



Joint Ventures in the Middle East

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MARNI CENTOR: Hello everyone. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's webcast, Joint Ventures in the Middle East.

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast.]

Our presentation today will be moderated by John Angelo, senior corporate counsel at Koch Chemical Technology LLC. Now, I'll turn it over to John.

JOHN ANGELO: Welcome to the Association of Corporate Counsel International Legal Affairs Committee webcast entitled Joint Ventures in the Middle East. As mentioned, my name is John Angelo and I will be moderating today's presentation. I'm senior corporate counsel for Koch Chemical Technology Group LLC, and I also have the privilege of serving as vice chair of membership and outreach for the International Legal Affairs Committee.

Today we have two outstanding presenters. First, we have Mr. Christopher Jobson with us. Chris is managing partner of Eversheds' Middle East business. Formerly a regional head of a department of Eversheds' core practice area, Chris moved to Qatar in January 2004. Chris' practice area in Qatar now ranges from project managing syndicated banking transactions to drafting and advising on a wide variety of commercial matters, including the incorporation of new companies, joint ventures, agency distributor agreements, the acquisition or leasing of commercial property, and providing general business advice.

Next we also have today Mr. Kuljit Ghata-Aura. Kuljit is a partner at Eversheds' International Corporate and Commercial Practice based in Abu Dhabi. Kuljit specializes in cross border mergers and acquisitions, private equity, joint ventures, initial and secondary public offerings, and general corporate advisory and commercial work across a wide number of sectors, including energy, real estate, and financial services. His professional biography lists a number of sophisticated cross-border matters that Kuljit has advised and represented major clients on. Kuljit contributed to the chapter of English law in the third edition of *International Business Acquisitions: Major Legal Issues and Due Diligence* published by the World Law Group.

Today's webcast participants are invited to review Chris' and Kuljit's complete professional biographies at www.eversheds.com. We thank both Chris and Kuljit for being with us here today.

This webcast is being presented through ACC's updated webcast page. During the course of this webcast, you will see a satisfaction survey on your screen. Please take a moment or two to respond to the survey. It is a very useful tool for ACC to organize and present webcasts that are both interesting and informative to our members. Before I hand today's presentation over to Chris and Kuljit, Marni has our first verification code for those participants who might be seeking CLE for today's webcast.

[The code and instructions provided here were intended for attendees of the live webcast when it was originally broadcast.]

JOHN ANGELO: Now let me turn the presentation over to Chris and Kuljit.

CHRISTOPHER JOBSON: Thanks, John. Well, good morning. By way of introduction, my name is Chris Jobson and I'm the managing partner for Eversheds in the Middle East. I will be presenting this webinar together with my partner, Kuljit Ghata-Aura, who heads our corporate practice in the Middle East.

The purpose of today's presentation is to give you an introduction to some of the key issues that arise when entering into a joint venture with a Middle Eastern party for business that is to be carried out in the Middle East. I think it's worth pausing here and making the point at the outset that when we refer to the Middle East, we are really referring to a number of separate and distinct sovereign states. Some people think the countries of the Middle East are essentially the countries of the Gulf Cooperation Council (the GCC), mainly Bahrain, Kuwait, Oman, Qatar, and Saudi Arabia and the United Arab Emirates [UAE]. But let's cast the net wider to include, say, Iran, Iraq, Jordan, Syria, and others.

[An] important point is that each country has its own laws and regulations. In the case of the United Arab Emirates, the position is even more complicated because whilst there is a federal law which applies throughout, a bit like the USA, there are specific laws that apply in each of the seven emirates, of which Abu Dhabi and Dubai are probably the most famous. Accordingly, whilst this presentation is entitled Joint Ventures in the Middle East, it would not be possible, given the time, to cover all the specific issues that relate to every country that comprises the Middle East. As such, we've tried to be as general as possible, drawing on the experience we've gained from acting for clients on joint ventures, predominantly in the UAE, Qatar, and Saudi [Arabia], which is where we have offices, and also Bahrain, which is another popular destination for foreign investors.

It's very important when you're thinking about entering into a joint venture in any country in the Middle East that you have a full understanding of the laws that will apply to your relationship from the outset in order to avoid common pitfalls that may arise and which we will discuss in more detail during the course of this webinar.

If we can turn to slide 2, what do we mean by a joint venture? The general definition of a joint venture is a contractual agreement joining together two or more parties for the purpose of executing a particular business undertaking. I accept that that is a fairly wide definition that could potentially comprise anything from an agreement by a foreign company to export goods to a local distributor for that distributor to sell to customers in its market, to a corporate joint venture where the parties form a company to pursue a common business objective for a limited or unlimited duration.

In this presentation, we will consider three main types of joint venture: firstly, a corporate structure where the parties incorporate a company for their business venture; secondly, the agency/distribution/franchise model, which we've lumped together because in a number of

Middle Eastern countries there's no legal difference between them; and thirdly, truly contractual joint ventures where there's a form of business cooperation which does not actually fall within the agency model, perhaps a form of consultancy agreement or cooperation agreement.

So, before I go any further and before I hand it over to Kuljit, perhaps I could ask for the first of the poll questions which we'll be asking this morning. The first question is: Does the company you work for have an existing joint venture in the Middle East? I think you'll be able to poll yes or no. The second question, which I'll pose at this stage, is: Is the company you're working for—

MARNI CENTOR: Chris? I'm sorry, our audience is still voting on the first question.

CHRISTOPHER JOBSON: OK, I'll hold.

MARNI CENTOR: That's OK. I'm going to close the poll now. I'm sorry. Let's show those results of the poll now. We have 33% of the audience has an existing joint venture in the Middle East, and 67% says no, they do not have an existing joint venture. We want the second poll now; is that correct?

CHRISTOPHER JOBSON: We do. And the second poll, Marni, is: Is the country that you're working for contemplating a joint venture in the Middle East? Answer yes or no please.

MARNI CENTOR: We have that question up and our audience is voting. We will give them just a few more seconds to vote. It looks like everyone who is going to vote has voted, so we will close the poll. The results of this poll: 83% of our audience is contemplating a joint venture in the Middle East; 17% is not. Back to you, Chris.

CHRISTOPHER JOBSON: I think therefore the webinar is of utmost importance to the audience, and we hope that, together with Kuljit, we give the information that they're looking for to get the ball rolling. At this point, perhaps I could hand it over to my partner, Kuljit.

KULJIT GHATA-AURA: Thanks, Chris, and if we could just have the next slide please, John. I think that the results of the polls were very interesting, and they very much bear out what we are seeing on the ground here in the Middle East, which is that there is increasing move to the Middle East as a very popular investment destination by a number of Western companies.

Anyway, moving on to the preliminary issues that we think one would need to consider on entering into a joint venture in the Middle East, one of the key issues for foreign companies looking to enter into a joint venture with a Middle Eastern company or individual is the identity of the person that they are to partner with. Often this is something that is decided prior to lawyers being instructed. We often hear the phrase from clients that a potential local partner is extremely well-connected, and that seems to be the overriding quality required in a local partner—that they have excellent local connections and are able to open up opportunities for a foreign company. However, the basis on which it has been established that a person is well-connected is sometimes not particularly well-founded. It's often incumbent on ourselves as legal advisors to ensure that a client has done enough in terms of basic due diligence to ensure that the client has protected his own personal position within a company and also the good name of his company. On occasion, we have found that clients had thought that they were talking to or dealing with a particular

person or organization with great influence who was extremely well-connected, but in actual fact they were talking to one of his relations with less influence and connections.

Arabic names can be very confusing to the uninitiated, and it's important to look at the name carefully to establish who the particular person is. One of the ways that can assist this is to look at the entire name to see who the relevant person is the son of. This is usually prefixed with the word "bin," meaning "son of." An example of this, just to illustrate this, is the current president of the UAE, who is Sheikh Khalifa bin Zayed Al Nahyan, meaning that Sheikh Khalifa is the son of Sheikh Zayed, with Al Nahyan being the family name. These cases of mistaken identity can be embarrassing, and in the worst cases can result in a joint venture with the wrong party, which is extremely difficult then to get out of.

What makes the position more difficult is the lack of freely available public information on companies in the Middle East. It is simply not possible in most jurisdictions in the Middle East to obtain even the most basic information on the ownership of companies without the consent of the company itself. Even the information that is available, where such consent is forthcoming, is often out-of-date and unreliable. Given all of the above and the lack of freely available public information, we would usually advise a client to engage a specialist business intelligence firm to conduct the appropriate level of due diligence. The scope can be as basic as confirming that the relevant person is who they say they are, or a more detailed analysis such as examining the financial net worth of an individual or a company, examining an individual's reputation and connections.

Additionally, some firms will also assist in partner selection, where a client is looking to exploit a particular sector and is looking for someone with connections and influence in that sector. It almost goes without saying that it is absolutely essential for a foreign company to conduct standard best practice checks so as not to fall afoul of the relevant anti-corruption or anti-money laundering legislation, the most prominent and well-known of this, which of course you in the U.S. will appreciate is the Foreign Corrupt Practices Act. Often international companies will have policies governing compliance in this area, such as asking for a detailed questionnaire to be filled out and signed by a potential partner. These should be followed in a stringent manner to ensure that any reputational or potential reputational risk for a foreign company is minimized. From experience, reputable collaborators will be more than happy to provide this information, and in fact are well used to doing so. The basic message to get through is that when doing business in the Middle East, it is even incumbent on companies, supported by their internal and external counsel, to conduct best practices so as to ensure that the paper trail is fully there.

Whilst at present we have been focusing on reputational issues regarding actual entry into a joint venture, i.e., partner selection, one point that I would like to make at this juncture and that has often been neglected is the reputational impact on a foreign company of exiting a joint venture. We would suggest that such an evaluation should really be carried out at the outset as the result of a client's exit planning. This is, of course, whilst we would all hope that the joint venture would be extremely successful and the parties would eventually walk away having both made a lot of profit and it had been a fruitful relationship, sometimes this isn't the case, and part of what we, as external counsel, advise is really downside protection for a foreign investor. If I could have the next slide, please.

I would now like to move the discussion on to the matter of memoranda of understanding [MOUs]. Memoranda of understanding are very common in the Middle East, as they are in the U.S. and Europe, and their purpose is to record an understanding between the parties prior to the entry into definitive agreements. MOUs need to be treated with some caution in the Middle East. Whilst those parts of an MOU which are stated as being nonbinding should generally be considered by the local courts as being so, and compelling the parties to conclude a deal. However, these provisions do act as evidence of serious intent and may hold some moral force should either of the parties radically diverge from the provisions of the MOU in later negotiations. Therefore, there is a risk that even the elements of the MOU, which are stated to be nonbinding could be considered as binding in the relevant countries, as the courts might complete that the parties are under a moral obligation to negotiate within the terms of the MOU. Additionally, in a number of jurisdictions in the Middle East, there is an overriding obligation on the parties to negotiate in good faith. This can become problematic should negotiations break down over matters that were agreed in the MOU, even if they were expressed in a nonbinding fashion.

The issue becomes even more problematic when you realize that if the matter were to reach the local courts, the document would have to be translated into Arabic, which can lead to the subtlety of the English language drafting being lost. For the reasons given above, we would strongly recommend that prior to the entry into an MOU, legal advice is taken and that there are very clear statements dealing with governing law jurisdiction and which provisions of the MOU should be considered binding. In our experience, it is advisable to have clear binding provisions relating to termination, confidentiality, exclusivity, and intellectual property rights. At the later stage, when negotiations regarding the joint venture have developed far enough, we strongly recommend agreeing a detailed term sheet for the joint venture. We have found it to be a very helpful tool in identifying the key issues early in the process and figuring out any deal breakers. Additionally, this will usually be the only document that the decision-makers at the Middle Eastern party read, so it is important that it deals with all the key issues and leaves little scope for misunderstanding, which is all too common in these parts, and not surprisingly, as one of the parties is not really operating in their first language.

The worst thing to do, in our experience, is to adopt an overtly Anglo-Saxon approach and produce a standard-form, hundred-page joint venture agreement and then expect all the key issues to be picked up. In our experience, they won't, and you will spend a lot of time and expense in creating a full set of documents to no avail. If I could have the next slide, please.

As I lead into this next section about selecting the right structure, I'd like to take another poll. Could you canvass the audience's opinion?

MARNI CENTOR: Great, yes. Here is the next poll we have for our audience: In your experience, what has been the main driver for the type of joint venture structure adopted by the company you work for? Please select one of the following: tax, ease of doing business, ability to safeguard or enforce contractual rights, or no overriding driver or a mixture of the above and other factors. We'll give our audience a few more seconds to vote before we close the poll. If you haven't yet voted, please do so. I am going to close the poll. Here are our results. Nine percent of the audience chose tax, 18% chose ease of doing business, 5% chose ability to enforce

and safeguard contractual rights, and 68% of our audience has no overriding driver or a mixture of the above and other factors. Thank you.

KULJIT GHATA-AURA: Thanks, Marni. That's very interesting. For those of you who voted for [choice] D, that's obviously the right answer.

Anyway, moving on. Just to illustrate that in the context of Middle Eastern joint ventures, actually you will see that illustrated in what I go on to say. Obviously, selecting the correct structure for a joint venture is absolutely essential. We have found that the best way to recommend the correct type of structure requires us to have a detailed discussion with the client about what their business objectives are. Often clients will come to us following discussion with a local partner with a structure that has already been proposed and will simply ask us to document this. Often the structure is one that has been imposed on the foreign partner by the local partner. It is taken as read that this structure is the appropriate one or one that is required by local law. More often, though, we have found that a full structuring call or meeting with a client will present them with a number of options as opposed to the one that they thought that they had.

Some of the key questions that need to be considered are of the following ones, which are really quite specific to the Middle East. The first is the nature of the business to be conducted, which in our experience will have a major effect on the form of the relationship parties decide upon. The second is where the business will be conducted, and in particular whether the foreign partner will be conducting business in the relevant Middle Eastern jurisdiction. If that is the case, then more often than not, the foreign partner will require some kind of legal presence in the relevant Middle Eastern jurisdiction. Third, another complicating factor can be whether the foreign party needs its own personnel to be on the ground in the relevant jurisdiction. Again, if this is the case, it will often be the case that a formal presence—a legal presence—will be required in the relevant Middle Eastern jurisdiction, mainly because in most jurisdictions a local entity is required to sponsor the relevant employees. The final one, really, is the foreign partner's attitude to risk, because there are obviously certain structures that are open to more risks than others, both in terms of legal and commercial issues. If we can have the next slide, please.

Another issue that will need to be reviewed carefully is the tax structuring. Tax is really outside the remit of this presentation, but it goes without saying that an analysis should be carried out in relation to the flows of income and capital out of the joint venture. For example, if the joint venture is going to be cash-rich and distribute income to shareholders, you'll need to understand what taxation will be applied to those income receipts. Additionally, on the actual exit from a joint venture, for example on the disposal of shares in the joint venture company, will there be any capital gains tax on that disposal? It may be decided that it would be beneficial, for these reasons, to have the shares in the joint venture company held by a holding company which is in a jurisdiction which has a favorable bilateral tax arrangement with the relevant Middle Eastern company or with the actual parent company of the foreign shareholder. Additionally, a beneficial structure may be for income to be derived from a management or services agreement entered into between the foreign shareholder and the joint venture company.

Another key issue that needs to be considered when structuring a joint venture in the Middle East is whether there is a bilateral investment treaty, or a BIT, in place between the relevant Middle

Eastern country and the country from which the investment is being made. BITs will be discussed by Chris in a little more detail later in this presentation, but they can provide very significant protection to foreign investors whose investments are negatively affected by the activities or inactivity of nation-states and state organs or entities. These can include central, regional and municipal governments, government departments and ministries, local councils, industry regulators, courts and governmental authorities, and institutions.

BITs will allow a foreign investor to claim compensation for the reduction in value of its investment in a local vehicle incorporated in the host state where a breach of the bilateral investment treaty's standard was the cause of the decrease in value. The treaties allow an investor to channel its investment through a country with a favorable BIT in place, as these can differ. Tax-efficient jurisdictions, such as the Netherlands and Luxembourg, have around 100 BITs each including with Middle Eastern countries. If the action of a foreign government is a potential risk, which it can often be when dealing with a Middle Eastern jurisdiction, then it is worth conducting an analysis of the BIT position on the structure of the investment as well as on the tax analysis. If I could have the next slide, please.

I next want to talk specifically about corporate joint ventures. One of the first key issues to contend with in a corporate joint venture is that a number of countries in the Middle East require that nationals of that country must hold a minimum percentage of shares in a company. Minimum percentage for the UAE and Qatar is better than 51%. In Saudi Arabia, the provisions are more liberal, and depending on the sector, 100% foreign ownership is permitted. In Bahrain, 100% foreign ownership is permitted for nearly all sectors. The restrictions on foreign ownership are obviously an issue if the intention is that a foreign shareholder will hold a controlling interest and the law does not permit this.

So what are the ways around this, if any? Whilst the laws of, for example, the UAE and Qatar have a minimum local ownership requirement, the law does permit the economic interest, and that is what a shareholder would receive on a distribution of profits or a liquidation, to be different from its nationality. So, for example, it would be lawful for a foreign shareholder owning 41% of shares to have the right to receive 75% of the profits of the company, for example.

Additionally, whilst most of the decisions of the shareholders can by law be passed by a simple majority of the votes cast by shareholders holding that simple majority of shares, it is possible to set this threshold at a higher level, effectively requiring the foreign shareholders' consent on every major decision. Resolutions for the winding up of a company or amending the company's constitution will generally always require unanimity. It will be seen that these are really more of a defensive as opposed to a positive right.

The major positive right that a foreign shareholder will usually obtain through negotiation is the right to appoint the executive management of the company, such as the CEO or the CFO [chief financial officer]. It is very important that the extent of the authority of these persons is accurately set out in the company's constitution to enable the company to be run on a day-to-day basis. The removal of the CEO or CFO can be expressed to only be possible with the consent of both shareholders, which would possibly entrench their positions.

You may have also heard of “side agreements” in relation to joint ventures in the Middle East. These are usually private agreements between the foreign shareholder and the local shareholder that seek to change the legal position, for example, by the local shareholder agreeing that the foreign shareholder can exercise his votes to give the foreign shareholder de facto control when that is not permitted by law. The basic position is that such agreements are not enforceable, and in some countries, such as Qatar and the UAE, not lawful. Accordingly, they must be treated with a great deal of caution.

Given that there may be a situation where there is majority control by a local shareholder, but the executive management of the company has been appointed by the foreign shareholder, it is highly advisable to put in place clear corporate governance in terms of what the board is responsible for and what the executive management is responsible for, and who they report to. The executive management can be put in an extremely awkward position where they have been appointed by one of the shareholders and the shareholders have subsequently fallen out or are in dispute. We would recommend that it is clearly documented that the executive management owe their duties to the company and not just the shareholder who appointed them. Otherwise, the executive management may be at risk of liability from an action brought against them by one of the shareholders.

Just moving onto the issues on termination and breach. Although these are key issues in all corporate joint ventures, they are particularly so in the Middle East, given the much more limited ability to enforce contractual rights, which Chris will go into more detail [on] later. A clear exit strategy when things go wrong should be planned for. For example, in addition to the usual types of remedy for termination on breach, for example, the exercise of a put option to enable the foreign shareholder to sell its entire stake in the joint venture company to a local shareholder at fair market value, if the foreign shareholder is providing expertise or loan power to the company, its termination could effectively render the business unworkable and may serve as a powerful incentive to bring the other party to the negotiating table.

One of the most recent phenomena we have seen in the Middle East is where one of the shareholders seems to have lost interest in a project which is the subject of a joint venture, sometimes due to a refocusing of resource and strategy caused by the difficult financial climate, and this has resulted in the joint venture company being in freefall with no ability to take any action, as this would require the consent of the other party. We would very much recommend that clear deadlock-resolution procedures and the consequences are set out in the shareholders’ agreement. This might include an escalation procedure requiring the chief executives of both companies to meet to resolve the issues, and if that such resolution isn’t possible, then potentially a liquidation of the joint venture. But it’s clear that there should be something in there that incentivizes the parties to come to the negotiating table. If we could have the next slide, please.

In my view, the single most important document on a joint venture in the Middle East is the memorandum of association, sometimes referred to as the articles of association. This is a dual-text document in Arabic and English which is effectively the constitution of the company. It is signed before a notary public and filed in the relevant commercial registry. This document will confer the share rights of the parties, thresholds at which decisions will be made, percentages of directors, and the agreement of the authority of the board and the executive management, as well

as dealing with termination. It is an immensely important document and in my view as much of the substance of arrangements between the parties should be contained in this document, as this is the document which is filed in the official record.

The shareholder agreement is obviously another key document. I won't go into too much detail on this, as it will be familiar to the majority of you. It can be subject to foreign law and our best practices recommend that it contains a binding arbitration clause, assuming that the relevant Middle Eastern country is party to the U.N. convention on the enforcement of foreign arbitral awards. Chris will discuss this in more detail later. The key issues that would be dealt with in the shareholder's agreement as opposed to in the articles are noncompetition, funding for the term of the joint venture, and termination or breach. You would also seek to replicate the key provisions from the memorandum of association in the shareholder's agreement, to ensure that there is no inconsistency. Can I have the next slide, please?

In this next section, I want to deal with agency, distribution and franchise. This scheme of joint venture usually relates to a situation where a foreign company wishes to sell its products in a market in the Middle East and requires a route to that market. This can be as straightforward as a sales agency or distribution agreement or complex. For example, in the retail field, where a party is engaging an agent or franchisee to set up a retail outlet with the same branding as that of the principal or franchisor so that the local outlet has the same look and feel as that of the principal anywhere in the world. A good example is say of Starbucks. The reason we have taken the agency, distribution and franchise concepts, which are distinct in the U.S. and Europe—the reason why we have taken them together in this presentation is that, purely from a legal standpoint, there is no difference in the majority of Middle Eastern countries. They generally fall within a single agency law.

In such arrangements, the foreign party has no onshore presence in the relevant Middle Eastern country, but is reliant on the performance of its agent. There are usually complex documents entered into governing the relationship between principal and agent, which we will look at a little bit later. One of the main issues that a foreign party will need to consider is its ability to terminate the agency, if, for example, the local agent is not performing or it breaches any of the provisions in the agency agreement, and if so, if any compensation is due to be payable to the local agent on this termination. This is a complex area and needs to be dealt with carefully on a jurisdiction-by-jurisdiction basis. In the UAE, for example, much depends on whether the agent is a registered agent or not.

A registered agent is one who is registered with the Ministry of Economy in the UAE with respect to certain products. In order for an agent to be registered, he must be a UAE national or, if a company, wholly owned by UAE nationals. Registration affords certain protection to the foreign party, in that it prevents parallel forms of the registered product being made, but it affords great protection to the agent. For example, the agency, even one that was for a fixed period, can only be terminated by mutual consent or by a court order, and we understand that there are hundreds of cases pending.

On termination, if the principal can produce evidence of any fault committed by the agent or any other legitimate reason, the agent will be entitled to compensation for termination or nonrenewal.

The level of compensation is at the court's assessment and will depend, amongst other things, on the extent to which the agent, through his efforts, promoted products or services, and the losses that the agent will face on termination or nonrenewal.

In some jurisdictions, any agent has to be a registered agent, and in others, where there is no such requirement, certain types of products, for example relating to fire and safety, cannot be sold through a registered agent. So it is often dependent on the type of product that is being sold.

Whilst the agency law cannot be contracted out of, there are ways in which risk can be mitigated, for example by ensuring that the agency is not registered with the ministry, perhaps by having nonexclusive relationships with more than one agent for the same product. What hasn't been tested in the local courts is whether, even in such cases, the agency law would treat the unregistered agency as falling within its ambit. Accordingly, it is difficult to come to a definitive view on this.

The key documents here will be the agency agreement, which will govern the relationship between parties and contain the usual provisions you would find in such an agreement. Another structure that we've seen used recently is a master agreement. A foreign company engages a single agent to effectively run all its local agents in the various Middle Eastern countries. In this way, the only contractual relationship the foreign company will have is with the master agent, with the result that, on the face of it, at least, the master agent will bear the responsibility and cost of the local agent, including any liability for compensation on termination. However, this again remains untested as to whether, even in those circumstances, a local agent would be able to seek compensation from the effective principal. If we could have next slide, please.

Where a joint venture doesn't fall into any of the categories set out above, we refer to it as a contractual joint venture. This could be some form of cooperation agreement or consultancy agreement. Great care needs to be taken with regard to such arrangements, and an analysis needs to be undertaken [as to] what business activity is being carried out in the relevant Middle Eastern country and who is undertaking that business activity. If the activity is being undertaken by the Middle Eastern entity, then it is good practice to receive some form of confirmation that the entity in question has the requisite trade license to carry out that particular activity.

In many Middle Eastern jurisdictions, the key aspect of incorporating a company is also obtaining the relevant license. If there is any business activity being carried out by the foreign company in the Middle East, then that company will be required to obtain the requisite licenses, which will [involve] incorporating itself [as] a business presence in the relevant country. Contravening the law can have serious consequences to a foreign business and, in extreme cases, lead to the foreign company not being permitted to carry out business in the relevant country again. One key issue to be wary of is anything that can be perceived as being license-renting. That is where a business activity is being carried out by a foreign company using the license of a local. This can have serious consequences for [not just] the local but also the foreign company. The laws of the UAE and Qatar specifically outlaw such activity.

I'm now going to hand it over to Chris, so if we could we have the next slide, please. Chris is going to talk about dispute resolution and enforcement.

CHRISTOPHER JOBSON: Thanks, Kuljit. As you clearly outlined, there are many issues to address before parties enter into joint ventures with Middle Eastern entities. Thank you.

Before I look at dispute resolution and enforcement, perhaps I could have another poll, please? Marni, the questions are, firstly: What would be your preferred option on the governing law of a joint venture? U.S. law or state law, law where the JV is domiciled, or a law of a jurisdiction not related to the parties, such as a neutral law, like English law?

MARNI CENTOR: OK, and we have that question up for our audience now. We would ask that everyone vote by clicking on an option on your screen to answer the question. What would be your preferred option on the governing law of a joint venture? U.S. law, law where the joint venture is domiciled, or law of a jurisdiction not related to [the] parties? Our audience is voting and we will give just a few more seconds for the rest of the votes to come in. We will close the poll in just a few seconds. Closing the poll now and showing the results. OK, we have 62% prefer U.S. law, 10% prefer the law where the joint venture is domiciled, and 29% prefer the law of a different jurisdiction.

CHRISTOPHER JOBSON: Thanks, Marni. The results don't surprise me, but it probably won't surprise the audience if I said my guess is that 62% of the parties in the Middle East would prefer the governing law to be, for example, Qatari law, UAE law, or Omani law, so you can see the tension between the two parties.

Perhaps one other quick poll at this stage, please, before I crack on. Would your preferred option for the venue of disputes to be heard be courts or arbitration? Again, if you could perhaps vote, please?

MARNI CENTOR: Yes, and we have that poll up for our audience now. If everyone could please vote. Your preferred option would be courts or arbitration. Again, waiting for our audience to vote, and we're going to close the poll now. The results of our poll: 14% prefer the courts and 86% prefer arbitration. Back to you, Chris.

CHRISTOPHER JOBSON: Again, interesting. I very much agree with the audience. I think arbitration is the route. In the next five minutes, perhaps I can explain why. I am conscious of time before the end of the webinar, so I will try to rattle through dispute resolution and a number of cultural issues, and then perhaps leave a little bit of time at the end to take questions.

So, dispute resolution and enforcement. Inevitably in joint ventures, parties sometimes fall out. It's therefore important that the dispute-resolution procedures agreed in the relevant documentation provide for impartial and speedy resolution of disputes. From the foreign investors' point of view in particular, it's important that any court judgment or arbitral award is readily enforceable in the country where the joint venture's partners' assets are situated, which in most cases would be the Middle Eastern country where the joint venture is being set up.

Two issues arise: first, choice of law. The civil codes of the various countries generally leave the parties free to choose the law of their choice to govern their relationships. Another issue to consider is whether any dispute should be resolved in the local courts but through arbitration,

hence the poll, which is the favored method of alternative dispute resolution in the Middle East. We generally advise our clients against allowing disputes to be resolved in the local courts. Proceedings in the local courts are generally—a generalization—slow and cumbersome, are conducted in Arabic using procedures which are often alien, certainly to the common-law countries and foreign investors. For example, in most Middle Eastern countries, disputes are resolved on the papers without oral examination, without giving the parties opportunity to cross-examine each other's witnesses. Also where the dispute involves technical issues, for example, accounting fees, surveying, the court is very likely to appoint an expert, and the court-appointed experts generally have a significant role in deciding the outcome of the case, but the quality of the court-appointed experts is mixed and there are limited opportunities to question their findings. So, for these reasons we recommend to clients that any disputes are referred to arbitration. However, care should be taken when deciding the seat of the arbitration and the institution and rules to which it should be subject.

The seat of the arbitration is important because it determines the extent to which the local courts can assist or intervene in the arbitral proceedings and the enforceability of any arbitral award. The local joint venture partners often suggest that the seat of the arbitration be local, that is, in the country where the joint venture is being set up, and should be conducted in accordance with the rules of local arbitration centers. The well-established centers in the Middle East are Dubai International Arbitration Center, Abu Dhabi Commercial Conciliation Arbitration Center, and the GCC Arbitration Center in Bahrain.

We generally recommend that foreign investors should resist a proposal that the seat of the arbitration be in the local Middle Eastern country or that the arbitration should be subject to the rules of these arbitration centers. This is because, for the most part, the arbitration laws in the Middle East are relatively limited. The same can be said of the rules of the arbitration centers. There is also a feeling that the arbitration centers are overloaded. There is a substantial backlog of cases, which precludes speedy resolution of disputes.

The preferred option is to agree that the seat of arbitration should be conducted in a foreign jurisdiction which is a signatory to, say, the New York Convention and be subject to the rules of recognized international arbitration centers such as the LCIA [London Court of International Arbitration] or ICC [International Chamber of Commerce].

Just a couple more points on enforcement. The New York Convention, as you'll probably know, requires courts of contracting states to give effect to agreements to arbitrate and to recognize and enforce arbitral awards made in other contracting states. As of 2009, there were about 104 states which have adopted the New York Convention, including a number of the major economies in the Middle East such as Saudi [Arabia], the UAE, Qatar, Bahrain, Kuwait, and Oman. As such, arbitral awards made in these countries, which are signatories to the New York Convention, should, but not necessarily will, be readily enforceable in the Middle East.

I think, Marni, I'm just conscious of time, so I think I'd like to leave dispute resolution without further explanation of BITs, because of their complexity—and I could probably spend an hour talking about BITs at this point—and just briefly in the time that we've got left, look at some

cultural issues, which should not be underestimated in this part of the world. But before I look at the cultural issues, perhaps I could just ask a couple of poll questions again, please?

MARNI CENTOR: Sure, here we go. The first poll question dealing with cultural issues is: What is the usual work week in the Middle East? Please select what you think is the correct answer. We will just give a few more seconds for our audience to vote. Again, our choices are Monday to Friday, Sunday to Thursday, Saturday to Wednesday, or “depends on which country in the Middle East you’re in.” We’re going to close the poll. Our results show that 57% of the audience believes that it’s Sunday to Thursday, 5% believe that it’s Saturday to Wednesday, and 38% believe it depends on the country.

CHRISTOPHER JOBSON: Well, those of you in the 38% are absolutely right. It depends upon which country you’re in in the Middle East. There has been debate in the Middle East in the last few years as to whether they should move to a more western working week, but I’ll go through the working week in a couple of minutes in the cultural issues. But before I do, one final poll, and that is: When does Ramadan fall?

MARNI CENTOR: Yes, and here’s the poll for our audience. Your choices are August and September, Christmas, or it varies from year to year depending on the lunar month. Please select what you think is the correct answer. We’ll give our audience just a few more seconds to vote. Most everyone has already voted. I’m going to close the poll now. Our audience is split: 33% believe it’s over August to September and 67% believe that it varies from year to year.

CHRISTOPHER JOBSON: Again, 67% are quite right; it varies from year to year depending upon the lunar month.

Just turning quickly to cultural issues before we close. The working week in the Middle East is different to the U.S. and to Europe. The usual working week is Sunday to Thursday, although in Saudi [Arabia], it is Saturday to Wednesday. That’s normally, if I am honest, Wednesday lunchtime, their time. Accordingly when doing a deal between the U.S. and Saudi [Arabia], the reality is: You only have three common days of the week in which to work. Otherwise, somebody is working on a weekend, and of course we have to remember Friday in this part of the world is their holy day.

When doing deals in the Middle East, it’s also worthwhile having a detailed project timetable which marks religious holidays. It’s not always possible to fix these, as they are dependent on moon sightings, but the general time can be targeted.

The holy month of Ramadan is of course when observing Muslims fast from dawn to dusk—a particular time to be aware of—and in fact we’re in the midst of Ramadan at the moment. Government and private offices close early. In fact, there are penalties for not doing so. The working day is cut short by several hours, if not many hours, in reality. Accordingly, if you’re trying to do something that involves the ministries, such as registering a company, there is significantly less time to do this during Ramadan.

Finally, it cannot be overstated that the scope for misunderstanding when trying to deal with often complex issues in the Middle East is high. Accordingly, we would stress trying to keep things as simple as possible, only deviating from this principle where absolutely necessary. Documents should be kept as short as possible and prepared in an easy-to-read form, using as little legalese as possible. Please, please, be patient. Often a counterparty will not be communicating in their first language, and it may take them longer to grasp the issues and points that are being made. This should not be taken as obstruction or lack of engagement. It does take longer for deals to get done out here, but many have found that they are worth it and that the Middle East continues to be a very popular investment destination.

Thank you, Marni. I think that my presentation and Kuljit's presentation are formally over, and we can hand it back to you and John to go from here.

JOHN ANGELO: Thank you very much, Chris and Kuljit. [It was] an excellent presentation. Before we turn to a couple of questions, Marni has our second CLE verification code.

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MARNI CENTOR: And now, John, questions from the audience?

JOHN ANGELO: We've had a couple that folks have asked for both Kuljit and Chris. One question came up regarding the conversation about knowing who you're dealing with in Middle Eastern countries. The question was: When someone is establishing a joint venture in the Middle East, is there a registry or is there some way to search for available names for your joint venture?

KULJIT GHATA-AURA: Chris, I'll take this one, if that's all right.

CHRISTOPHER JOBSON: Of course, Kuljit. Fine.

KULJIT GHATA-AURA: Unfortunately, there are no such registries within the Middle East [countries] themselves, but what you will find is that if you—for example, we as a law firm, when we're conducting conflicts checks and when we are trying to just ensure that we're not acting for somebody who is politically compromised, we, for example, do have access to a database where we can put names in and come up with that kind of basic check that helps on reputational issues. Other than that, unfortunately there isn't anything that we could point to and say, "Well, that's something that one could search and that's definitive." Unfortunately, you do have to engage somebody, I think, if you are concerned, or even if you're not, just to ensure that you have done the right thing, who will be able to use their resources to verify people's identities and net worth, if required.

CHRISTOPHER JOBSON: I agree with that, Kuljit, wholeheartedly.

JOHN ANGELO: Very good. One final question was, for each of you, why would you consider the key reason or reasons for JVs failing or doing poorly in the Middle East?

KULJIT GHATA-AURA: I'll go first on that one. Unfortunately, this is a pretty pertinent question, because it's something that we have been looking at over the past year or so, where joint ventures have failed. I actually think that there are two reasons.

The first is that people went into arrangements without really properly agreeing [on] a business model. I know that that sounds very, very odd and strange but it's actually the truth. I think there was an element of there being a gold rush, and people got involved without really sitting down and doing the very hard work of getting very detailed on business models, on exit planning—on, effectively, downside protection.

I think the second aspect of that, which is kind of related, is that I don't believe that structures were put in place where you were dealing on a frequent basis with the people that you actually did the deal with, so what would happen is that you would have negotiated a form of joint venture agreement with certain people, and then when the actual joint venture started, you would never see those people again. Of course, that makes it very difficult, because you have got no relationship to back into when things start to go wrong. I think more control over things like board meetings, ensuring that the named individuals actually turn up at those board meetings, and they're not effectively on day one subbing in different people that you've never really had anything to do with.

JOHN ANGELO: Very good.

CHRISTOPHER JOBSON: I agree with that as well. Actually, I wrote down two answers. One [is] mismatch of expectations, and I think Kuljit's correctly identified the business model and whether it's really linked in with each other. Secondly, I put cultural, and again I think that links in with Kuljit's point about perhaps the very senior management of U.S. or Western companies do a deal with perhaps a local—it could be Emirati, Omani, Kuwaiti—and the deal is done at a broad level, and then they drop out of the picture, leaving their (for want of a better expression) gofers to actually do the work. It's very difficult then to pick up with the senior people if there's a wrinkle. Again, I wholeheartedly agree with the other points that Kuljit has made.

JOHN ANGELO: Very good. Considering the time, I appreciate the time and effort that both of you have put into putting on today's presentation. I'll go ahead and conclude today's webcast. Again, I would like to thank both of our panelists for their time and excellent presentation, and I also would like to thank Eversheds for sponsoring our webcast today and the ACC International Legal Affairs Committee over this past year.

Once again, let me remind our participants that this and other ACC webcasts are recorded and are available for about a year from the presentation date. The information on accessing these webcasts is available in your materials. Also, if you asked a question that did not get answered during today's presentation, answers will be posted at a later date by ACC on the Web site. I would also like to thank again our participants for participating today and request that they do not forget to complete the survey.

Finally, I would encourage all of you to consider attending the ACC annual meeting in Boston, which will be held October 18 through October 21. If you'd like to learn more about the annual

meeting or about ACC membership, please visit the ACC Web site at www.acc.com. With that, I'll turn it back to Marni for any final comments she might have.

MARNI CENTOR: Thanks, John. On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you again for listening to today's program.

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Thank you again and have a good day.