**Gulf News**
November 3, 2016

GIBSON DUNN

# Horses for Courses Strategy Should Prevail in Deals

**Whether an all-share deal or one limited to asset sales, some diligence is needed**

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The two predominant methods of buying and selling a business owned by a company (the "target") is either to transfer the shares in a share deal or to transfer its assets and liabilities in an asset deal. Simply put, in former, the purchaser acquires shares in the target which has all of the assets, liabilities, rights and obligations of the business, even those that the purchaser does not know about.

In an asset deal, the purchaser acquires only those assets, liabilities, rights and obligations that it chooses. The purchaser can therefore cherry-pick those parts of the business it wishes to acquire. It is useful, first of all, to understand what I mean by assets, liabilities, rights and obligations in this context.

Assets are the target's resources and the things that it owns such as cash, real estate, machinery, goodwill and amounts owed to it as a creditor. Liabilities are amounts that the target may owe to others. Some assets and liabilities may be contingent on an event happening: for example, a litigation claim may, depending on the outcome, entitle the target to receive compensation or may require the target to pay compensation.

The target will have rights and obligations under its existing contracts and under law. The target may, under a contract, have the right to sell a particular good in a territory to the exclusion of others. It may also be under an obligation to ensure that such goods comply with health and safety laws, or the factory in which the goods are made does not pollute the environment.

If in an asset deal the purchaser can cherry-pick, surely this is better than a share deal? Not necessarily. Despite its flexibility, an asset deal is more complex and takes longer to implement. Each aspect of the business will need to be separately transferred, often requiring numerous third-party consents.

Does this mean, then, a share deal is better? Again, not necessarily. It all depends on the circumstances. Here are some factors that should be considered:

Put simply, share deals are usually quicker than asset deals. Further, they are less complex as the target business remains intact and is transferred automatically. Asset deals require the identification and individual transfer of the relevant assets, liabilities, rights and obligations.

In a share deal, contracts, leases and licences automatically transfer. However, beware of a change of control provisions which may require you to seek consent. In an asset deal, each contract, lease and licence must be individually transferred, requiring the consent of third-parties (unless the consent is "pre-baked" into the contract). Any consent requirement could lead to renegotiation or termination of the relevant contract, lease or licence.

Moreover, in a share deal, the target remains the employer and, therefore, employees automatically move with the business. However, in an asset deal in the Gulf region, employees will not automatically transfer with the business. The purchaser must choose who to keep on, which can trigger end-of-service payments to terminated employees.

Trade purchasers (those with an existing operating business in the same or a complementary sector) may prefer an asset deal. This is because it allows them to take on particular parts of the target they are interested in so as not to duplicate operations and to help achieve synergies. Private equity purchasers, by contrast, may prefer a share deal as they are buying into an existing standalone business and management team they can then streamline and grow.

Finally, share deals and asset deals are not mutually exclusive. A share deal may also involve an asset deal and vice versa. For example, in a share deal a purchaser may acquire a target along with certain additional assets from the seller that are not owned by the target, but are required to ensure the smooth running of the target business. Another example is where some of the assets being acquired in an asset deal include shares in a company, such as subsidiaries of the target.

The appropriate deal structure will be driven by the business objectives of the purchaser as well as several legal, tax and financial considerations. In taxable jurisdictions, for example, share deals are generally preferred. Therefore, the question is not whether one should do a share deal or asset deal but which deal structure makes most sense.

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