

Private M&A 2022

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Private M&A

2022

Contributing editors**Will Pearce and Louis L Goldberg****Davis Polk & Wardwell LLP**

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.



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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 | How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

There are two main categories of privately owned companies in Egypt: partnerships and corporations.

Partnerships

There are two types of partnerships in Egypt:

- general partnership (GP): the capital contribution of a GP can be made by at least two active partners who are deemed by law to be jointly liable for all obligations arising from the operation of the GP; and
- limited partnership (LP): the capital contribution of an LP can be made by at least one active partner who is deemed by law to be liable for all obligations arising from the operation of the LP in addition to one other limited or salient partner, who must neither be personally liable for those obligations nor involved in the management of the LP.

Corporations

In general, the concept of piercing the corporate veil does not apply to corporations in Egypt except for in the case of active partners in a limited partnership by shares (LPS); therefore, the liability for operating corporations is only limited to the paid-in capital thereof. This general rule is subject to certain exceptions where the liability may be exposed to the board members, managers, shareholders or partners.

There are four types of corporations in Egypt:

- joint stock companies (JSC): in general, the capital of a JSC must be owned by at least three shareholders, who can be individuals or juristic persons of any nationality;
- limited liability companies (LLC): LLCs must be owned by at least two partners, who can be individuals or juristic persons of any nationality;
- one-person companies (OPC): OPCs can be owned by one partner, who can be an individual or a juristic person of any nationality; and
- LPS: as in the case of an LLC, an LPS requires at least two partners, one of whom must be an active partner who is deemed by law to be liable for all obligations arising from the operation of the LPS.

Acquisition of shares

An acquisition of a share structure may differ from the types above; however, acquisition of shares in a GP, an LP or an LPS is, in general,

not preferable for buyers as it involves unnecessary personal liability exposure.

It is generally worth noting the following:

- acquiring share capital in an LLC or an OPC is simpler than in a JSC, and acquiring shares in a JSC may take longer than acquiring shares in an LLC or an OPC;
- founding and in-kind shares in a JSC and an LPS cannot both be transferred before publishing the financial statements of the first two full fiscal years following the incorporation of the company, except for certain cases and provided that approval is obtained from the chair of the General Authority for Investment and Free Zones (GAFI);
- acquiring share capital in an LLC is subject to a pre-emption right (or right of first refusal) that must be waived in a specific way to complete the acquisition; and
- acquiring share capital in a JSC that is listed on the Egyptian Stock Exchange (EGX) involves more procedures and fillings than those that apply to JSCs that are not or were not listed on the EGX.

Acquisition of businesses and assets

An acquisition of a business can be made in two different ways:

- spin-off (eg, horizontal spin-off) or split-off (eg, vertical split-off) to acquire the target business; or
- assignment of the contracts that are related to the business by way of subrogation.

In respect of an acquisition of assets, the structure is determined based on several elements, including the type and location of the assets and the legal system governing the company owning the assets.

There are also a number of elements that must be taken into consideration in structuring any acquisition and disposal transactions in Egypt, such as:

- the legal systems governing the target company, business or asset (if any);
- the country from which the target company, business or asset will be acquired;
- the location of the target company, business or asset; and
- whether the target shares in the JSC are centrally registered with the Misr for Central Clearing, Depository and Registry (MCDR).

Legal regulation

2 | Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Private acquisitions and disposals are generally governed by the following laws:

- the Civil Code;
- the Trade Code;

- the Companies Law;
- the Capital Market Law; and
- the Investment Law.

According to the Civil Code, the application of a non-Egyptian law to an acquisition and disposal transaction is valid, but this does not apply to any provisions relating to private international law. This non-application also includes the formalities and procedures that are mandatory under Egyptian law.

Furthermore, the Civil Code adopts the basic principle of *pacta sunt servanda*, the principle of which has also been confirmed by several judgments by the Court of Cassation. The agreement governing the acquisition or disposal transaction shall have the same level of enforceability as Egyptian law, provided that the agreement's provisions do not contradict the provisions in respect of public policy and order in Egypt; otherwise, the contradictory provisions shall be deemed null and void.

In light of the above, Egyptian law will recognise and treat the validity and binding nature of obligations contained in an acquisition or disposal agreement as being governed by non-Egyptian law; however, the Egyptian courts will not give effect to the application of the non-Egyptian law to a provision if it has an effect contrary to Egyptian public policy and morality.

Legal title

- 3** | What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The Egyptian law does not differentiate between legal and beneficial title. Acquisition of shares in a non-listed JSC, in practice, can be proved by a number of documents, including a transfer notification issued by the EGX, an amendment to the articles of incorporation governing the JSC and a certificate issued by the MCDR.

In respect of the acquisition of shares in an LLC or an OPC, the acquisition can be proved by an authentic or informal title deed – unless otherwise required by the articles of incorporation of the LLC or OPC – and the relevant allotment ownership ledger.

Multiple sellers

- 4** | Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Egyptian Law does not, in general, regulate or recognise the concepts of drag-along and squeeze-out; however, a full acquisition of the share capital in a JSC, an LLC or an LPS requires the consent of all shareholders.

The latest amendment made to the Companies Law in 2018 introduced for the first time in Egypt the concept of having a shareholder agreement to regulate the relationship between shareholders in corporations. Several conditions must be met for the shareholder agreement to be enforceable in respect of the non-signing shareholders. In practice, this shareholder agreement may include certain drag-along and squeeze-out provisions.

The Capital Market Law and its Executive Regulation grant a tag-along right to minority shareholders in listed and delisted JSCs upon acquisition of 90 per cent or more of the share capital or voting rights of the JSC.

Exclusion of assets or liabilities

- 5** | Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

If the acquisition of business is made by way of implementing a spin-off or split-off for the target business, the only way to exclude any assets or liabilities from the transaction is not to include those within the spin-off or split-off before the acquisition transaction.

If the acquisition of business is made in the form of assignment of the contracts related to the target business by way of subrogation, the possibility of excluding any asset or liability can only be determined on a case-by-case basis.

Consents

- 6** | Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

In general, there are no material nationality requirements or foreign ownership restrictions for acquiring share capital in companies in Egypt except for partnership, as foreign ownership in a partnership cannot exceed 49 per cent of its share capital.

However, foreign ownership restrictions apply to some sectors and locations, such as:

- undertaking the import business for the purpose of resale or trading, commercial agencies or intermediary business; and
- doing business in Sinai.

Regulatory and government consents are also required in certain cases, such as:

- acquisition of any non-banking financial company controlling 10 per cent or more of the size of its relevant market;
- acquisition of more than 10 per cent of the share capital or voting rights in, or any percentage that leads to actual control of, any bank registered with the Central Bank of Egypt; and
- acquisition of any private hospital.

According to Law No. 305 of 2015 on work permits procedures and requirements for foreigners, security clearance must be obtained for any foreigner to work or do business in Egypt. In practice, GAFI usually approves change of shareholding structures without having security clearance except in the case of some nationalities, such as China, Russia, Ukraine, Nigeria, Israel, Iran, Belarus, Bangladesh, Iraq and Palestine.

- 7** | Are any other third-party consents commonly required?

Acquiring share capital in an LLC is subject to a pre-emption right (or right of first refusal) that must be waived in a specific way to complete the acquisition.

Egyptian Law does not, in general, regulate or recognise the concepts of drag-along and squeeze-out; however, a full acquisition of the share capital in a JSC, an LLC or an LPS requires the consent of all shareholders.

Regulatory filings

- 8 | **Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?**

Acquiring shares in a JSC must be made through the EGX regardless of whether the JSC is listed on the EGX. This transfer process involves, among other things, payment of government fees to the EGX through the licensed brokerage firm that will execute the transfer.

Following the transfer process above, the articles of incorporation of the JSC are amended to reflect the transfer through an extraordinary general shareholders' meeting and then filed with GAFI, of which the amendment process involves, among other things, payment of government fees to GAFI, the Financial Supervisory Authority, the notary public and the Egyptian Bar Association. This amendment process is also required in the case of an LLC, GP, LP or LPS, although in those cases filing before the EGX is not required.

In general, acquiring businesses or assets in JSCs that are listed on the Egyptian Stock Exchange (EGX) involves more procedures and filings than those that apply to JSCs that are not or were not listed on the EGX.

Except acquisitions of businesses or assets in JSCs that were listed on the EGX, the filing requirements associated with this type of acquisition can only be determined on a case-by-case basis.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

- 9 | **In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?**

Tax and financial advisers are usually required. It is also common for buyers in major industrial transactions to engage human resources, environmental and technical advisers.

There are no typical terms of appointment for those advisers other than the common terms applied in respect of confidentiality, conflict of interest and scope of work.

Duty of good faith

- 10 | **Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?**

As a general rule, Egyptian law does not explicitly recognise the duty to negotiate in good faith.

However, according to the Civil Code, a contract must be performed in accordance with its contents and in compliance with the requirements of good faith; therefore, if the parties agreed under any pre-closing agreement (eg, memorandum of understanding or letter of intent) that they must act in good faith, they must both negotiate in good faith.

Documentation

- 11 | **What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?**

It is common for buyers and sellers to enter into a master acquisition agreement (eg, a share or asset purchase agreement) in addition to any other ancillary documents (if applicable), such as escrow agreements.

However, in respect of the acquisition of assets or business, the contractual structure is more sophisticated than in a share purchase agreement; it involves multiple separate agreements, depending on the nature of the assets or business to be acquired.

- 12 | **Are there formalities for executing documents? Are digital signatures enforceable?**

Yes. The transaction documents can usually be executed physically by the authorised signatories during a face-to-face session. The execution can also be made by circulation, but a signature verification should be obtained, taking into consideration that it is not easy in practice to obtain the verification from banks that are registered with the Central Bank of Egypt.

Documents can also be executed electronically, given that according to the e-Signature Law, electronic correspondence, electronic signatures and electronic documents have the same degree of authenticity as non-electronic correspondence, signatures and documents governed by the Evidence Law, provided that certain technical conditions are met, the conditions of which can be verified by one of the licensed electronic signature service providers in Egypt.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

- 13 | **What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?**

As a general rule under the Civil Code, the seller is not answerable for any defects of which the purchaser was aware at the time of the sale or any defects that could be discovered by the purchaser by examining the subject of the sale with the care of a reasonable person, unless the purchaser proves that the seller confirmed the absence of those defects.

There is no typical scope of due diligence in Egypt as it depends on the level that the buyer is willing to conduct; however, conducting a full due diligence is usually recommended to be in line with the general rule above. Buyers can rely on due diligence reports produced by the sellers if the sellers conduct the due diligence with the care of a reasonable person.

Liability for statements

- 14 | **Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?**

It depends on the final agreement; however, sellers are usually liable for binding provisions under any pre-contractual document. They are, in all cases, also liable for any misleading statements.

According to the Civil Code, if a party does not perform his or her contractual obligations, the other party is entitled to request the defaulting party to perform his or her obligations. If the defaulting party does not perform his or her obligations, the affected party may claim damages.

The damages are estimated by the competent court on a case-by-case basis, based on the value of the suffered losses and deprived profits that the defaulted party would have expected at the time of concluding the contract, unless otherwise agreed upon in the contract or stipulated by law. Contractual liabilities may be limited, expressed in the form of liquidated damages or waived, except liabilities resulting from gross negligence or fraud.

Publicly available information

- 15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Public record information in respect of private companies is relatively limited. The following public record information can usually be obtained:

- commercial registers, which show, among other things, date of registration, current board members and directors, business activities, places of business, share capital and powers of the board members and directors; however, commercial registers do not include, for example, information on the shareholding structure;
- real estate registered titles, which requires knowing the exact address of the target real estate;
- litigation cases check, which is a time consuming process to check as it requires conducting a separate check at each court.

Impact of deemed or actual knowledge

- 16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

As a general rule under the Civil Code, the seller is not answerable for any defects of which the purchaser was aware at the time of the sale or any defects that could be discovered by the purchaser by examining the subject of the sale with the care of a reasonable person, unless the purchaser proves that the seller confirmed the absence of those defects.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

- 17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

It depends on the outcome of the due diligence; however, the use of closing accounts is more common. In many transactions, retaining payment for a specific time is also very common.

Form of consideration

- 18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

All types of consideration are accepted in practice in Egypt; however, cash is much more common than any other form. Individual sellers may be offered different deal terms, including in respect of the form of consideration.

Earn-outs, deposits and escrows

- 19 | Are earn-outs, deposits and escrows used?

Escrows are usually used more than the other forms.

Financing

- 20 | How are acquisitions financed? How is assurance provided that financing will be available?

Acquisitions are usually funded by the buyers' own sources; however, acquisition financing is also commonly used through banks and international financial institutions.

In practice, assurance is made in the form of undertakings in the pre-contractual documents.

Limitations on financing structure

- 21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

Yes. Banks registered with the Central Bank of Egypt (CBE) may provide acquisition financing of only up to 50 per cent of the acquisition value unless prior approval is obtained from the CBE. There is no general restriction on a seller from giving financial assistance to a buyer unless such restriction is imposed on the specific seller by law or by virtue of any provisions within the seller's governing statutory documents.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

- 22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Closing conditions are determined on a case-by-case basis; however, in practice, closing conditions usually include, among other things, regulatory approvals, payment, top management restructuring and execution of ancillary documents (if any).

- 23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Closing conditions are usually subject to obligations related to a specific timeline and acting in good faith; however, more additional obligations may be added, depending on the subject matter of the closing conditions.

Pre-closing covenants

- 24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Yes. Pre-closing covenants are usually related to, among other things, conduct of business, authorisation, breach of representation and warranties, as well as no transfer or encumbrances.

Termination rights

- 25 | Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Yes. The transaction can be terminated after signing, subject to the terms and conditions thereof, including non-satisfaction of any pre-closing or post-closing conditions or breach of specific material representations and warranties.

- 26 | Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Although break-up fees and reverse break-up fees are permissible in Egypt, they are not usually used.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

- 27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

Yes. Sellers usually provide buyers with representations, warranties and indemnities related to the satisfaction of all authorisations to enter into the transaction; the transaction documents being binding, legal and valid towards the seller; non-conflict with any other documents; absence of encumbrances; and obligations not to dispose, sell or create any right over the target.

Limitations on liability

- 28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Sale and purchase agreements do not usually include any limitations on a seller's liability except certain disclosures made to the buyers in respect of any defects in the target.

Transaction insurance

- 29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

It depends on the nature of the target shares, assets or business.

Post-closing covenants

- 30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Yes, the parties usually agree to post-closing covenants, such as an obligation on the seller to take any further action reasonably requested by the buyer for the purpose of carrying out the transaction agreement.

TAX

Transfer taxes

- 31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Any profit realised by unlisted corporations or persons through transactions involving transfers of shares are subject to capital gains tax at a rate of 22.5 per cent on net taxable income.

According to the Income Tax Law, profits arising from a company's re-evaluation – including the merger of two or more resident companies, the split of a resident company into two or more resident companies, the transformation of a partnership into a corporation, the transformation of a corporation into another form of corporation and the transformation of a juristic person into a corporation – are also taxable at a rate of 22.5 per cent on net taxable income. The capital gains tax is borne by the seller in all cases.

Capital gains realised by a corporation through selling its shares in companies listed on the Egyptian Stock Exchange (EGX) are usually subject to capital gains tax at a rate of 10 per cent; however, the tax has been suspended until 1 January 2022, extensions permitting.

According to the Stamp Tax Law, stamp duty tax is levied on transactions involving the transfer of shares in a company – regardless of whether the shares are issued by Egyptian or foreign companies and regardless of whether the securities are listed on the EGX – at a rate of 0.05 per cent on the gross transaction value, without the deduction of any costs. It is borne equally by the purchaser and the seller.

There may be deviations from the rules above if an applicable double taxation treaty to which Egypt is a party applies.

Corporate and other taxes

- 32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transactions involving the transfer of shares in a company are not subject to VAT; however, transfers of assets may be subject to VAT, the current standard rate of which is 14 per cent.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

- 33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

According to the Labour Law, employees are automatically transferred in all cases of transfer of business, including mergers, acquisitions and sales. The Labour Law provides additional protection for employees through the provision of joint liability of the new employer and former employer in satisfying employees' rights that accrued before the transfer of the business.

Notification and consultation of employees

- 34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

No. The Labour Law does not oblige employers to obtain the approval of or to consult employees in the case of acquisitions of shares in a company, a business or assets.

Transfer of pensions and benefits

- 35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Yes. Both the new employer and former employer are jointly liable to satisfy the employees' rights, benefits and pensions that accrued before the transfer.

UPDATE AND TRENDS

Key developments

- 36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

The most significant developments mainly relate to specific sectors such as healthcare, which were imposed to restrict control of healthcare entities by single investors or investment groups.

Coronavirus

37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

As part of the state's efforts to stimulate the Egyptian economy, the president issued Law No. 152 of 2020 on the development of micro, small and medium-sized enterprises (the SMEs Law).

This SMEs Law aims to attract projects developed in the informal economy and to legalise their status in accordance with the applicable laws. The SMEs Law has developed new mechanisms to grant easy access to SMEs using financial institutions and to support those institutions in their fund recovery.

According to Law No. 170 of 2020 on confronting some of the economic repercussions resulting from the impact of pandemics or the occurrence of natural disasters, deductions of 1 per cent on the monthly salaries and 0.5 per cent on the pensions of all public and private sector employees shall be made to support the national economy and to manage the consequences resulting from pandemics, such as the covid-19 pandemic, and natural disasters. Employees whose net salary does not exceed 2,000 Egyptian pounds and pension recipients whose monthly pension does not exceed 2,000 Egyptian pounds are exempted from those deductions.

Law No. 170 took effect for 12 months from August 2020. The deducted amounts have been used to provide support to companies affected by the covid-19 pandemic and their employees, affected families and individuals, as well as to fund medical research and other matters, subject to the decision of the Cabinet, to mitigate the effects of the pandemic.

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