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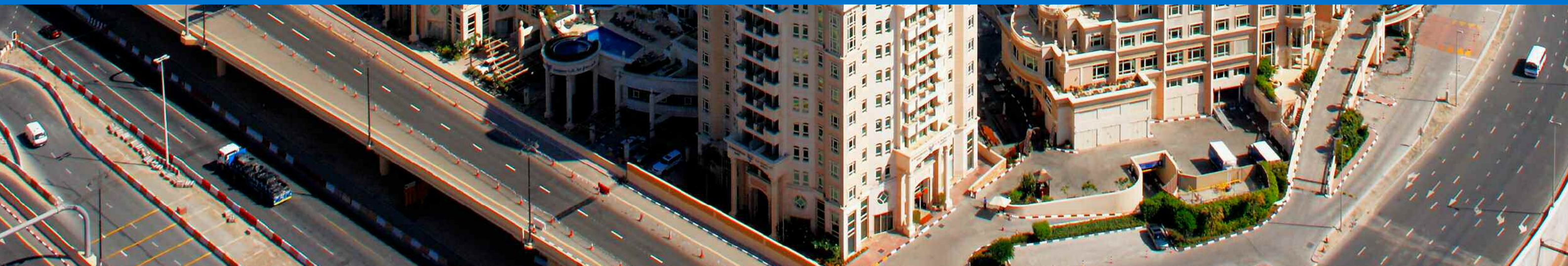
UAE: Essential tips for successful investment



UAE: Essential tips for successful investment

The United Arab Emirates (UAE) has a population of over 9 million people and a growing economy. With the UAE's continued diversification into non-oil related sectors, Dubai's successful bid to host Expo 2020, political stability and a favourable tax regime, it continues to be an attractive destination for foreign investment.

Here are our top legal tips for investing successfully in the UAE.

Relationships are key

Establishing and maintaining relationships is at the heart of doing business in the UAE. Decisions made by UAE partners and businesses can be influenced by the strength of business relationships. It is therefore important to invest the time and effort to build trust and a rapport with your proposed UAE partner.

The importance of due diligence

You should conduct a comprehensive due diligence exercise to understand and evaluate the risks associated with the target and/or your proposed UAE partner. Some of the risks include legal and regulatory challenges, sanctions, availability of a skilled labour force and enforceability of contractual rights. You should also be mindful of the history of your proposed UAE partner's other joint venture relationships, which could provide a useful insight into the way in which it does business.

Foreign investment restrictions

Shares in onshore companies

There are foreign ownership restrictions in most sectors in the UAE which require at least 51% of the shares in a UAE onshore company (outside of certain free zones) to be owned by UAE nationals or companies owned by UAE nationals. In some circumstances some or all of the UAE ownership requirement may be satisfied by nationals of other Gulf Co-operation Council countries (or companies owned by them).

It is anticipated that a new Foreign Investment Law may be issued which will provide a framework for relaxing the foreign ownership restrictions in certain market sectors. The timing for publication and extent of the regulations is currently unclear.

In addition, there are a number of sectors in which foreign investment is "conditional" and requires approval from the appropriate regulators and ministries. Common sectors that are subject to approval requirements or restrictions include financial services, education, telecommunications, healthcare, construction and utilities.

It is therefore important to identify any restrictions or approvals that will be required at the outset of a transaction and to engage with the relevant authorities at an early stage of the transaction process.

Free zone companies

Free zones are geographical areas in the UAE that promote inward investment and provide a market oriented legal and regulatory alternative to the regime that exists elsewhere in the UAE.

The main benefits of free zones include 100% foreign ownership of companies and exemptions from taxes and custom duties. Land and property may be leased for a specified period of time under fully transferable renewable leases and ownership of land is possible for a 99 year period, along with freehold ownership in some free zones. The free zones also facilitate speed and ease of establishing a presence.

There are a large number of free zones in the UAE, each with a different industry or sector focus and its own legal and regulatory regime. Examples of some of the larger free zones include the Dubai International Financial Centre (DIFC), the Jebel Ali Free Zone, Dubai Creative Clusters and the Dubai Airport Free Zone (all of which are located in Dubai) and Khalifa Industrial Zone Abu Dhabi (KIZAD), Masdar Free Zone, Abu Dhabi Global Market and Abu Dhabi Airports Free Zone (all of which are located in Abu Dhabi). If you are considering an investment in a free zone, you should take legal advice as to the possible options and applicable legal regime.

Real property

Restrictions on foreign ownership of real estate vary from Emirate to Emirate. There are generally no restrictions on the ownership of real estate by UAE nationals. GCC nationals are also typically unrestricted, however, in some Emirates, the Ruler's consent is required. Foreign nationals are usually either prohibited from owning real estate or limited to owning buildings and apartments or real estate within designated areas. Most foreign residents and foreign businesses lease their homes and office spaces. Entities operating outside the free zones are permitted to lease space in the UAE upon registration as a locally incorporated entity or as a branch or representative office. For entities operating within the free zones, registration as a free zone entity requires, in most cases, a lease or purchase of freehold from the free zone's real estate authority. The areas designated for foreign ownership of real estate are not necessarily the same as the free zones.

Depending on how important real property is to your business venture, detailed legal advice on this should be sought during the structuring process.

Public company issues

The Securities and Commodities Authority (SCA) regulates listed public companies in the UAE.

There are three public exchanges in the UAE (outside of the DIFC): the Dubai Financial Market, the Abu Dhabi Securities Exchange and the Dubai Gold and Commodities Exchange. In addition, over the last few years, the SCA has taken a more active role in the regulation of other matters, for example, with regards to investment funds. The role of the SCA is expected to evolve further with the implementation of a new financial services law.

Currently the UAE does not have a codified takeover regime. A bidder should, however, give careful consideration to the number of shares it is proposing to acquire, as the purchase of a shareholding representing 50% or more in a target is likely to trigger a requirement to make a mandatory offer for all the target's shares, which may not be intended. Additionally, whilst there are no restrictions on stakebuilding activity for stakes of up to 29.99 per cent., advance notification to the SCA is required where a holding of 30 per cent. or more is to be acquired. The SCA, after consulting with the relevant market, may prohibit the proposed share purchase where it is considered that it would be detrimental to the interests of the market or the national economy.

Conversely, UAE law does not provide a bidder with a mechanism to compulsorily acquire shares from residual minority shareholders following a successful offer – this can result in some degree of uncertainty and an unsatisfactory outcome for bidders in certain circumstances. There are, therefore, no clear rules or guidance as to how an offer for 100% of the shares of a listed target might be structured. In principle a tender offer could be made but the detail of how this would operate in practice has not been thoroughly tested and would need to be discussed in advance with the SCA. Detailed legal advice should be sought at an early stage in relation to any potential public company transaction.

In addition to the onshore exchanges, the DIFC has its own exchange, NASDAQ Dubai, which is regulated by the Dubai Financial Services Authority. The DIFC has a codified takeover regime based largely upon the UK Takeover Code.

Exchange controls

There are no foreign exchange control regulations in the UAE. However, the UAE imposes a boycott on trade with Israel.

Transfer pricing

There are no regulations relating to transfer pricing in the UAE.

Transfer taxes

Notary fees are payable in connection with the execution of agreements to transfer shares, real estate and certain other assets.

There are no property taxes in the UAE; however, a fee is payable to the relevant Emirate's lands department when registering dealings relating to real estate. These fees can be significant.

Merger control

The UAE enacted a Competition Law in December 2012, which came into force on 23 February 2013. Prior to the Competition Law there were no specific laws or provisions in existing laws that dealt comprehensively with anti competitive behaviour in the UAE.

The Competition Law prohibits activity constituting an abuse of dominant market position and restrictive agreements above a certain *de minimis* threshold and regulates economic activity (including mergers and acquisitions) which will result in an enterprise attaining a dominant market position.

While the UAE Competition Law is now in effect, the UAE's competition regulator is yet to be established and the relevant thresholds have not yet been introduced. In practice, this means that it is difficult currently to state with certainty the impact of the Competition Law on a particular transaction. Accordingly, if your proposed transaction involves two or more entities with a business presence in the UAE, you should take legal advice on whether and how best to approach notifying the relevant authority.

Employment

The UAE Labour Law applies to employees working in the UAE (except for certain free zones) whether they are nationals or non-nationals. The UAE government is pursuing a policy of "emiratisation", pursuant to which certain professions have quotas of UAE nationals that must be employed. Generally, for every establishment that employs over 50 employees, at least 2% should be UAE nationals. The quota is higher in the financial and insurance sectors.

Good faith obligations

The UAE Civil Code recognises the concept of good faith (a concept applicable to all transactions). The UAE Civil Code states that all persons (including legal entities) must act "in a manner consistent with the requirements of good faith". When discussing the terms of a transaction you should ensure that you are not legally bound under this concept to proceed with a transaction until a definitive agreement is signed.

Enforcement

Generally, in the absence of a bilateral treaty or other convention, non UAE court judgments are not automatically enforced by the UAE courts. In addition, the procedure for enforcement of non UAE judgments is restrictive and heavily qualified even in cases where a treaty/convention is in existence.

In July 2006, the UAE ratified its reservation-free accession to the New York Convention with respect to the enforcement of arbitral awards. While the ratification of the New York Convention is to be welcomed, it remains difficult in practice to enforce non-UAE arbitral awards in the UAE.

In light of these difficulties, you should seek advice on possible structuring and security options to maximise the enforceability of common rights sought by foreign investors in investment documentation such as put/call options.

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These tips are just the starting point. Like investments anywhere, careful structuring, adequate due diligence and properly drafted documentation are essential and there are always industry and regional legal issues to consider.

We would be happy to share more of our UAE expertise with you to make your investment a success.

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