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The International Comparative Legal Guide to:

Mergers and Acquisitions 2015

9th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
March 2015

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ISBN
ISSN 1752-3362

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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 55 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&As are supervised by several authorities and governed by a number of laws. On the regulatory front, GAFI (General Authority for Investment) plays a major role supervising and approving all corporate documents and resolutions. The EGX, on the other hand, supervises the regulation of the transfer of shares operations, whether for listed or unlisted companies.

1.2 Are there different rules for different types of company?

There are different rules for different types of companies. The law primarily distinguishes between a limited liability company (such as an LLC or JSC), enjoying a separate legal entity from its shareholders and partnerships, where no separation exists between the founder(s) and the entity itself.

1.3 Are there special rules for foreign buyers?

There are no special rules for foreign buyers subject to a few minor exceptions. For instance, land in some areas of the Sinai Peninsula cannot be owned by a company that has foreign shareholders. Such exceptions however are amended or retracted on an arising basis and are usually issued through directives and regulations rather than law.

1.4 Are there any special sector-related rules?

There are certain sector-related rules in addition to the general rules governing the establishment of companies and their subsequent sale. These are mainly licences and approvals obtained from various governmental authorities (depending on the sector in question).

1.5 What are the principal sources of liability?

Under Egyptian law, a company is commercially and civilly liable for all its deeds and acts. Criminal liability against its shareholders and/or directors can also be engaged where proof of their wilful misconduct or gross negligence can be established.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

There are no alternatives to acquisitions per law. That being said, the law does not forbid or prevent the execution of some form of profit participating loans, whereby a given lender (usually a shareholder with minor stakes) extends a debenture to the company in exchange of pre-set returns and possibly a preferential rate of return indexed to the company's profits.

2.2 What advisers do the parties need?

Legal advisors to both sellers and purchasers are customary. For large entities, the presence of a financial advisor, especially on the buy side, is common practice. In addition to the foregoing, a broker is involved in the closing of any transaction so as to complete the share transfer process.

2.3 How long does it take?

It is difficult to assert the time span during which a company is sold. The length of time usually depends on the size of the target company and the due diligence process prior to the share transfer process. The sale of a medium size company can usually take up to three or four months from initiation to closing.

2.4 What are the main hurdles?

Conducting a thorough due diligence process not only demands a comprehensive inspection and review of the documents appurtenant to the target company, but may also require some background verifications *vis-à-vis* a number of governmental entities, such as the central bank (to ensure that there are no unrevealed and outstanding debts), the labour office, the environmental agency, etc. Such a process may be time consuming yet, in a number of instances, it is necessary.

2.5 How much flexibility is there over deal terms and price?

Deal terms and price are subject to the sovereign appreciation of the parties involved. The law only stipulates that transactions must be concluded in good faith and at an arm's length. Customarily,

the representations and warranties of the seller, along with the time span during which such representations and warranties would be actionable, are subject to lengthy debates and negotiations.

2.6 What differences are there between offering cash and other consideration?

Consideration in cash or in-kind are both acceptable. However, in-kind consideration would call for the appraisal of a specialist, whether be it real estate or stocks in another entity (share swap).

2.7 Do the same terms have to be offered to all shareholders?

Different shareholders may be offered different deal terms. This is usually the case where an acquisition is accompanied by management agreements executed with the managers/shareholders of the target company. Usually, share transfer restrictions for a certain period of time can be agreed upon contractually.

2.8 Are there obligations to purchase other classes of target securities?

For unlisted companies, there is no such obligation. The purchaser may opt to purchase the shares of specific shareholders and the latter, unless bound by a shareholders' agreement that stipulates otherwise, may dispose of such shares irrespective of whether or not the remaining shareholders were offered the same terms. For listed companies in contrast, there are mandatory tender offer rules that apply where the purchaser has in effect purchased more than 33% of the listed company at stake. In this case, the purchaser must tender an offer to the remaining shareholders, which terms must at least be equal to those pertaining to the shares already acquired.

2.9 Are there any limits on agreeing terms with employees?

The only limit that exists when a company is acquired by new shareholders is the observance of the rights and entitlements of the employees that have vested. In that regard, the purchaser/acquirer may opt to restructure the salaries, benefits, bonuses and profit shares for as long as the employees' rights are not diminished in any way.

2.10 What role do employees, pension trustees and other stakeholders play?

In the course of an acquisition, especially where a restructuring of the work force is contemplated, the acquirer may choose to negotiate with the staff union any potential changes/restructuring. For as long as the rights of the employees are not affected by the contemplated acquisition, the employees cannot object to the sale of the target company. It is noteworthy that any negotiation with the staff union/employees emanates from good sense rather than by operation of law.

2.11 What documentation is needed?

The acquisition process requires clear ownership titles to the shares being sold, a share purchase agreement (containing all the terms and conditions of the foreseen transfer of shares) and duly authenticated empowerments from both buyers and sellers. Other documents required by the broker entail signed buy and sell orders. Where a significant consideration price is at stake, there usually is an escrow agreement instructing the escrow agent as to when and how the consideration price is to be transferred to the seller.

2.12 Are there any special disclosure requirements?

As a general rule, the obligation to disclose information in connection with the acquisition of shares and/or assets, whether to the Egyptian Competition Authorities (ECA) or Egyptian Capital Market Authority (EFSA), is an obligation incumbent upon the buyer/acquirer. The seller or transferor has no obligation whatsoever to disclose any information to the authorities.

2.13 What are the key costs?

Key transaction costs include legal counsels, financial advisors, broker and escrow agent (if any).

2.14 What consents are needed?

Other than regulatory approval from GAFI and the EGX, no additional approvals are required.

2.15 What levels of approval or acceptance are needed?

The approvals of the aforementioned entities are obtained when i) a shareholders' resolution to the sale is submitted to GAFI, and ii) the buy and sell orders are submitted to the EGX.

2.16 When does cash consideration need to be committed and available?

The availability of cash consideration is subject to the appreciation of the parties. As stated earlier, the consideration price is usually deposited with an escrow agent, who would transfer the agreed upon amount to the seller upon the submission of the share transfer certificate.

3 Friendly or Hostile

3.1 Is there a choice?

There is a choice and hostile takeovers are not common in the Egyptian market. The vast majority, not to say all acquisitions, are a result of a consensus between sellers and purchaser. Hostile takeovers overpassing the will or intent of the board of directors/ shareholders, as it would be the case in other jurisdictions, are considered a rarity in Egypt.

3.2 Are there rules about an approach to the target?

There are no specific rules when approaching the target, except for publicly traded securities where certain disclosure requirements exist.

3.3 How relevant is the target board?

The target board is often relevant to the extent shareholders may rely on the board's opinion as to whether to dispose of their shares

at the offered terms and conditions. That being said, the board does not have the empowerment to either reject or accept an offer made to acquire the target company. Such a decision is relevant only to the shareholders of the target company, who may charge the board pursuing the sale process at the offered terms.

3.4 Does the choice affect process?

Whether friendly or hostile, the acquisition process is the same and the choice to pursue either method would not affect the legal process mandated.

4 Information

4.1 What information is available to a buyer?

Traditionally, the seller provides the buyer with all information needed to assess the financial net worth and liabilities of the target company. The buyer, on the other hand, must ensure that all the information provided is accurate and complete. To do so, a thorough due diligence process, both legal and financial, is carried out on the target company. Furthermore, the share purchase agreement usually contains extensive representations and warranties language covering instances where the information provided was either incomplete or inaccurate.

4.2 Is negotiation confidential and is access restricted?

Negotiations are confidential to the extent the acquisition has not yet been consummated and the target company (or its shareholders) may suffer reputational damage if and where the acquisition fails to close. As regards access, it is also restricted to potential buyers and their advisors. It is nonetheless possible to allow access to several buyers simultaneously where no exclusivity has been granted by the seller to any specific buyer.

4.3 When is an announcement required and what will become public?

The announcement is required imminently before closing (i.e. transfer of shares) and shall be limited to the identity of the purchaser along with the total transaction value without disclosing any further details or specifics regarding the transaction.

4.4 What if the information is wrong or changes?

Instances where the information provided to the purchaser is inaccurate as of the time of closing, or becomes so shortly after closing, are usually covered in the representations and warranties offered by the seller. Unless fraud can be established and the losses suffered by the purchaser, as a result of misleading information, are significant, remedies in the form of indemnity from the seller to the purchaser are mandated by operation of law and more so, liquidated damages are provided for in the share purchase agreement.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes, shares can be bought outside the offer process; stakebuilding is not prohibited by law.

5.2 Can derivatives be bought outside the offer process?

Similarly, derivatives can also be bought outside the offer process.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

As stated earlier, disclosure requirements are imposed immediately prior to the consummation of the transaction/stakebuiding process.

5.4 What are the limitations and consequences?

The limitation of the process is when the acquirer reaches 33% of the target company, upon which event, mandatory tender offer rules apply and the acquirer must tender a public offer to the remaining shareholders with terms and conditions no less favourable than the ones offered to acquire the aforementioned stake.

6 Deal Protection

6.1 Are break fees available?

Break fees are applicable when and if there has been a contractual arrangement to that end. Upon the closing of the due diligence process, the buyer, having a rather complete overview of the target's company imminent and latent liabilities, would be in a position to decide as to whether or not proceed with the contemplated acquisition. Break fees are usually stipulated in the pre-acquisition arrangements and shall be applicable when the suspension of the transaction is deemed abusive or unjustified.

6.2 Can the target agree not to shop the company or its assets?

Yes, it is an arrangement that could be reached between any potential acquirer and the seller. The former may set a date in the course of the process, past which the seller may not dispose of any significant assets (other than in the ordinary course of business) or offer the sale shares to any other third party for a limited period (such as an exclusivity clause granting the potential buyer the sole right to inspect the company in furtherance to its acquisition).

6.3 Can the target agree to issue shares or sell assets?

It can be agreed that the target would proceed, prior to the acquisition, with a rights' issue and/or sale of certain assets. However, such a process usually demands a firm level of commitment from the acquirer to proceed with the prospective acquisition. Otherwise, where no firm and legally binding commitment exist, the target may suffer irreparable damage as a result of such rights issuance or sale of assets if the acquirer declines to proceed with the contemplated acquisition.

6.4 What commitments are available to tie up a deal?

During the due diligence process, it is difficult and uncustomary to seek a firm commitment from either buyer or seller. As stated earlier, the due diligence process aims at reaching the net worth of the target company, based on which, both parties will decide whether or not to proceed with the sale/acquisition. Upon completion of the due diligence process and where the purchaser for instance has expressed its willingness to proceed forward, the seller may request a written and binding undertaking to that effect, indicating the number of shares to be purchased along with the final purchase price. Such an undertaking is a viable tool to tie up a deal.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

Conditional offers can be placed for the acquisition of the target company. These conditions may, for instance, entail a certain cap of liability for the target company or a certain volume of net sales or IRR (usually when the acquirer is a private equity fund). The invocation of these conditions may be restricted to the buyer and to that extent, the buyer may, upon completion of the due diligence process, either waive them if not realised or terminate the deal as of right.

7.2 What control does the bidder have over the target during the process?

Other than contractual arrangements restricting the disposal of shares or certain asset, the bidder has no legal control over the target company. Control passes on to the buyer only after consummation of the transaction.

7.3 When does control pass to the bidder?

Legal control passes to the bidder upon completion of the acquisition. Other contractual arrangements pre-acquisition have limited legal effect and cannot be enforced as if the bidder had actually acquired the target company.

7.4 How can the bidder get 100% control?

Acquiring 100% control of the target would boil down to obtaining at least 75% of the target's securities. With such a percentage of ownership, a bidder would effectively have control over ordinary and extraordinary general assembly meetings along with other important prerogatives such as appointing the majority of the board of directors and block any decision deemed unsuitable. That being said, it should be highlighted that minority protection precepts could limit the acquirer from engaging in any act deemed contrary to the target's interests.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Other than disclosure requirements mentioned earlier, the board has no obligation to publicise discussions. In actuality, discussions revolving around any potential sale are usually kept confidential.

8.2 What can the target do to resist change of control?

It is difficult to address this issue in the abstract; however, resisting a change of control can only be effected through a minimal threshold of ownership, the least of which would be 26% of the target company so as to be able to block any extraordinary decision deemed unsuitable to the interests of the company.

8.3 Is it a fair fight?

It is usually not a fair fight to the extent that blocking minority from one side and an incapacitated majority on the other would almost always result in a company poorly managed, thereby leading it to potential financial distress.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

It is evident that the success of any given acquisition must emanate from the willingness of both buyer and seller to cooperate towards successful closing. Transparency and a comprehensive due diligence report are also major factors contributing to the success of any given transaction.

9.2 What happens if it fails?

When an acquisition fails, and where there is no contractual arrangement, such as break fees or indemnities that are in place, each buyer and seller would bear its own costs and expenses appurtenant to the process so far undertaken. Often, where a potential acquisition has been publicised or disclosed, a statement is issued by either buyer or seller stating that the acquisition at stake will no longer be pursued with no further details as to the reasons why failure has ensued from the process.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Egypt.

As stated earlier, M&As are largely governed by the laws and regulations appurtenant to companies and capital markets. As markets evolve in a rather cautious manner and investors become more risk averse, we witness a wider array of assurances from the seller to the buyer as regards the good standing and clearance of liability of the target company. Such a trend is marked by increasingly higher retention prices, applied for longer periods, so as to mitigate undisclosed and latent liabilities of the target company.

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Dr. Ramy El Borai, managing partner at El-Borai & Partners, is admitted to practice law in Egypt and in the State of New York. He advises on various aspects of commercial, corporate, banking and finance law and has closed on diverse and complex transactions, covering a wide array of structures such as Project Finance, Asset-backed Finance, Capital Leasing, Derivatives, Loan Syndications; and Risk-Participation Agreements. He has accumulated extensive expertise in investment banking transactions, including initial public offerings, private placements, debt raising exercises along with the foundational and structural work such transactions implicate. He also advises on the establishment of on/offshore PE funds. Among other transactions he successfully closed, Dr. El Borai was the legal advisor, in 2009, to 23 lending banks in connection with the then largest loan syndication to ever take place in Egypt with an aggregate value surpassing USD 1 billion. In 2010, Dr. El Borai, this time in his capacity as legal counsel to the borrower, successfully closed on a landmark syndicated facility extended by 28 commercial banks to his client for a total loan amount of EGP 7.2 billion (USD 1.3 billion). In 2012, he was the advisor to a syndicate of lenders for a total loan amount of EGP 8.4 billion (USD 1.25 billion) in connection with the financing of a large petrochemical project.

Dr. El Borai has held such posts as: former assistant lecturer at the University of London, Queen Mary University and Westfield college; former assistant lecturer at Southern Methodist University, Dallas, Texas; lecturer for the ethics, conflict of interests and legal writing courses with the American Bar Association; Continued Legal Education Program (CLE); lecturer in Labour Law with the American University in Cairo – Management Centre; and lecturer in contract and commercial law in the MBA Programme of the *Ecole Supérieure Libre des Sciences Commerciales Appliquées* (ESLSCA). Dr. El Borai is a former legal consultant to the World Bank's financial sector in Washington, D.C. He holds a Ph.D. from the University of London in Cross-Border Corporate Insolvency, an LL.M. from the University of Warwick (UK), an LL.M. from Southern Methodist University (TX), an LL.B. from Paris I Panthéon-Sorbonne, and an LL.B. from the University of Cairo.

El-Borai & Partners was established in 1986 by Dr. Ahmed El Borai. The Firm, initially specialising in labour and civil law matters, has recently been the subject of significant growth, both in terms of client base and specialties. With its exceptional attorneys, of-counsels and staff, the firm has expanded its scope of services and expertise onto business and commercial law, including private equity, M&As, banking, project finance, PPP, corporate restructuring, commercial agencies, real estate, energy and Information Technology.

Moreover, the Firm has a strong procedures and government relations department. The Firm enjoys a strong regional presence with a large local and international client base, including: leading local corporations; regional and international financial institutions; transnational corporations; and governmental organisations. The Firm has been selected to represent prominent local, regional, and international clients in major transactions that took place since its inauguration. Such transactions include, but are not limited to, strategic mergers & acquisitions, private placements, syndicated loans, real estate development and public concession agreements.