purchase agreement will typically contain a list of pre-closing covenants requiring the consent of the buyer prior to certain actions being undertaken (e.g., amendments to the share capital, acquiring or disposing of a material asset, incurring material opex/capex, the entry into, amendment or termination of a material contract, declaration or payment of any dividends, the commencement/settlement of material litigation and/or the amendment of the terms of key employee compensation etc.).

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Very common for private deals.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: The obligation on the seller to notify the buyer of a breach of warranty between signing and closing is very common. It is very common for the seller to be able to provide an updated disclosure letter disclosing matters or events that have occurred between signing and closing that would constitute a breach of warranty given at closing. Typically, the buyer will have a right to terminate in the event of material breach, or proceed to closing and seek damages.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Very common; materiality qualifiers are commonly seen but often not quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers depend upon the outcome of negotiations between the parties as to risk-sharing, and are often limited to the actual knowledge of certain individuals, subject to obligations of due enquiry of certain specified members of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: No

## Is disclosure of the data room common?

Frequency/market practice: Very common, but often up to an agreed date prior to signing of the purchase agreement.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Very common. The scope of the warranties that are repeated at closing (i.e., all or a sub-set) will depend on the strength of the respective parties' bargaining position.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: No

## Is a bring-down certificate at closing common?

Frequency/market practice: The use of ‘bring-down’ certificates is rare.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate is common for business warranties (with certain warranties qualified by materiality). Fundamental warranties must be absolutely true and accurate.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely. Double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: Commonly between 30% to 40% for business warranties in negotiated purchase agreements, with fundamental warranties being at 100%.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: The limitations usually apply to warranty claims only, however it is common that all claims under the purchase agreement (other than for breaches of any restrictive covenants) will not exceed 100% of the purchase price. It is also common to agree separate caps for any express indemnities.

## What are the common exceptions to the cap?

Frequency/market practice: Fundamental warranties (e.g., title, capacity and due authority) are often not subject to the cap that applies to business warranties. Other exceptions include tax and specific areas of concern, which may be subject to a higher cap/express indemnity.

## Is a deductible or basket common?

Frequency/market practice: A deductible is usually resisted and a tipping basket is more common.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: General survival of 18 to 24 months is common (usually one full audit cycle under the buyer's ownership) for business warranties. Tax, environmental and fundamental warranties and/or specific indemnities will be subject to a longer tail period.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud. The liability period for tax warranties is typically longer than the liability period for business warranties.

## Is warranty insurance common?

Frequency/market practice: Warranty and indemnity insurance is increasingly common, especially in transactions involving private equity institutions or sovereign wealth funds.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Rarely; tax indemnities only started being used in the UAE since the introduction of VAT on 1 January 2018, therefore, there is not an established market practice for this at the moment.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common for any insurance proceeds that are actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common for amounts actually recovered from third parties.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Very common for English law governed purchase agreements - this is required by English law for warranty damages (not indemnities) and is usually incorporated into purchase agreements. Under UAE law, a party that contributes to a loss cannot claim damages for such loss, therefore, implying a duty to mitigate. It is nonetheless common to include a contractual duty to mitigate loss in the purchase agreement.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: English law is commonly used, particularly for cross-border transactions, transactions involving foreign parties, large corporates, UAE sovereign wealth funds, regional private equity institutions and large family offices. UAE law is also commonly used in purchase agreements between two UAE-based parties (particularly for smaller-cap deals).

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration in the ADGM, DIFC or overseas jurisdictions is commonplace and recommended as awards can generally be enforced without a local court rehearing the case.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: No stamp duty is payable. Notarization fees for the transfer of shares in an LLC are paid by each party.

If the target company or a subsidiary thereof holds real estate in the UAE, then registration fees would be payable. The rates vary depending on the emirate. In Dubai, a registration fee is 4% if payable on the value of the property where there is a transfer of either freehold title or of a long-term lease of 10 or more years, with 2% being typically borne by the buyer and 2% by the seller.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Very common; tax indemnities and warranties are increasingly being used in the UAE since the introduction of VAT on 1 January 2018. They are usually included in the SPA and are relatively short form in comparison to other jurisdictions.

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