

THE INTERNATIONAL  
CAPITAL MARKETS  
REVIEW

SEVENTH EDITION

Editor  
Jeffrey Golden

THE LAWREVIEWS

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CAPITAL MARKETS  
REVIEW

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# PREFACE

This book serves two purposes, one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a comparative law reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based, no longer enjoys the luxury, if ever it did, of focusing solely at home within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, the client certainly may have multijurisdictional ambitions or, even if unintended, its activities often may risk multijurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

But actually the second purpose that this book aims to serve is, ironically, to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local, but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory framework, thereby giving lawyers, in-house compliance officers, regulators, law students and law teachers also an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could or should best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in our domestic as well as international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

A week before writing this Preface, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, in the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the

more theoretical aspects of our discussion and ground them in the specific example of the capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.

In such cases, with so much at stake given the volumes of financial market trading on standard terms and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual exchanges of information between lawyers from different jurisdictions directly. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the Appendices to this book may help identify local counterparts in potentially relevant jurisdictions (one new jurisdiction, Thailand, having been added this year). And, in that case, hopefully a pre-read of this book's content may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration of our contributing experts, as I wrote in the preface to the last edition, continues. It remains too a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amidst the growing interdependence of our professional world.

**Jeffrey Golden**

P.R.I.M.E. Finance Foundation

The Hague

October 2017

# UNITED ARAB EMIRATES

*Gregory J Mayew and Silvia A Pretorius<sup>1</sup>*

## I INTRODUCTION

The United Arab Emirates (UAE) was established in 1971, and comprises the seven emirates of Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. Abu Dhabi is the capital of the UAE, and the site of a number of federal ministries, the Central Bank of the United Arab Emirates (Central Bank) and other government institutions and agencies.

Under the UAE Constitution, each of the seven emirates retains substantial control over the conduct of governmental affairs within the emirate. With some exceptions, regulation of capital markets is generally a matter of UAE federal law.<sup>2</sup>

The legal system in the UAE (which includes UAE federal laws and individual emirate laws, such as those of the emirate of Dubai) is a developing system. UAE law does not recognise the doctrine of binding judicial precedent. In the absence of a doctrine of binding precedent, the results of one court case do not necessarily offer a reliable basis to predict the outcome of a subsequent case involving similar facts. Consequently, the UAE legal system may generally be regarded as offering less predictability than more developed legal systems.

In contrast, the DIFC has been established as a financial free zone with its own body of laws and regulations, which are largely separate from the UAE legal system. The DIFC also has its own courts. The DIFC laws and rules of court are largely based on English common law and the procedural rules currently in place in England and Wales.

In February 2013, the creation of a new financial free zone in the emirate of Abu Dhabi was announced (Federal Decree No. 15 of 2013), and the Abu Dhabi Global Market (ADGM) was then established pursuant to Abu Dhabi Law No. 4 of 2013. The commercial rules and regulations have been enacted by the ADGM Board of Directors as from March 2015, followed by the publication of the Financial Services Regulatory Authority Rules, which establish the legislative and regulatory framework for financial services in the ADGM. The ADGM began issuing licences to non-financial services entities in May 2015, and to accept and approve financial services licence applications in October 2015.

The UAE Constitution provides for a federal court system, but permits each constituent emirate to opt out of this and maintain an independent court system. The emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain have joined the federal court system. The emirates of Dubai and Ras Al Khaimah each maintain separate court systems. Since 2006, the emirate of Abu Dhabi has also maintained its own court system.

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1 Gregory J Mayew is a partner and Silvia A Pretorius is a senior associate at Afridi & Angell Legal Consultants.

2 The most notable exception is the Dubai International Financial Centre (DIFC), which is discussed below.

The UAE capital markets are young and still developing. There are currently three securities exchanges in the UAE, all of which are less than 15 years old: the Abu Dhabi Securities Exchange (ADX), the Dubai Financial Market (DFM) and NASDAQ Dubai. In addition, the UAE is home to the Dubai Multi Commodities Centre and the Dubai Mercantile Exchange Limited. In 2014, the creation of a 'second market' where shares in private joint-stock companies would be eligible for trading was launched.

Regulation of securities and financial markets in the UAE is a potential source of confusion to investors and financial institutions. Generally speaking, there are two different regulatory schemes. The first is the UAE federal regulatory scheme. The second is the regulatory scheme applicable in the DIFC (and to a lesser extent, the ADGM). With regard to the laws and regulations affecting capital markets, the DIFC and the ADGM are effectively different jurisdictions altogether, with rules and regulations that differ significantly from the UAE federal regulatory scheme.<sup>3</sup> A detailed discussion of the DIFC and the ADGM schemes are beyond the scope of this chapter, which deals primarily with the UAE federal scheme.

Historically, regulation of securities trading and transactions involving investment products was the domain of the Central Bank. The Central Bank is entrusted with the issuance and management of the country's currency, and the regulation of the banking and financial sectors. A governmental agency, its capital is fully owned by the federal government and it has its headquarters in Abu Dhabi. The Central Bank acts as the UAE's central bank and regulatory authority, directing monetary, credit and banking policy for the entire country (other than inside the DIFC). The individual emirates do not have separate corresponding institutions. The Central Bank is also empowered to set the exchange rate of the dirham against major foreign currencies.

In 2000, the Emirates Securities and Commodities Authority (SCA) was created. Until 2009, the SCA generally limited its regulatory oversight to publicly listed UAE companies and the public securities exchanges in the UAE. In recent years, the regulatory responsibility of the SCA has expanded considerably, and the SCA is now the primary regulator of capital markets under the UAE federal scheme. The shift in regulatory responsibility over foreign securities from the Central Bank to the SCA has occurred gradually over time pursuant to an unpublished memorandum of understanding between the Central Bank and the SCA. The public is informed of regulatory developments as and when the SCA publishes new regulations. In addition, the SCA has adopted regulatory procedures and practices, some of which are not published.

Financial markets in the UAE are young and still developing. In June 2013, Morgan Stanley Capital International (MSCI), which maintains the most widely used equity index in the world, upgraded the status of the UAE capital markets from frontier to emerging market status. While the promotion of the UAE capital markets was first announced in 2013, it became effective in May 2014 with the changes to the indexes. At such time, MSCI added nine UAE companies to its benchmark emerging markets index for the first time.

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<sup>3</sup> The DIFC is often a source of confusion to international investors who are not familiar with the UAE. The DIFC is a financial free zone established in the emirate of Dubai. It should not be confused with the emirate of Dubai itself. As noted above, the DIFC has its own laws and regulations, which differ considerably from the laws and regulations applicable to capital markets and securities transaction outside the DIFC. The DIFC regulatory scheme applies only within the DIFC. The UAE federal regulatory scheme applies everywhere in the UAE (i.e., in all seven emirates), except the DIFC. The DIFC has its own regulator, the Dubai Financial Services Authority (DFSA).

With 10 companies, the index covers approximately 85 per cent of the UAE equity market. Subsequent to the decision to upgrade the UAE markets, and in an attempt to meet listing conditions under MSCI indexes over the coming period (which requires, in addition to other conditions, that listing conditions include permitting foreign ownership at acceptable rates), a number of companies listed on the ADX and the DFM decided to raise the percentage of foreign ownership.

## **II THE YEAR IN REVIEW**

### **i Developments affecting debt and equity offerings**

One recent prominent development is the issuance by SCA Board of Directors' Chairman Decision No. 9/RM of 2016 Concerning the Regulations as to Mutual Funds (New Fund Regulations), which replaces SCA Board Resolution No. 37 of 2012 Concerning the Rules of Investment Funds, as amended (Old Fund Regulations) and which became effective on 31 July 2016.

The New Fund Regulations continue to ensure that:

- a* overseeing the licensing, regulation and marketing of investment funds in the UAE remains with the SCA, which also carries out oversight and prudential supervision tasks pertinent to the financial position of mutual funds established and licensed in accordance with the provisions of these New Fund Regulations;
- b* SCA approval is required for the establishment of a local investment fund, which is any investment fund established in the UAE, excluding the free zones, and licensed by the SCA;
- c* SCA approval is required for the marketing and promotion of foreign funds to investors in the UAE. The New Fund Regulations define a foreign fund as 'a mutual fund established outside the UAE, in a free zone, or in a financial free zone within the UAE'; and
- d* the marketing of a foreign fund to investors in the UAE requires the appointment of a UAE-licensed local promoter.

The New Fund Regulations do not apply to the accumulation of funds for purposes of investment in a joint bank account; concluding group insurance contracts; participation in social security, employee incentive programmes or investment plans associated with insurance contracts unless such investments or collected money are directed from such plans to mutual funds, nor to funds established by federal or local governmental agencies, the companies fully owned by any of them or the foreign funds promoted to one of such entities. The New Fund Regulations now specifically also do not apply in the case of reverse solicitation.

While the New Fund Regulations provide that no foreign fund may be offered, marketed, advertised or distributed within the UAE prior to obtaining approval of the promotion from the SCA and appointing a local promoter, they do not specify who is eligible to be a local promoter, what the obligations of the local promoter are or the minimum subscription per single investor. The New Fund Regulations provide that the term of the SCA approval shall be one year and may be renewed with an application submitted to the SCA at least one month before expiry thereof. The SCA shall have the right to reject the application for renewal as required by the public interest.

The New Fund Regulations apply to both private and public placements. A distinction is, however, made between public funds (either open-ended or close-ended funds established in the UAE and which target all investors) and private funds (either open-ended or close-ended funds established in the UAE and which target qualified investors).

An application for the licensing of a public open-ended mutual fund must be submitted by its founders or a corporate entity licensed by the SCA to practise the activity of establishing and managing such funds in the UAE. The New Fund Regulations provide that a prospectus with supporting documents, as well as a key investor information document, must be submitted. It is prohibited to announce the start of initial procedures to obtain a licence for such fund, announce its licensing, subscribe in its units, promote it, distribute any promotional materials or announce any information in relation to such fund prior to obtaining the approval of the SCA on such licensing and announcement. The term of the licence for the fund shall be one year, and it may be renewed.

Similarly to public open-ended funds, the scope of investment in public close-ended funds include tradable securities (stocks, bonds and cash instruments) and high-liquid non-tradable securities, financial derivatives on tradable securities to control the level of risks set forth in the prospectus or for hedging in an amount not greater than the total net asset value subject to disclosure thereof, declared indexes and bank deposits to ensure liquidity with a maximum maturity of 12 months with licensed banks, subject to determining the investment ratio.

Public close-ended mutual funds have various investment restrictions:

- a* The ratio of investment in securities issued by one entity may not exceed 10 per cent of the net value of the fund's assets or 10 per cent of the issued capital (whichever is less).
- b* The ratio of investment in unlisted securities may not exceed 10 per cent of the fund's net asset value.
- c* The ratio of investment may not exceed 20 per cent of the fund's net asset value in securities listed in a foreign market, provided that such market is subject to a regulator similar to the SCA.
- d* Investment in financial derivatives is subject to a limit of no more than 1 per cent of the fund's net asset value.
- e* Refraining from investing in another mutual fund unless it is consistent with the investment policy of the fund and in a manner that serves the interests of unit holders.
- f* Engaging in foreign exchange operations only when they are incidental and with the objective of managing its investments.

The New Fund Regulations make provision for various types of mutual funds including a master fund (a public mutual fund or a part of a group of funds affiliated to an umbrella fund, provided the master fund meets certain criteria), a feeder fund (a public mutual fund or a part of a group of funds affiliated to an umbrella fund excluded from investing in tradable securities and from some other investments as determined by the SCA, and that invests at least 85 per cent of its assets in the units of a public master fund or a public foreign fund) and an umbrella fund.

In January 2017, the SCA issued Chairman of the SCA Board of Directors' Decision No. 3/RM of 2017 Concerning the Regulation of Promotion and Introduction (the Promotion Regulations). These Promotion Regulations appear to supplement but not necessarily replace those sections of the New Fund Regulations that relate to promoting foreign funds, as the Promotion Regulations do not stipulate that they replace the New Fund Regulations either

fully or in part. While the Promotion Regulations reconfirm that any marketing of interests in foreign funds to investors in the UAE requires that such interests be registered with the SCA, they also reiterate that reverse solicitations set out in the New Fund Regulations still apply. The Promotion Regulations also specify a further exemption whereby a foreign fund need not be marketed by way of a private offering in the UAE by an SCA-licensed promoter if offered to a qualified investor. A qualified investor is:

- a* an investor that is capable of managing its investments by itself and on its own accord such as:
  - the federal government and local governments, governmental institutions and authorities, or the companies fully owned by any of the aforementioned;
  - international bodies and organisations;
  - a person licensed to engage in a commercial business in the UAE, provided that one of the purposes of its business is investment; or
  - a natural person with an annual income of no less than 1 million UAE dirhams, or with his or her net equity, with the exception of his or her main residence, valued at 5 million UAE dirhams and declaring that he or she has the adequate knowledge and experience – whether solely or through a financial consultant – to assess the offering documents, the advantages and the risks associated with or arising from the investment; and
- b* represented by an investment manager licensed by the SCA.

In addition to foreign funds, the SCA has assumed oversight responsibilities in relation to the marketing of most types of foreign securities in the UAE. Specifically, the SCA has regulatory oversight with regard to matters pertaining to plain vanilla (non-listed foreign) security products, while the Central Bank still retains oversight authority with regard to sophisticated products such as credit linked notes. Various new SCA regulations relating to funds were enacted in 2016 and 2017. These are:

- a* Board of Directors' Chairman Decision No. 10/RM of 2016 concerning the fees of mutual funds, outlining the fees payable to the SCA in respect of application fees and licence renewals for public and private mutual funds;
- b* Administrative Decision No. 49 of 2016 regarding exchange-traded funds (ETFs), regulating the incorporation and prospectus requirements for ETFs;
- c* Administrative Decision No. 52 of 2016 regarding cash investment funds (CIFs), regulating the investments permissible for CIFs;
- d* Administrative Decision No. 1 of 2017 regulating real estate investment trusts;
- e* Administrative Resolution No. 2/RT of 2017 regarding private ownership funds, which has introduced rules relating to the obligations of both the general and limited partner and places restrictions on the investments a private ownership fund can make. This means that a fund must invest the majority of its monies in purchasing:
  - shares in limited liability, joint partnership, joint venture or private shareholding companies; or
  - securities of public shareholding companies that are intending to commence conversion into private shareholding companies or before the commencement of the liquidation process;
- f* Administrative Decision No. 3/RT of 2017 regulating venture capital funds;

- g* Chairman of the Authority's Board of Directors' Decision No. 4/R.M of 2017 Concerning the Regulation of the Activity of Administrative Services for Investment Funds;
- b* Administrative Decision No. 57/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Mutual Funds; and
- i* Administrative Decision No. 58/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Promotion and Introduction Activities.

In addition to regulations relating to investment funds, the SCA has been active on a number of other fronts. Recently, the SCA issued a series of regulations governing market making, securities lending and borrowing, short selling and liquidity,<sup>4</sup> as well as central clearing, cross-border securities trading, and efficiency and appropriateness controls for licensed companies and accredited persons in the securities industry.<sup>5</sup>

Market making is defined in these regulations as the activity of providing continuous prices for the purchase and sale of certain securities to increase the liquidity of such securities in accordance with market maker regulations. The practice of market making requires a licence from the SCA. An applicant for such a licence must be a corporate person with paid capital of at least 30 million UAE dirhams (or its equivalent) meeting any of the following criteria:

- a* a company established in UAE with at least 51 per cent UAE ownership or the nationality of one of the Gulf Cooperation Council (GCC) states. One of its purposes must be to practise market making;
- b* a company established in the UAE and licensed by the SCA to operate in the field of securities, in which case the applicant shall be subject to the controls issued by the SCA concerning the prevention of conflicts between activities; or
- c* a commercial bank or investment company licensed by the UAE Central Bank, or a branch of a foreign bank, provided that the parent bank is licensed to practise this activity, and subject to obtaining the approval of the UAE Central Bank in any of these cases.

Any investor is permitted to lend securities owned by that investor, but the borrowing of securities, unless otherwise approved by the SCA, is permissible only when carried out by a licensed market maker practising market making or by the clearing department of an exchange in the case of a failure to deliver sold securities on the settlement date.

Licensed market makers are permitted to engage in short selling. Each exchange has the power to determine the securities eligible for short sales provided that short selling is not

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4 See SCA Board Resolution No. 46 of 2012, Concerning the Regulations as to Market Maker, as amended by SCA Chairman Resolution No. 26 of 2014, SCA Board Resolution No. 47 of 2012 Concerning the Regulations as to Lending and Borrowing Securities, SCA Board Resolution No. 48 of 2012 Concerning the Regulations as to the Short Selling of Securities and SCA Board Resolution No. 49 of 2012 Concerning Regulations as to Liquidity Provision.

5 See SCA Board Decision No. 11 of 2015, Concerning the Regulations of Clearing Operations in Commodities Markets, SCA Board Decision No. 22/RM of 2016 Concerning the Regulation of the Central Clearing Party Business, Administrative Decision No. 34/RT of 2016 Concerning the Regulatory Controls for Financial Activities and Services, Administrative Decision No. 49/RT of 2016 Concerning the Controls of Funds and Administrative Decision No. 52/RT of 2016 Concerning the Controls of Cash Investment Fund.

permitted until one month after a company's initial listing. In addition, short selling is not permitted for a subscription in capital increase shares or in covered warrants. More generally, each exchange has the power to create its own rules governing short selling procedures provided that these rules are subject to SCA approval.

Duly licensed market makers are also permitted to act as liquidity providers by entering into agreements with issuers of listed securities provided that the liquidity provider cannot at any time own more than 5 per cent of the listed securities. All liquidity provision agreements must be disclosed to the SCA, and the exchange on which the securities are listed and the exchange in turn shall disclose the agreement to the public.

The regulations address separating clearing and settlement functions, transferring securities ownership and depositories, and further permit the incorporation of companies, independent from securities exchanges, to handle clearing transactions under a licence from the SCA.

The regulations for central clearing houses provide that clearing transactions are no longer executed on securities exchanges. The regulations also regulate clearing transactions and redistribute the tasks carried out on the exchanges.

In June 2013, the SCA issued Board Resolution No. 38 of 2013 Concerning the Trading of Rights Issue for Capital Increases. A rights issue can be listed and traded subject to the provisions of this Resolution. A rights issue is defined therein as a financial instrument representing rights that are granted to a company's shareholders to have priority to subscribe for shares in such a company's capital increase.

In January 2014, the SCA issued Board of Director's Decision No. 1 of 2014 Concerning the Regulations on Investment Management, which became effective on 28 February 2014. This Decision defines investment management as the management of securities portfolios for the account of third parties or the management of mutual funds.

With limited exceptions (the promotion of financial portfolios owned by federal and local government entities), any entity wishing to carry on or promote investment management activities in the UAE must obtain a licence from the SCA. Applicants must meet strict eligibility criteria, and must have a paid-up capital of no less than 5 million UAE dirhams and a bank guarantee of 1 million UAE dirhams. There are also conditions to be met relating to technical and administrative staff, the entity's premises, required electronic and software programs, internal control systems and an operational guide for risk management systems.

In April 2014, the SCA issued two new regulations: Board of Directors' Decision No. 16 of 2014 Concerning the Regulation of Sukuk (the Sukuk Regulations) and Board of Directors' Decision No. 17 of 2014 Concerning the Regulations of Debt Securities (the Debt Securities Regulations).

*Sukuk* are defined as tradable financial instruments of equal value that represent a share of ownership of an asset or a group of assets, and that are issued in accordance with shariah law.

Retail *sukuk* may only be issued in the UAE through public subscription, and approval must be obtained from the SCA before issuing or listing any *sukuk* on the market in accordance with the provisions of these Sukuk Regulations. Excluded from the provisions of the Sukuk Regulations are government *sukuk*, and *sukuk* that will not be offered through public subscription and that will not be listed on the market. A condition for the principal listing of retail *sukuk* is that the applicant must be established in the UAE and outside a financial free zone.

Other issues covered under the Sukuk Regulations include the procedures and documents required for approval by the SCA of primary and joint listings of *sukuk*, the establishment of an SCA *sukuk* register, as well as trading, clearance and settlement of *sukuk*, and suspension and cancellation of listing.

The Debt Securities Regulations replace SCA Board Resolution No. 94/R of 2005 Concerning the Listing of Debt Securities. Debt securities are defined as tradable financial instruments of equal value evidencing or creating indebtedness on the issuer, whether secured or unsecured. The Debt Securities Regulations state that with the exception of government corporate bonds, no corporate bond shall be issued and offered for public subscription in the UAE without first obtaining the SCA's approval. The corporate bonds must also be listed on the market. To be listed, debt securities must satisfy the following conditions:

- a* they must comply with the provisions of the Commercial Companies Law and with the issuer's constitutional documents;
- b* unless the SCA decides otherwise, the aggregate value of all debt securities to be listed must be at least 10 million UAE dirhams, or the equivalent thereof in a foreign currency that is acceptable to the SCA and the market; and
- c* where the debt securities sought to be listed are secured debt securities, a trustee must be appointed to represent the interests of the holders of such debt securities, and that trustee must have the right of access to any information relating to the assets.

The Debt Securities Regulations provide that the general assembly must approve the issuance of corporate bonds if the issuer is a joint-stock company, and that subscription announcement must be prepared and presented according to the format approved by the SCA.

The Debt Securities Regulations also require non-government issuers to obtain SCA approval before publishing any document or making any announcement inside the UAE relating to the listing of corporate bonds. The documents or announcement must clearly indicate that SCA approval was granted for publication. This requirement is also applicable to *sukuk*.

Both the Sukuk Regulations and the Debt Securities Regulations provide that neither the SCA nor the markets shall have any responsibility for any information (lists, financial statement, financial data, information, reports or any other documents) presented by the applicant or issuer.

The SCA issued Board of Directors' Decision No. 27 of 2014 on the Regulation of Securities Brokerage in July 2014. The regulation classifies brokerage firms into those that engage in trading only while the clearance and settlement operations are conducted through clearance members, and those that engage in trading clearance and settlement operations for their clients.

Some of the features of the new Regulation include the new classification of brokerage firms, new capital requirements (3 million UAE dirhams with respect to the brokerage company (trading member) and 10 million UAE dirhams for the brokerage company (trading and clearing member)), and increases in the value of bank guarantee requirements. Under the new Regulation, no company shall engage in a brokerage activity without a licence from the SCA and registration in the SCA Register for brokers.

In July 2014, the SCA also introduced controls for brokerage firms trading for their clients in foreign markets whereby a brokerage firm may trade for its clients in the foreign markets in the normal way of trading, or using accounts only after obtaining the approval of the SCA.<sup>6</sup>

The SCA issued Board of Directors' Decision No. 10 of 2014 Concerning the Regulation of Listing and Trading of Shares of Private Joint Stock Companies, which provides the conditions under which private joint-stock companies would be able to list their shares on the market, including the requirement that the capital be paid in full, that the audited budget be issued for the last two fiscal years and that the company facilitate the trading of its shares through brokerage companies licensed by the SCA. Private joint-stock companies that are listed on the market shall be exempt from the Corporate Governance Regulations, Ministerial Resolution No. 370 of 2009 concerning the Share Register of Private Joint-Stock Companies and the SCA Board of Directors' Decision No. 3/R of 2000 concerning the Regulations as to Disclosure and Transparency.

The much-anticipated new UAE Commercial Companies Law (Federal Law No. 2 of 2015) was issued on 1 April 2015 and came into force on 1 July 2015. The provisions relating to corporate governance have been significantly enhanced. Some of the most significant amendments relate to public companies and capital markets. The minimum free float permitted in an initial public offering (IPO) has been reduced from 55 to 30 per cent, with the maximum proportion that can be floated decreased from 80 to 70 per cent. The share price can now be determined by way of a book building process, and shares can be issued at a premium. Pursuant to the Commercial Companies Law, the concerned authorities have introduced subordinated legislation in a number of areas, including the Corporate Governance Regulations as noted below, as well as regulations on IPOs and regulations on book-building.<sup>7</sup> The concerned authorities have also been authorised to introduce legislation regarding the rules on the formation and qualification of shariah boards, the creation of different classes of shares and their rights. For public joint-stock companies, the minimum share capital requirement of 10 million UAE dirhams has been increased to 30 million UAE dirhams. The concept of authorised (but not issued) share capital has been introduced. Public offers of subscription to shares are expressly prohibited without SCA consent.

The Commercial Companies Law prohibits any company, other than a public joint-stock company, from offering any securities in an IPO. In all cases, no company, or natural or corporate person, incorporated or registered anywhere in the world may publish any advertisements in the UAE that include a call for an IPO in securities prior to obtaining the approval of the SCA. This prohibition has also been introduced by the SCA.<sup>8</sup>

A company may now issue shares to a 'strategic partner' (i.e., an investor from a related industry sector to the company's own) through a capital increase on terms approved by a special resolution of the shareholders without needing to comply with pre-emption rights.

The Commercial Companies Law has introduced the concept of investment funds incorporated as a separate legal personality in the form of common investment companies,

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6 See SCA Administrative Decision No. 86/RT of 2014 Concerning the Controls of Trading by Brokerage Firms for their Clients in Foreign Markets.

7 See SCA Board Resolution No. 11/RM of 2016 On the Regulations for Issuing and Offering Shares of Public Joint Stock Companies.

8 See SCA Board of Directors' Decision No. 18 of 2015 Amending Certain Articles of the Regulations as to Disclosure and Transparency.

and the concept that a public shareholding company may buy back a portion of its own shares to resell them. The SCA Board of Directors' Decision No. 40 of 2015 set out the conditions and procedures for companies to do so, which include the following:

- a* at least two financial years must have elapsed since the establishment of the listed public shareholding company on the financial market;
- b* the company must have issued two audited balance sheets approved by its general assembly;
- c* at least one year must have elapsed since the last selling transaction of shares previously bought back (if any);
- d* approval of the general assembly of the company under a special resolution on the buy-back for resale transaction;
- e* the buy-back may not exceed 10 per cent of the shares representing the company's paid-up capital; and
- f* the company may not execute the buy-back transaction except after the lapse of six months from the last issuance of any securities in a public offer.

Pursuant to the Commercial Companies Law, the SCA issued Resolution No. 7/RM in April 2016, which sets out new corporate governance rules and corporate discipline standards for public joint-stock companies (the Corporate Governance Regulations), which replaces the existing resolutions and regulations.<sup>9</sup> The Corporate Governance Regulations apply to all listed UAE companies, their board members, managers, chair and auditors to whom the provisions of the Commercial Companies Law apply. As an exception, Chapter Two (which covers the corporate governance rules) will not apply to banks, finance companies, financial investment companies, and money exchange and financial brokerage firms that are subject to the supervision of the Central Bank.

The Corporate Governance Regulations now provide clear rules in relation to calling a general assembly. Unless approved by 95 per cent of the shareholders, a board can no longer call a general assembly with less than 30 days' notice. Immediate disclosure must be made to shareholders pursuant to a detailed notice to the market and on the website of the company directly after the conclusion of the board meeting declaring its resolutions and the date of the general assembly's meeting.

The standards to be observed with regards to participation in the meetings of boards of directors via modern technology (such as videoconferencing) are now comprehensively covered in the Corporate Governance Regulations.

Under the Corporate Governance Regulations, listed companies are also now required to maintain special and comprehensive registers of conflicts of interest, insiders and related parties.

The Corporate Governance Regulations also require listed companies to include a provision in their articles of association that provides for a minimum representation of women on their board of not less than 20 per cent. Companies that do not satisfy this requirement will need to disclose why in their annual governance reports.

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<sup>9</sup> See SCA Board Resolution No. 16 of 2013 Concerning the Amendment of the Regulations on Disclosure and Transparency, which amended certain articles of SCA Resolution No. 3/R of 2000 Concerning the Regulations as to Disclosure and Transparency.

**ii Developments affecting derivatives, securitisations and other structured products**

Derivative products have been marketed and sold in the UAE for many years. There have been no significant recent changes to the rules and regulations affecting such products.

Securitisation transactions are extremely rare in the UAE as the existing legal and regulatory environment is not well suited to structuring such transactions. There have been no significant recent developments.

**iii Cases and dispute settlement**

As noted above, the capital markets in the UAE are young and developing. The UAE only achieved emerging market status within the past three years. The UAE is not a common law jurisdiction, and the doctrine of binding judicial precedent is not followed. To date, there is an absence of significant court cases regarding securities law matters, and there have been no significant recent developments.

**iv Relevant tax and insolvency law**

With limited exceptions, the UAE is (as a matter of practice) a tax-free jurisdiction. There is no federal income tax law in the UAE; nor are there any federal taxes on income. There is no personal income tax.

Corporate income tax statutes have been enacted in most of the emirates (all of which predate the formation of the UAE in 1971), but they are not implemented.<sup>10</sup> Instead, corporate taxes are collected with respect to branches of foreign banks (at the emirate level) and courier companies (at the federal level). Further, taxes are imposed at the emirate level on the holders of petroleum concessions at rates specifically negotiated in the relevant concession agreements. Taxes are imposed by certain emirates on some goods and services (including, e.g., sales of alcoholic beverages, hotels, restaurant bills and residential leases).

The UAE Ministry of Finance has issued Federal Decree-Law No. 8 of 2017 (the VAT Law) and launched a dedicated tax website for the Federal Tax Authority. The VAT Law introduces a new 5 per cent value-added tax starting in January 2018. The VAT Law is based on the common principles agreed by all GCC countries in the GCC VAT framework agreement, and sets the general rules for the implementation of the new tax and includes some details on the goods and services subjected to VAT, as well as those that will receive special treatment. Full details of the scope of VAT implementation will be revealed in the VAT Law's executive regulations, which are expected to be released by the fourth quarter of 2017.

Separately, the UAE Ministry of Finance has announced that it is still studying reforms to the UAE corporate tax regime, that the tax rate is under study and that businesses will be given at least one year to prepare for any changes. As there are still many stages to go through before the laws are enacted, there is still no firm timeline for the implementation of the corporate tax legislation.

The economic slowdown that affected the UAE following the global financial crisis highlighted the inadequacy of the bankruptcy and insolvency law. The new Bankruptcy Law of the UAE was enacted on 20 September 2016 as Decree-Law No. 9 of 2016 and was in effect

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<sup>10</sup> Each emirate, except for Umm Al Quwain, has an income tax decree. The income tax decrees of the emirates of Fujairah (1966), Sharjah (1968), Ajman (1968), Dubai (1969) and Ras Al Khaimah (1969) are based on, and broadly similar to, the Emirate of Abu Dhabi Income Tax Decree of 1965.

on 31 December 2016. The new Bankruptcy Law replaces and repeals the previous legislation on the subject, Book 5 of the UAE Federal Law No. 18 of 1993 promulgating the Code of Commercial Practice. Perhaps the most important new feature of the new Bankruptcy Law is the introduction of a regime that allows for protection and reorganisation of distressed businesses. It will be interesting to see how the new Bankruptcy Law is implemented in practice and whether debtors make use of its provisions. Nevertheless, the introduction of an insolvency regime that offers protection and encourages restructuring to enable troubled businesses to survive what would otherwise have been a bankruptcy situation is welcome, and is a milestone development in the UAE's business law landscape.

In addition to the new Bankruptcy Law, the Commercial Companies Law contains provisions for the dissolution of a company. The Penal Code of the UAE (contained in Federal Law No. 3 of 1987) also contains criminal sanctions for bankrupts.

The Commercial Companies Law provides for the dissolution of a company in certain prescribed circumstances, including where the losses to a company amount to half of its capital. All debts of the company become due and owing upon the company's dissolution. If the company's assets are not sufficient to meet all of the debts, then the liquidator is required to make proportional payment of such debts, without prejudice to the rights of preferred creditors. Every debt arising from acts of liquidation must be paid out of the company's assets in priority over other debts.

It has also been reported that the UAE is working on a personal insolvency law, which is expected to be approved in 2017. The time frame for the realisation of the personal insolvency law cannot be predicted.

#### **v Role of exchanges, central counterparties (CCPs) and rating agencies**

The SCA is responsible for the regulatory oversight of the ADX and the DFM.<sup>11</sup> In addition to the rules and regulations of the SCA, each exchange has its own rules and regulations.

The ADX and the DFM each have a Clearing, Settlement, Depository and Registry Department that operates a clearing, settlement and depository system (CSD) and is responsible for clearing and settlement of the transactions executed on the exchange. Each of these exchanges follows a multilateral netting system under which transactions are cleared and settled on a net basis by brokers. After the clearing of the transactions by the exchange, the transfer of securities ownership is made through the electronic book-entry system operated by the exchange.

To buy or sell securities listed on the ADX or the DFM, an investor must apply for and be granted an identification number called an investor number (IN) by the relevant exchange. The issuance of an IN by an exchange triggers the creation of an investor account for the custody of shares traded on the exchange (custody account). The IN identifies the investor's account in the CSD. In addition to the custody account, every investor must have at least one trading account with a licensed broker (trading account).

All shares traded on the ADX and the DFM are in dematerialised (electronic) form. Ownership of shares is reflected in a computerised credit entry in the investor account.

All trading is done through licensed brokers. An investor must have at least one trading account with a licensed broker and can have accounts with multiple brokers. To open an

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<sup>11</sup> The SCA does not regulate NASDAQ Dubai, which is regulated by the DFSA and is part of the separate regulatory regime applicable in the DIFC. As noted above, the regulatory scheme applicable in the DIFC is beyond the scope of this chapter.

account with a broker, an investor has to enter into a customer agreement with the broker. The investor must also give the broker a power of attorney authorising the broker to execute any written share transfer form on behalf of the investor in relation to any trades executed on the applicable exchange by the broker. The broker will process buy or sell orders from the investor upon receipt of instructions in the manner specified in the customer agreement.

To sell listed securities, investors must transfer the securities from their custody account to their trading account with a broker. Upon receiving a sell order, the broker will record the order into the electronic trading system. The system matches buy and sell orders of a particular stock based on the price and quantity requirements. The cash settlement is done among brokers through the designated settlement bank. Once the trade is executed, the investor will be notified of the deal confirmation, and the transfer of share ownership occurs electronically by debits and credits to the custody accounts of the seller and buyer.

As a legal matter, the transfer of securities occurs by way of contractual assignment. At the time sellers of securities transfer the securities from their custody account to their trading account with a broker, the obligation to settle transfers to the broker. However, the seller is still at risk up until the time payment is actually received. Every broker is required to submit a bank guarantee of at least 10 million UAE dirhams, and the seller may draw upon this guarantee if payment is not received.

While each of the ADX and the DFM operates a CSD, neither acts as a CCP in the sense that neither legally guarantees the completion of transactions on the exchange. The economic risk of clearing and settlement is intended to be addressed by the bank guarantees required by each accredited broker and the trading limits imposed on the brokers.

There are no UAE-based rating agencies. Some UAE issuers have securities rated by international rating agencies such as Moody's and Standard & Poor's.

#### **vi Other strategic considerations**

Under the current law, all companies incorporated in the UAE must have majority UAE ownership. In addition, the authorities impose additional restrictions on the ownership of some publicly traded companies. As a result of these restrictions, the demand from foreign investors for shares in certain publicly traded companies may, at times, exceed the numbers of shares permitted to be sold to foreign nationals. Many UAE banks will hold shares in publicly traded companies on behalf of clients through custodial arrangements. A riskier strategy for investors is to use an unregulated individual holding UAE nationality as a proxy to hold shares on the investor's behalf.

It is possible to register a security interest over listed securities with the relevant exchange. In practice, however, the registration fees charged by the ADX and the DFM are often deemed to be prohibitively expensive by investors and secured parties, who sometimes opt for the cheaper but far riskier (from the perspective of the secured party) alternative of an unregistered contractual pledge.

### **III OUTLOOK AND CONCLUSIONS**

The pace of legislative and regulatory change has been slow, but the adoption of the long-awaited revision of the Commercial Companies Law in 2015 was a significant development. The new, long-awaited Bankruptcy Law adopted in 2016 has been welcomed by bankers and business leaders as a move that will improve business confidence in the country and enhance small- and medium-sized enterprises' access to bank funding. The SCA anticipates that it will, with

the issuance of the various new regulations put into effect a plan to upgrade the status of the UAE capital markets from emerging to developed market status. The most significant changes in the next few years will be in the area of taxation. The UAE has long been a tax-free haven, but with lower oil prices and a desire to diversify the economy, the authorities have pressed ahead with the implementation of VAT, and federal corporate taxation is a future possibility.

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