King & Spalding
www.kslaw.com/measure

measure

The Middle East Quarterly Bulletin
Summer 2015

Recognition of Close-Out Netting — DIFC Law No. 2 of 2014

Global Solar Energy — A Bright Future

Top Ten Tips for In-House Counsel

Top Tips for Real Estate Term Sheets

Foreword

Welcome to the Summer 2015 issue of *measure*, King & Spalding's Middle East quarterly newsletter. This issue covers a number of areas with interesting developments and valuable guidance. Phillip Sacks and Jodi Norman discuss the value of the Netting Law in the DIFC with respect to enforceability and other related issues. Tim Burbury and Usman Ahmad talk about the future of solar energy in light of falling oil prices. Raza Mithani gives the lowdown on what every in-house counsel should bear in mind with regard to arbitration proceedings in the UAE. Last but not least, Isam Salah and Benjamin Newland discuss some critical term sheet tips for real estate joint ventures.

We are pleased to announce the further growth of our team in the region, with counsel Brian Pierce and senior associate Usman Ahmad joining us in Abu Dhabi, focusing on project development and finance matters, and associate Macky O'Sullivan in Dubai focusing on investment funds, financial services regulation and private equity. Our Middle East team continues to lead the market in innovation and creatively structuring deals to help our clients expand their businesses. Recent awards we have won in the past several months include the following:

1. Awarded "Structured Finance Deal of the Year 2014" for the US$190 million murabaha financing for Fawaz Abdulaziz Al Hokair & Co., the largest franchise retailer in Saudi Arabia. This *Shari'ah*-compliant deal involved operational control over point of sale terminal receivables, resulting in a credit card receivables synthetic securitisation.
2. Awarded "Commodity Murabaha Deal of the Year 2014" and honourable mention for Most Innovative Deal of the Year for arranging US$120 million senior unsecured five-year certificates for UAE-based engineering and design firm Drake & Scull International. The deal was the first sukuk to be structured using certificates listed on the NASDAQ Dubai Murabaha Platform.
3. Ranked "Band 1" Middle East Investment Funds practice for the fifth consecutive year (*Chambers Global 2015*). A significant amount of our funds work in the Middle East is *Shari'ah*-compliant.
4. Awarded Asset Management and Funds Law Firm of the Year 2014 by *Islamic Finance News*: King & Spalding was named law firm of the year in the Asset Management and Funds category and received honorable mention as overall Law Firm of the Year and in the Banking category. In awarding King & Spalding this recognition, IFN noted the firm's work on the Al Diyafa Makkah Fund which it called "instrumental in driving forward Islamic asset management in the Gulf region."
5. Awarded "Best Onshore Law Firm – Client Services" for our funds practice by MENA Fund Manager 2014.

We are pleased to continue providing updates to you on market trends and legal developments affecting the region. Stay tuned for our fall issue and upcoming seminars, and in the meantime, as always, we welcome your comments and feedback.

Jawad I. Ali
Managing Partner – Middle East Offices and Deputy Practice Group Leader – Middle East & Islamic Finance Practice Group

Volume 4: Issue 8
Copyright 2015, King & Spalding LLP. All rights reserved.
The information provided in this bulletin is intended to inform but is not a substitute for specific legal or other professional advice where warranted by each situation's facts and circumstances. Under some Rules of Professional Conduct, this communication may constitute "Attorney Advertising."

This Issue

03 Regulatory

Recognition of Close-Out Netting — DIFC Law No. 2 of 2014
Netting agreements have been in use with DIFC counterparties for some time, so what is the value of the Netting Law? *Phillip Sacks* and *Jodi Norman* shed light on enforceability and other related issues.

06 Energy

Global Solar Energy — A Bright Future
Tim Burbury and *Usman Ahmad* discuss the future of solar energy growth globally in light of falling oil prices.

10 International Arbitration

Top Ten Tips for In-House Counsel
Raza Mithani gives the lowdown on what every in-house counsel should bear in mind with regard to arbitration proceedings in the UAE.

13 Real Estate and Corporate

Top Tips for Real Estate Term Sheets
Isam Salah and *Benjamin Newland* discuss some critical term sheet tips for real estate joint ventures.

King & Spalding
measure

CO-EDITOR
Hoda Mana
hmana@kslaw.com

CO-EDITOR
Phillip Sacks
psacks@kslaw.com

SUBSCRIPTIONS
Hoda Mana
hmana@kslaw.com

DESIGN
Laura Owens
lowens@kslaw.com

COVER PHOTOGRAPHY
Courtesy of iStock by Getty Images; modern tower in finance district of Dubai.

Regulatory

Recognition of Close-Out Netting — DIFC Law No. 2 of 2014

The Dubai International Financial Centre (DIFC) is a financial free zone located in the Emirate of Dubai in the UAE. The DIFC operates a unique legal and regulatory framework with a view to creating an optimal environment for financial sector growth.

Such a framework is achieved through a synthesis of Federal law and Dubai law which permits the DIFC to have its own civil and commercial laws modelled closely on international standards and principles of common law. This distinctive framework has enabled the DIFC last year to issue the region's first netting legislation, DIFC Law No. 2 of 2014 (the "Netting Law"), closely modelled on the International Swaps and Derivatives Association ("ISDA") 2006 Model Netting Act.

Benefits of the Netting Law

Netting agreements, such as transactions governed by ISDA Master Agreements, are in common use with DIFC counterparties and have been for some time. So why the need for the Netting Law? The primary purpose of the Netting Law is to ensure the enforceability of close-out netting upon the occurrence of any termination event or event of default under the netting agreement, both prior to, and following, commencement of insolvency or analogous proceedings. The Netting Law acts to address areas of DIFC law which could potentially conflict with the effectiveness of netting agreements generally.

General principles of contract law

The DIFC Contract Law provides that any person of competent legal capacity is free to enter into a contract and determine its content. Furthermore, the Contract Law expressly recognises contractual set-off, which it defines as *"a duty or option granted by contract whereby a debtor must or may set-off his cross claim in discharge of the creditor's primary claim, being set-off created by a contract in circumstances where, in the absence of the contract, there would be no right of set-off"*. Although never tested in front of the DIFC courts, it is likely that close-out netting would be considered enforceable under the general principles of contract law applicable in the DIFC. However, the Netting Law removes any doubt by confirming that the provisions of a netting agreement are enforceable in accordance with their terms, including against an insolvent party and, where applicable, guarantors and other persons.

Gaming contracts

An issue that arises in jurisdictions predicated on principles of *Shari'ah* is the risk that a derivatives contract could be characterised as a gaming contract and therefore be considered void. The civil and commercial laws of the UAE do not apply inside the DIFC; however, the criminal laws of the UAE do. This includes the UAE Penal Code, which prohibits both gambling and the management of establishments used for the purposes of gambling. There is no provision equivalent to Section 10 of the UK Gambling Act 2005, which states that a contract, the making or accepting of which is a regulated activity under the UK Financial Services and Markets Act 2000, does not constitute a gambling contract. Article 7 of the Netting Law goes some way in addressing this issue by affirming the validity of transactions from a civil and commercial perspective by providing that "*a qualified financial instrument shall not be and shall be deemed never to have been void or unenforceable by reason of being, or have the characteristics of, a wager, lottery, gambling or gaming contract*". Although this provision will provide a degree of comfort to firms, the DIFC Authority itself acknowledges that it is not sufficient to eliminate all legal uncertainty, as DIFC law cannot override UAE criminal law.

Insolvency laws

One of the most prominent issues affecting close-out netting occurs when insolvency legislation acts to impede the close-out netting of transactions when a party is subject to insolvency or analogous proceedings.

The DIFC Insolvency Regulations provide for statutory insolvency set-off, being the aggregation or set-off of amounts representing mutual obligations. However, statutory insolvency set-off does not apply to amounts arising under transactions entered into at certain times, e.g., after the creditor had notice of winding-up or administration procedures that immediately proceeded an insolvency. Firms employ various mitigation techniques in an attempt to mitigate the risk that such amounts would not be included in any aggregation for statutory set-off purposes, including making election for automatic early termination of transaction upon or, as the case may be, immediately prior to the happening of insolvency-related events. The Netting Law provides certainty in this regard by stating that the provisions of a netting agreement are enforceable in accordance with their terms and will not be stayed, avoided or otherwise limited by any provision of law applicable to an insolvent party.

Similar to many insolvency regimes, there are a number of circumstances provided for in the DIFC Insolvency Law wherein a transaction may not be enforceable in the event of an insolvency, including transactions that are considered to constitute a preference. Such provisions cause difficulty when considering, for example, matters of substitutions or exchanges of collateral during the preference period. The Netting Law, however, is explicit that the liquidator of an insolvent party may not avoid or render ineffective transactions on the grounds that it constitutes a preference by the insolvent party to the non-insolvent party unless there is clear and convincing evidence that the transaction was for the sole purposes of defrauding creditors.

The Insolvency Law also permits the liquidator of an insolvent DIFC company to disclaim onerous property, including any unprofitable contract. This entitlement creates a risk of 'cherry-picking' whereby the liquidator may choose to continue with transactions which are 'in the money' for the insolvent party whilst repudiating any 'out of the money' transactions. The Netting Law removes this risk by providing that any powers of

> Although never tested in front of the DIFC courts, it is likely that close-out netting would be considered enforceable under the general principles of contract law applicable in the DIFC.

a liquidator to assume or repudiate individual qualified financial instruments apply, if at all, only after having given effect to the terms of the relevant netting agreement. This effectively limits the liquidator's powers to dealing with qualified financial instruments at the level of the netting agreement.

The Netting Law not only deals specifically with issues of prohibition of termination, preferences and the risk of 'cherry-picking' but further provides that, in case of conflict between the Netting Law and the Insolvency Law and Insolvency Regulations, the Netting Law will prevail (except for the provisions relating to Financial Markets). The Netting Law therefore affirms the enforceability of netting provisions where conflict with insolvency legislation has been identified and also adds the additional protection of dis-applying provisions of the insolvency legislation which might cause issue.

King & Spalding comment

In the post-financial-crisis world, netting agreements are valued by financial institutions as a credit risk mitigation tool. A netting agreement which is legally effective and enforceable in all relevant jurisdictions and gives the non-defaulting party the right to terminate and close out all transactions under the agreement in a timely manner upon the event of default, including in the event of the bankruptcy or insolvency of the counterparty, will directly impact the cost of doing business, as it feeds into the cost of capital. The Netting Law provides assurances that such netting agreements will be enforceable when dealing with DIFC counterparties and where such agreements are governed by DIFC law.

The Netting Law provides the DIFC with an immediate competitive advantage, but it is hoped that other jurisdictions in the region will follow suit. Indeed, this hope is already materialising as the draft Insolvency Regulations released by the Abu Dhabi Global Market ("ADGM") earlier this year also propose implementing netting legislation derived from the ISDA 2006 Model Netting Act. |

Phillip Sacks is a partner in King & Spalding's Dubai office. Phillip specialises in investment funds and asset management. He can be contacted at psacks@kslaw.com or +971 4 377 9916.

Jodi Norman is an associate in the Financial Services and Regulation team covering advisory mandates and investigations and enforcement actions in the UK and the Middle East.

Energy

Global Solar Energy — A Bright Future

Falling oil prices no deterrent as the International Energy Agency (IEA) estimates that by 2020, 2% of the global energy demand will be met by solar power with the figure rising to 16% by 2050.

In 2013, the total capacity of renewable energy worldwide was 1,560 gigawatts (GW), of which hydropower accounted for approximately 1,000 GW. However, the annual increase in hydropower over the preceding year was 4%, while that for other renewables (primarily wind energy and solar energy) was nearly 17%. Even though wind energy is currently far more prevalent than solar energy, there are numerous reasons to be confident that solar energy will grow at a significantly faster rate than wind in the years to come.

This article serves as an initial overview of the trends in the global solar power market generally. In the coming months, we will publish articles on the various elements of developing solar projects, including Power Purchase Agreements and feed-in tariffs, construction and O&M considerations, regulatory considerations, and financing structures.

In addition to hydropower, wind technology has been the mainstay of the renewable energy industry for the past few decades. The investments in this sector have been considerable in both Europe and North America, demonstrated by the fact that a third of Denmark's and a fifth of Spain's energy supplies in 2013 were provided by wind energy. In the United States, investment in wind energy, being the most viable of the renewable technologies, has been driven by the various government subsidies – including tax credits, grants and federal loan guaranties – in place since the early 1990s.

However, wind energy seems to be running into its current technological limits – there have been few gains in terms of siting or in the design of blades and bearings. Moreover, wind turbines are generally thought to be noisy, unattractive and dangerous to bird species.

Solar power, on the other hand, has seen tremendous innovation in the past decade. This has been in two forms. The first (and accounting for about one-tenth of the existing solar energy capacity) has been thermal storage whereby sunlight is concentrated as heat and then used for producing steam to power turbines. The second, and more widespread, form of solar energy is electricity produced by photovoltaic (PV) cells. The IEA recently noted that the cost of solar panels had come down by a factor of five in the past six years and is expected to further halve in the next 20 years, making this a viable long-term option as countries explore various avenues to reduce dependence on fossil fuel-based energy.

> The IEA recently noted that the cost of solar panels had come down by a factor of five in the past six years...

Countries with considerable fossil fuel (specifically petroleum) resources have an incentive to explore alternate energy sources in an effort to preserve their reserves for export and to produce other value-added products. Economies importing fossil fuels to meet energy requirements are incentivised to explore other options in an effort to be less susceptible to the vagaries of the global oil market (as demonstrated by the massive swings in price since 2007).

Europe, North America and China

Considerable investment in solar energy is expected to occur in Europe and North America in the coming years; however, other countries are likely to be just as active, if not more so, in terms of their solar investments. China, for instance, invested more than US$56 billion in renewable energy in 2013 alone (more than all of Europe and more than it invested in fossil fuel and nuclear capacity combined) including 13 GW of solar energy.

UAE

The UAE has strived to position itself at the forefront of the growth of solar energy in the region. The Emirate of Abu Dhabi established the Abu Dhabi Future Energy Company (Masdar) in 2006 with a mandate to reduce the emirate's dependence on oil. Since its inception, Masdar has made considerable investments in renewable energy initiatives including the Shams 1 project, a 100 megawatt (MW) concentrated solar energy project development in conjunction with Abengoa Solar and Total. Abu Dhabi is also home to the International Renewable Energy Agency Irena.

Dubai has also made significant strides in the development of solar power and is in the process of developing a 1,000 MW solar park of which the first phase (of 13 MW) was commissioned in October 2014. A further 200 MW was awarded in early 2015 in what was the lowest ever bid price for a solar project (US$5.84/kWh), which was bid by the winning consortium comprising ACWA Power of Saudi Arabia and Spain's TSK. This pricing is, in part, indicative of the technological advances in the PV industry. By 2030, Dubai hopes that 15% of its energy will be produced from renewable sources.

The Dubai Electricity & Water Authority (DEWA) recently announced a rooftop solar net metering program as part of its 'Shams Dubai' initiative, and further development of the regulatory framework in the UAE can also be expected in the near future.

Saudi Arabia

Saudi Arabia launched the King Abdullah City for Atomic and Renewable Energy (KA-CARE) in April 2010 with the mandate of contributing to development of the renewable energy industry. KA-CARE had the target of procuring 24 GW of renewable energy by 2024. However, the programme stalled before the procurement process commenced, and in March 2015, the government gave the responsibility of developing renewable energy to the Saudi Electricity Company (SEC). While no new targets have been officially publicised, there are some indications that the programme will initially be of a smaller scale, aiming for projects with a total capacity of 500 MW in the medium term.

The market will be closely watching SEC and the Electricity & Cogeneration Regulatory Authority (ECRA) in the coming months to see how the solar sector will be regulated, how projects will be procured and the framework for any feed-in tariff.

It is instructive to note that Reuters estimates that it costs Saudi Arabia approximately US$5/barrel (inclusive of capital expenditures) to extract oil, so using it for the production of electricity domestically displaces oil from other more value-added uses. This opportunity cost, coupled with the vast solar energy potential in Saudi Arabia and the government's drive to diversify the energy mix away from dependence on oil, means Saudi Arabia can certainly be expected to aggressively develop its solar energy sector in the coming years.

Jordan

Jordan has been actively involved in the development of solar energy in recent years in an effort to reduce its dependence on imported sources of energy (it currently imports 97% of the energy it consumes). Increase in solar power is a significant part of its strategy, and it hopes to connect about 1.65 GW of renewable energy projects to the grid by 2020.

Jordan was the first country in the region to introduce net-metering regulations in 2012, allowing PV owners to sell solar power at a rate of approximately US$0.18/kWh and has recently announced plans to install PV systems on the rooftops of each of the 6,000 mosques in the country.

> Egypt's geographic location makes solar energy very attractive; however, at the end of 2013, it had only 20 MW of installed solar energy capacity.

On a larger scale, a consortium led by the European Banks for Reconstruction and Development (EBRD) committed to provide financing of US$100 million for the construction of three solar projects totalling 40 MW of capacity. This comes after the EBRD also agreed to provide financing for a 20 MW project in September 2014.

Egypt

Egypt's geographic location makes solar energy very attractive; however, at the end of 2013, it had only 20 MW of installed solar energy capacity. The government hopes to have renewable energy contribute 20% to the energy mix by 2020.

In recent weeks, the Egyptian Electricity Holding Company (EEHC) has entered into a memorandum of understanding with Saudi-based ACWA Power and Masdar to explore the growth of renewable energy in the country – 500 MW worth of solar projects are meant to be evaluated in this regard.

Egypt has also created several incentives to encourage investments in the solar energy sector. The most notable of these are (i) government-backed 20-to-25-year power purchase agreements; (ii) a payment of the portion of the price to be based on US dollars (even though the payment would be made in Egyptian pounds at the prevailing exchange rate) to alleviate currency risk; and (iii) allowing the use of state-owned land in exchange for 2% of the energy produced by the project.

A feed-in tariff regime has also been established (the rates for household and commercial users will be different), and projects with capacity ranging from 500 kW to 50 MW will be eligible to participate.

Rest of Africa

Morocco has shown strong growth in solar energy and is targeting 2 GW of solar energy by 2020, and Algeria hopes to have 2.5 GW of renewable energy by 2030. Multilateral agencies have also shown strong interest in the sector, specifically in Africa, with the International Finance Corporation (IFC) announcing the creation of an initiative aimed to develop solar projects. This initiative, expected to be launched later in 2015, will also benefit from World Bank guarantees in respect of delays in connecting with the power grid of the host country as well as political risk.

King & Spalding's Renewable and Alternative Energy Practice provides effective advice and skilful solutions to clients in this fast-growing segment of the energy industry. Our multidisciplinary group provides a "one-stop" approach, assembling the exact blend of legal disciplines appropriate for each client matter. Our energy lawyers have been involved in solar and other renewable energy deals in all parts of the world, including in the UAE, Saudi Arabia, Jordan, Morocco, Kenya, South Africa, Pakistan, Indonesia, Malaysia, France, the United Knigdom, USA, Canada, Brazil, Argentina, Uruguay and Chile. |

Usman Ahmad is an associate in the Global Transactions Group in the Abu Dhabi office of King & Spalding. Prior to joining King & Spalding, Mr. Ahmad worked for various international law firms in New York where he practiced in the areas of general and project finance, mergers and acquisitions and other general corporate matters. He can be contacted at uahmad@kslaw.com or +971 2 596 7019.

Tim Burbury, based in Abu Dhabi, is a partner in King & Spalding's Global Transactions Practice Group. As an infrastructure specialist, he has over 15 years of experience advising sponsors, utilities companies, government-owned developers, equity investors and infrastructure funds on major energy, infrastructure and PPP projects throughout the Middle East and the Asia-Pacific region. Tim can be contacted at tburbury@kslaw.com or +971 2 596 7001.

International Arbitration

Top 10 Tips for In-House Counsel*

Raza Mithani of King & Spalding gives the lowdown on what every in-house counsel should bear in mind with regard to arbitration proceedings in the UAE.

It is the beginning of a new year - that time when newspapers and magazines are replete with top 10 lists from the previous year – the best films, the most innovative companies and the most significant world events. With that theme in mind, and on a slightly more lawyerly note, we set out our list of the top 10 tips for in-house counsel who may have to deal with arbitrations in the UAE. We have also picked up on some of the more interesting developments in arbitration in the UAE from the recent past, and focus on those matters which will enable in-house counsel to maximise the prospects of a successful outcome.

Tip No. 10 – Tailor the dispute resolution clause

When transactions are being negotiated, the dispute resolution clause is often the last thing on the parties' minds. However, it is worth carefully tailoring the clause so that if a dispute does arise, you are placed in the best possible position. Factors to be thoroughly considered include whether to go for ad hoc or institutional arbitration, the arbitral rules to be adopted, the number of arbitrators and the seat of the arbitration.

Depending on the rules chosen and the seat of the arbitration, other considerations may also come into play such as making express provision for the confidentiality of the proceedings and providing the tribunal with the power to apportion legal costs between the parties at the conclusion of an arbitration.

The importance of the latter in the context of the DIAC Rules was underlined by a recent case in which the Dubai Court of Cassation found that the DIAC Rules do not give an arbitral tribunal the power to apportion counsel's fees in an arbitration.[1] Where DIAC Rules are specified, it is therefore necessary to cover this off in the arbitration clause, or failing that, in the Terms of Reference for the arbitration.

Tip No. 9 – Ensure that the signatories to the arbitration agreement are properly authorised

It is crucial to ensure that the parties signing the arbitration agreement have authority to do so. Failure to do this can open up an award to challenge pursuant to Article 203(4) Civil Procedure Code on the grounds that the arbitration agreement was invalid.

Whereas for an individual, this is straightforward, for a corporate entity or government department, it is less so. Whilst this is a topic for an article in itself, the recent case of *Middle East Foundations LLC v Meydan Group LLC*[2] has shown that the arduous approval requirements to enter into an arbitration agreement with a government department are not generally necessary where one is simply dealing with a private company in which the government has a shareholding.

*This article was first published in *The Oath* magazine

[1] Dubai Court of Cassation Property Appeal No. 282/2012.
[2] Dubai Court of Appeal Case No. 249/2013.

Tip No. 8 – Avoid the "without prejudice" trap
In many jurisdictions correspondence marked "without prejudice" cannot be referred to in any subsequent proceedings without both parties consent. In the UAE such privilege does not generally apply.[3] Parties should therefore be careful to ensure that they avoid the trap of referring to matters in such correspondence which they would not wish disclosed to an arbitral tribunal.

Tip No. 7 – Follow the machinery in the dispute resolution clause
Dispute resolution clauses frequently contain a tiered process which should be followed before arbitration proceedings are issued. These may require the service of formal notices and/ or that the parties first attempt amicable settlement. Such provisions are ignored at a claimant's peril as they can, amongst other things, result in a tribunal refusing to take jurisdiction over the dispute.

Tip No. 6 – Choose the most suitable Tribunal
It is important to choose the tribunal that is most suitable for determining a particular case.[4] The best tribunal for determining a construction delay dispute is unlikely to be the most appropriate tribunal for determining a complex derivatives dispute. In addition, in this region where the failure to follow local requirements can result in the challenge of an arbitration award, it can be worth having at least one member of the Tribunal who is very familiar with these

requirements. As the UAE arbitration market has developed, the degree of choice available to parties has increased.[5]

Tip No. 5 – Powers of Attorney
The received wisdom amongst experienced arbitration practitioners in the UAE is that lawyers representing a party in arbitration must have a valid special Power of Attorney. A recent Court of Cassation decision has suggested that is not necessary.[6] However, best practice remains that such a Power of Attorney be provided. Indeed, the DIAC Rules permit an arbitrator to request proof of authority from a party's legal representative "*in such form as the Tribunal may determine*", and it is usual practice for arbitrators in the UAE to insist that a Power of Attorney be provided to evidence authority.

Tip No. 4 – Beware Public Policy
A line of recent cases has cast prominence on the principle that cases involving issues of public policy are not arbitrable. An attempt to refer such cases to arbitration may result in an arbitral award being annulled. For instance in *Baiti Real Estate Development v Dynasty Zarooni Inc*[7], the Court found that whether the non-registration of a property rendered the sale transaction void was a matter of public policy, and therefore could not be arbitrated.[8]

For this reason it is imperative that any claim referred to arbitration steers clear of matters which might be regarded as falling within the public policy jurisdiction of the Local Courts.

Tip No. 3 – Obtain statements at the earliest opportunity
The UAE has a transient population. It is not uncommon to encounter a situation where arbitration proceedings are issued in connection with a transaction or project where the key individuals that agreed the contractual terms or lead on the execution phase are no longer with the organisation. It is therefore important that preliminary statements be obtained from key individuals at an early stage. Not only do memories fade with time, but once an employee has left the organisation he or she may be reluctant to commit the same time and effort to the exercise of putting together a statement.

Tip No. 2 – It's all about the documents…
When I first qualified at the English Bar, a very eminent High Court Judge advised me that in even the most complex and substantial case, the judgment or award is likely to turn on not more than 50 documents. This is as true in arbitration in the Middle East as it is litigation in common law Courts. The trick of course is to identify those key documents, which is perhaps more easily said than done, especially when a dispute has just arisen. An important stepping stone to this is to ensure that evidence in general, and documents in particular, are preserved. In a digital age, this can mean not just letters, faxes and meeting notes, but also emails, texts and sometimes even messages sent through social media.

The initial documentary exercise should not just be viewed as an internal collection and preservation exercise, although that is of course an important part of it. It is also worth looking externally. In many cases it is much easier to obtain documents from third parties before arbitration has commenced as afterwards such parties can sometimes feel compelled to be partisan. The point applies with even greater force to the opposing party. Prior to arbitration commencing there may still be sufficient goodwill for the other side to provide documents with a view to resolving the dispute. After proceedings have commenced, often the only way of obtaining documents is by making a formal disclosure application.

Tip No. 1 – Involve specialist arbitration counsel at an early stage
Finally our top tip – involve specialist arbitration counsel at an early stage. This is perhaps fairly predictable advice. However, it is borne of many years of experience. Having specialist arbitration counsel involved at an early stage, before a dispute has fully crystallised, usually results in considerable cost savings later on.

Often this is simply due to the fact that by taking the right strategic approach when issues first arise, a full blown dispute can be avoided. An early assessment of the strengths and weaknesses of a party's position can also enable it to pursue a more informed negotiating strategy. Many of the matters which we have been involved with have been resolved in our clients' favour without the need for proceedings to be issued for this very reason.

On other occasions, specialist counsel can help to craft a strategy which maximises the prospects of successfully obtaining a favourable arbitration award, by ensuring that the key issues are proactively addressed at the outset, the strengths of the case capitalised upon and any gaps plugged.

It is worth noting that sometimes clients fear that having external lawyers involved at an early stage can serve to entrench the position of the parties. Whilst this is a legitimate concern, good external lawyers should have the opposite effect, providing objective assessment and robust guidance.[9] |

Raza Mithani is counsel in the Commercial Disputes Practice in the Dubai office of King & Spalding. He can be contacted at rmithani@kslaw.com or +971 4 377 9967.

[3] The position in the DIFC is slightly more nuanced. In any event there are practical methods by which the confidentiality of negotiations may be preserved.
[4] Even where an arbitration clause provides for the appointment of a Sole Arbitrator, it is open to the parties to agree on whom to appoint to resolve their dispute.
[5] Specialist arbitration counsel should be able to provide guidance as to the most appropriate arbitrator/s for any given case.
[6] Dubai Court of Cassation Property Appeal No. 216/2012.
[7] Dubai Court of Cassation Property Appeal No. 14/2012.
[8] See also Dubai Court of Cassation Case No. 282/2012 and Abu Dhabi First Instance Commercial Action No. 2847/2013, in which the limits of the public policy principle in the context of property cases was discussed.
[9] Also the involvement of external lawyers does not need to be immediately disclosed to the other party. We have been involved in a number of matters where we have crafted the correspondence to go from a client behind the scenes.

Real Estate and Corporate

Top Tips for Real Estate Term Sheets

A quick guide for investors in real estate joint ventures

The first rule of term sheets is to have a term sheet. The second rule of term sheets is to talk about that term sheet with your lawyer – before you sign it.

We understand the temptation to bypass these rules. You may feel pressure to "strike while the iron is hot," and win some modicum of commitment from a potential partner, rather than slowing down to negotiate terms. You may be afraid that a more detailed discussion of terms will create tension or discord at the start of a beautiful friendship. Or you may just be reluctant to incur expenses when the investment is still uncertain and closing seems remote.

If you succumb to these temptations, you may come to us with "a deal" that consists of a only a bulleted summary of select commercial terms or (even worse) with a detailed and signed term sheet – only to discover that your approach carries risks or causes an issue that you did not foresee, that the inclusion of some terms has made difficult the introduction of others, or that the structure of the proposed investment comes with tax or other inefficiencies.

Our experience is that some investment on the "front end" of a transaction is generally very well rewarded. The term sheet is an opportunity to optimize the investment structure, to create and allocate rights and obligations, and to allocate risk, at a time when the parties' good will and momentum are highest. Choices at the term sheet stage significantly impact the further negotiations and, more importantly, investment outcomes. That impact should be positive! The expense of involving legal counsel early is more than offset by the cost savings in the preparation and negotiation of the joint venture agreement and related documents, as well as by the reduced likelihood of "leaving money on the table" in the term sheet or in those negotiations. It is easier and less costly to address an important issue by drafting and negotiating a few sentences in a term sheet than by drafting and negotiating several pages in a joint venture agreement.

You will rely heavily on your local partner, so it is important that your local partner can be removed as manager and replaced quickly at the first sign of trouble.

Summarized below are some of the concepts that often cause difficulty for clients as they work to establish a real estate joint venture. Thoughtful consideration of these at the term-sheet stage can smooth the path to a successful investment.

1. Total Capital Committed. The capital requirement or purchase price is usually among the first points to be documented. In real estate investment, however, the agreed initial investment amount is often subject to increase for development cost overruns, anticipated renovations, cash-flow shortfalls, uninsured losses and other matters. In some cases, such as with development cost overruns, the local partner (overseeing development) will bear the risk of such overruns. In any case, the risk – and the party best positioned to control it and bear it – should be thought through. It is also important to consider who has the right to call for additional capital, and what the appropriate penalties are for failing to fund that capital. In a joint venture that is intended to operate on a *Shari'ah*-compliant basis, those remedies may be more limited than in a joint venture that is not.

2. Fees & Fee Offsets. In a real estate investment partnership with a local asset manager or developer, the local partner usually earns a management fee as well as a "promote," or a share of profits, after the investor's return of capital and a preferred return amount. The local partner may charge further fees for managing any development or renovation, as well as transaction fees on purchase or sales of property or on debt financings. The amount of these fees is subject to some negotiation, but there is usually a "market" rate that most parties settle around. Occasionally, investors will require the local partner to offset some of part of its fees – usually the portion that represents profit as opposed to a cost recovery – against the promote.

3. Treatment of Competing Projects. Good local partners are in high demand and have many partnerships and many projects underway at any given time. Where the local partner is focused on a particular asset type or within a particular geographical area, there is a risk that (for example) your new, untenanted office building turns out to be across the street from another untenanted office building which your local partner proposes to manage, or to acquire with a different partner. That risk can be avoided with a clear non-compete provision, usually one requiring that you either consent to or be given a right-of-first-offer on the acquisition of properties similar to yours within a certain geographical area.

4. Standard of Care. Where a local partner is managing the real estate asset on a day-to-day basis, it is important to establish a general standard of care as well as the specific obligations of the local partner. The companies laws of some jurisdictions require the managing member of the joint venture to act in the best interest of all members and may also impose duties of loyalty, good faith and fair dealing. In other jurisdictions these duties can be waived by agreement of the parties, and in still others the duties do not exist in the law. It is safest to assume that the managing member will have only those duties that the parties specifically agree on.

5. Removal of the Manager. You will rely heavily on your local partner, so it is important that your local partner can be removed as manager and replaced quickly at the first sign of trouble. Most often, the local

partner can be removed as the manager of the joint venture "for cause," meaning gross negligence, willful misconduct, other bad acts or a material breach of the joint venture agreement. Some clients, however, take the position that seeking to remove a manager for any of these causes is simply an invitation to a lawsuit, and instead insist that they have the right to remove the local partner as manager and terminate any related asset management agreement at any time, with or without cause. Such an approach is more likely to succeed if the local partner's investment percentage is very small.

6. Loss of Promote. It is important to grapple early on with the consequences that flow from removal of the local partner as manager of the joint venture. In some cases, removal of a local partner as manager of the joint venture will have no impact on allocation of the promote. If a manager is being removed for cause, however, the local partner might be entitled to unrealized promote that has accrued up to that point, or might lose the promote entirely. The parties also need to decide when the promote is to be paid to the removed local partner, if at all. This is, of course, of great importance to the local partner, and if not specifically addressed in the term sheet it will be a challenge to include a loss of the promote in the joint venture agreement.

7. Access to Information. As a member in a joint venture, you will not automatically be given unrestricted access to information on the business – even where you hold 80% or 90% of the equity. Information and access rights for equity holders must be bargained for, and it may be that optional restrictions on access in the relevant companies law must also be waived. Do you expect to see monthly property reports? Quarterly and annual financial statements? Annual valuations? Do you expect to be able to require an audit or outside appraisal of property? These points must be documented early, as they impose additional burdens on the local partner who is acting as manager.

8. Exit Rights. Although you will be relying on the local partner for many decisions, you will likely still want the ability to decide when to sell a real property asset, particularly if you are providing a substantial majority of the equity. Local partners will want some period post-acquisition to finish development or achieve stabilization, but after that it is customary for an investor to have "marketing rights" to sell the property. These rights might also be triggered earlier if the local partner is removed as manager. Another option that parties sometimes include is a "buy-sell" right, where one party names a price for a property and the other party must agree either to buy or to sell the property at that price. The risk of this arrangement, of course, is that the foreign investor will usually be at an informational disadvantage, and in addition may be saddled with an even larger investment (if it ends up as the "buyer" in the buy-sell) when what it really wanted was to exit.

There are, of course, numerous other issues to consider. The specific points to bring up and negotiate are dictated by each investor's particular concerns, relative leverage and risk tolerance. In every case, though, the investment outcome can be improved and the overall legal expense reduced at the term sheet stage by having a term sheet that is clear and that gives adequate attention to investment structuring, risk allocation, investor rights and partner obligations. |

Isam Salah is a partner in King & Spalding's New York and Dubai offices and is head of the firm's Middle East and Islamic Finance practice group. He can be contacted at isalah@kslaw.com, or in New York at +1 212 556 2140, or Dubai at +971 4 377 9903.

Benjamin Newland is a partner in King & Spalding's New York and Dubai offices. His practice covers a broad range of real estate, corporate and finance matters, with particular emphasis on real estate investment and financing transactions, joint ventures, private company M&A and *Shari'ah*-compliant transactions. He can be contacted at bnewland@kslaw.com, or in New York at +1 212 556 2121, or Dubai at +971 4 377 9902.

endnotes

About our Middle East Practice

With more than 25 lawyers in the Middle East, King & Spalding offers extensive experience in Islamic finance, construction, energy, real estate, private equity and international arbitration in the Middle East, North Africa and Asia. The firm has long been considered a leader in Islamic finance, having pioneered many of the *Shari'ah*-compliant financial products that exist today. Our energy practice is known worldwide for its oil and gas work, particularly in the area of liquefied natural gas, and also has a strong base in electric power, petrochemicals and renewable energy. Our corporate lawyers have advised on some of the most complex and high-profile private equity investments and M&A transactions in the MENA region and are consistently recognized in *Chambers Global* and *The Legal 500*. In the 2013 edition of the *Chambers Global* guide, King & Spalding was consistently ranked among the top law firms practicing in the Middle East.

About King & Spalding

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

We are green

We share your concern for the environment. To minimize our environmental footprint, *measure* is distributed in electronic format. Please feel free to email it to a friend or colleague.

Update your details

measure is intended to inform and update. If you change your email address, please contact Hoda Mana at hmana@kslaw.com or Fax: +971 4 377 9955 so that we may update our records.

Abu Dhabi
Atlanta
Austin
Charlotte
Dubai
Frankfurt
Geneva
Houston
London
Moscow
New York
Paris
Riyadh
San Francisco
Silicon Valley
Singapore
Washington, D.C.

Abu Dhabi
Level 15, Al Sila Tower
Abu Dhabi Global Market Square
P.O. Box 130522
Abu Dhabi, UAE
Tel: +971 2 596 7000
Fax: +971 2 596 7077

Dubai
Al Fattan Currency House
Tower 2, Level 24
DIFC
P.O. Box 506547
Dubai, UAE
Tel: +971 4 377 9900
Fax: +971 4 377 9955

Riyadh*
Kingdom Centre
20th Floor
King Fahad Road
P.O. Box 14702
Riyadh 11434
Saudi Arabia
Tel: +966 11 466 9400
Fax: +966 11 211 0033

*Affiliated Office