

THE INTERNATIONAL
CAPITAL MARKETS
REVIEW

NINTH EDITION

Editor
Jeffrey Golden

THE LAWREVIEWS

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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 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, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities often may risk multi-jurisdictional 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!'

Ironically, the second purpose this book aims to serve is 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 frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers 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 both our domestic and 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.

Not long ago, 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, on 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 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 and direct exchanges of information between lawyers from different jurisdictions. 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 to identify local counterparts in potentially relevant jurisdictions. And, in that case, I hope that reading the content of this book 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 for 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 amid the growing interdependence of our professional world.

Jeffrey Golden

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London

October 2019

UNITED ARAB EMIRATES

Gregory J Mayew and Silvia A Pretorius¹

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 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 emirates retains substantial control over the conduct of government affairs within the emirate. With some exceptions, regulation of capital markets is generally a matter of UAE federal law.²

The legal system in the UAE (which includes federal laws and individual emirate laws, such as those of the emirate of Dubai) is still developing. UAE law does not recognise the doctrine of binding judicial precedent. In the absence of such a doctrine, the results of one court case do not necessarily offer a reliable basis for predicting 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 Dubai International Financial Centre (DIFC) was established as a financial free zone with its own body of laws and regulations, which are largely separate from the UAE legal system. It 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. Commercial rules and regulations have been enacted by the ADGM Board of Directors as from March 2015, followed by 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 Abu Dhabi (since 2006), Dubai and Ras Al Khaimah each maintain a separate court system. The UAE capital markets are young and still developing. There are currently three securities

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

2 The most notable exception is the Dubai International Financial Centre (DIFC) – see footnote 3.

exchanges, all of which are less than 20 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. The creation of a second market, in which shares in private joint-stock companies would be eligible for trading, was launched in 2014.

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 regulatory schemes: the UAE federal regulatory scheme, and the 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.³ A detailed discussion of the DIFC and the ADGM schemes is beyond the scope of this chapter, which deals primarily with the UAE federal scheme.

Historically, the 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 regulation of the banking and financial sectors. A government 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.

The Emirates Securities and Commodities Authority (SCA) was created in 2000. 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 it 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 general 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.

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. This promotion became effective in May 2014 with the changes to the indexes. At that time, MSCI added nine UAE companies to its benchmark emerging markets index for the first time. Subsequent to the decision to upgrade the UAE markets, and in an attempt to meet listing conditions under MSCI indexes going forward

³ The DIFC is often a source of confusion to international investors who are not familiar with the UAE. It 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 transactions 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).

(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 prominent development is the issuance of the 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, and which became effective on 31 July 2016.

The New Fund Regulations continue to ensure that:

- a the oversight of 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 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:

- a the accumulation of funds for the purposes of investment in a joint bank account, concluding group insurance contracts, or 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; or
- b funds established by federal or local government agencies, the companies fully owned by any of them or the foreign funds promoted to one of such entities. In addition, the New Fund Regulations specifically 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. However, a distinction is made between public funds (either open-ended or close-ended funds established in the UAE that target all investors) and private funds (either open-ended or close-ended funds established in the UAE that 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 a fund in the UAE. The New Fund Regulations provide that a prospectus, with supporting documents, and a key investor information document must be submitted. It is prohibited to announce the start of initial procedures to obtain a licence for a fund, announce its licensing, subscribe in its units, promote it, distribute any promotional materials or announce any information in relation to the fund prior to obtaining the approval of the SCA for the 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 includes 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 the following 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 the 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* investment in another mutual fund is not permitted unless it is consistent with the investment policy of the fund and in a manner that serves the interests of unit holders; and
- f* engaging in foreign exchange operations is permitted 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 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 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 (Promotion Regulations). These 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 capable of managing its investments by itself and on its own accord, such as:
 - the federal government and local governments, government 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, it 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 have been enacted between 2016 and 2019:

- a* Chairman of the Authority's Board of Directors' 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/RT of 2016 Concerned the Exchange-Traded Fund (ETF), regulating the incorporation and prospectus requirements for ETFs;
- c* Administrative Decision No. 52/RT of 2016 Concerning the Controls of Cash Investment Fund (CIF), regulating the investments permissible for CIFs;
- d* Administrative Decision No. 1/RT of 2017 Concerning Real Estate Investment Fund Controls;
- e* Administrative Decision No. 2/RT of 2017 Concerning Private Equity Fund Controls, which has introduced rules relating to the obligations of both general and limited partners 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 Concerning The Venture Capital Fund Controls;
- g* Chairman of the Authority's Board of Directors' Decision No. 4/RM of 2017 Concerning the Regulation of the Activity of Administrative Services for Investment Funds;
- h* Administrative Decision No. 57/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Mutual Funds;

- i* Administrative Decision No. 58/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Promotion and Introduction Activities;
- j* Administrative Decision No. 123/RT of 2017 Concerning the Regulatory Controls for Financial Activities and Services;
- k* Decision of the Chairman of the SCA Board of Directors No. 32/RM of 2017 Concerning the Regulation for General and Limited Partnership Funds;
- l* Decision of the Chairman of the SCA Board of Directors No. 5/RM of 2018 Concerning the Imposition of Sanctions;
- m* Decision of the Chairman of the SCA Board of Directors No. 12/RM of 2018 Concerning the XBRL;
- n* Chairman of the SCA Board of Directors' Decision No. 18/RM of 2018 Concerning the Regulations as to Licensing Credit Rating Agencies;
- o* Chairman of the SCA Board of Directors' Decision No. 19/RM of 2018 Concerning the Regulation of the Central Depository Activity;
- p* Chairman of the SCA Board of Directors' Decision No. 20/RM of 2018 Concerning the Issuing and Offering of Islamic Securities;
- q* Chairman of the SCA Board of Directors' Decision No. 20/RM of 2018 Concerning the Offering or Issuance of Islamic Securities; and
- r* Chairman of the SCA Board of Directors' Decision No. 8/TM of 2019 on the Mechanism of Investment Funds.

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

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 securities in accordance with market-maker regulations.

The practice of market making requires a licence from the SCA. An applicant for a licence must be a corporate person with paid capital of at least 30 million UAE dirhams (or the 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;

4 See SCA Board of Directors' Decision No. 46 of 2012 Concerning the Regulations as to Market Makers, as amended by Chairman of the SCA Board of Directors' Decision No. 26 of 2014, SCA Board of Directors' Decision No. 47 of 2012 Concerning the Regulations as to Lending and Borrowing Securities, SCA Board of Directors' Decision No. 48 of 2012 Concerning the Regulations as to Short Selling of Securities and SCA Board Decision 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, Chairman of the SCA Board of Directors' 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 Concerning the Exchange-Traded Fund and Administrative Decision No. 52/RT of 2016 Concerning the Controls of Cash Investment Fund.

- 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 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 that 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 (Sukuk Regulations) and Board of Directors' Decision No. 17 of 2014 Concerning the Regulations of Debt Securities (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 the Sukuk Regulations. Excluded from the provisions of these Regulations are government *sukuk*, and *sukuk* that will not be offered through public subscription or 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 listings.

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 those 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 a 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 statements, 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 a brokerage company (trading member) and 10 million UAE dirhams for a 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.⁶

SCA Board of Directors' Decision No. 10 of 2014 Concerning the Regulation of Listing and Trading of Shares of Private Joint Stock Companies 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 facilitates 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 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 were 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) was 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, and regulations on IPOs and book-building.⁷ 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.

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 Chairman Resolution No. 6/TM of 2019, amending SCA Board Resolution No. 11/RM of 2016 On the Regulations for Issuing and Offering Shares of Public Joint Stock Companies.

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.⁸

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

In September 2018, the SCA issued SCA Chairman Decision No. (28/Chairman) of 2018 Approving the Fintech Regulatory Framework (Fintech Regulatory Sandbox Guidelines). A fintech regulatory sandbox is a process-based framework that allows entities to test innovative products, services, solutions and business models under a relaxed regulatory environment, but within a defined space and duration.

The Commercial Companies Law has introduced the concept of investment funds incorporated as a separate legal personality in the form of common investment companies, and the concept that a public shareholding company may buy back a portion of its own shares to resell them. 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 transactions;
- 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 until after six months have elapsed since 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 (Corporate Governance Regulations), which replaced the existing resolutions and regulations.⁹ The Corporate Governance Regulations apply to all listed UAE companies, their board members, managers, chairs 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.

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

9 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.

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 fewer 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 regard 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 these Regulations, listed companies are now required to maintain special and comprehensive registers of conflicts of interest, insiders and related parties. The 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 the reason for this in their annual governance reports.

On 11 March 2019, the SCA, the Dubai Financial Services Authority (DFSA) of the DIFC and the Financial Services Regulatory Authority (FSRA) of the ADGM issued a joint press release announcing the enactment of legislation enabling the implementation of a passporting scheme to facilitate the UAE-wide promotion of domestic funds. Historically, the existence of three different regulatory regimes in the UAE has been an impediment to the growth of the market for funds since a fund approved by a particular regulator was only eligible for promotion within the relevant jurisdiction and not throughout the UAE. The passporting regime aims to change this. The DFSA and ADGM have published amendments to the relevant rules and regulations implementing the passporting regime. The SCA's regulations have not yet been published. The passporting regime applies to both private and public domestic funds. It does not apply to foreign funds promoted in the UAE. Foreign funds and other types of securities promoted in the UAE remain subject to the applicable rules of the jurisdiction in which they are promoted.

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 some recent changes to the rules and regulations affecting these products to expand the investment options available to customers in the markets with the issuance of SCA Board of Directors' Decision No. 22 /RM of 2018 Concerning the Regulation of Derivatives Contracts (Derivatives Contracts Regulations).

Pursuant to the Derivatives Contracts Regulations, derivative contracts are financial contracts of a specific value determined by the contracting parties. These types of contracts derive their value from that of the underlying securities (defined to be local securities and foreign securities, or local or foreign index subject matter of a derivatives contract, and are dependent on the change of value of such securities) and are dependent on the change of value of such securities. The Derivatives Contracts Regulations also classify structured derivatives contracts as 'derivatives contracts structured on the local securities or indicators issued in accordance with the market's conditions and rules, derivatives contracts structured on foreign securities, issued in accordance with the market's conditions and rules upon obtaining the SCA's consent, and derivatives contracts structured on local securities or indicators, issued in accordance with the conditions and rules of the foreign market upon obtaining the SCA's

consent'. Customers who deal in over-the-counter derivatives contracts on local securities or indicators are required to settle and clear the trading of these contracts through a central clearing party.

The Derivatives Contracts Regulations address the obligations of the markets in the UAE. In addition to other obligations set forth in the law that established the SCA and its regulations, these include the following:

- a* to continuously disclose and update the securities involved in the structured derivatives contracts in the market;
- b* to continuously disclose the types and specifications of the structured derivatives contracts in the market in accordance with its rules, as well as any updates or amendments thereto, provided that they may not enter into force in the event there are pending unsettled structured derivatives contracts;
- c* not deregister any security involved, in cases where pending or unsettled structured derivatives contracts, which include these involving securities, exist in the market;
- d* announce the working days, the hours dedicated to trading in the structured derivatives contracts therein, and the opening and closing times;
- e* settle all transactions through a central clearing party;
- f* specify the number of structured financial derivatives contracts in the series of contracts. The market should also specify the securities involved, the month of contract settlement, the month of contracting and the expiry date of the contract that may be registered with the market. The market may enforce limits for each structured derivatives contract or for all contracts;
- g* specify the initial margin of the transactions of structured derivatives contracts therewith. The market should also set the conditions and rules governing the structured derivatives contracts therewith, rules of trading and listing thereof on the market, and the rules and conditions of licensing practice of the tasks of the derivatives member, and the rules of licence renewal as well as the obligations of the derivatives member, provided that the rules, as well any update or change thereto, are approved by the SCA before they enter into force; and
- h* abide by the provisions related to structured derivatives contracts that are compatible with the principles of Islamic *shariah*.

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 has already been noted, the capital markets in the UAE are young and developing. The UAE has only had emerging market status since 2012/2013. It 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, 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.¹⁰ 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, for example, sales of alcoholic beverages, hotels, restaurant bills and residential leases).

The UAE Ministry of Finance issued Federal Decree-Law No. 8 of 2017 (VAT Law) and launched a dedicated website for the Federal Tax Authority. The VAT Law introduced a new 5 per cent VAT starting in January 2018. The Law is based on the common principles agreed by all GCC countries in the GCC VAT framework agreement. It sets the general rules for implementation of the new tax, and includes some details on the goods and services that are subject to VAT and those that will receive special treatment. Full details of the scope of VAT implementation were revealed in the VAT Law's executive regulations, UAE Cabinet Decision No. 52 of 2017, which outlines supply of goods and services in all cases, including supply in special cases, supply of more than one component and exemptions related to legal supply. The regulations also define mandatory tax registration, optional tax registration, registrations that are liable to exceptions, tax grouping and deregistration.

Separately, the Ministry of Finance has announced that it is still studying reforms to the 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 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 came into effect 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 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 the debts, then the liquidator is required

¹⁰ 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.

to make proportional payment of those 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.

There have been reports in the past few years that the UAE is working on a personal insolvency law. However, at the time of writing, the time frame for realisation of this law cannot be predicted.

v Role of exchanges, central counterparties and rating agencies

The SCA is responsible for the regulatory oversight of the ADX and the DFM.¹¹ 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 departments that operate a clearing, settlement and depository system (CSD) and are responsible for the clearing and settlement of transactions executed on the exchange. Each exchange follows a multilateral netting system under which transactions are cleared and settled on a net basis by brokers. After the clearing of transactions by the exchange, the transfer of securities ownership is made through the electronic book-entry system operated by that 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 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.

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 but can have accounts with multiple brokers. To open an 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 on 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 confirmation of the deal, 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

11 NASDAQ Dubai is not regulated by the SCA but by the DFSA, and is part of the separate regulatory regime applicable in the DIFC. As already noted, the regulatory scheme applicable in the DIFC is beyond the scope of this chapter.

is still at risk until 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.

Although the ADX and the DFM each operates a CSD, neither acts as a central counterparty 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.

In May 2018, the SCA issued Chairman of the SCA Board of Directors' Decision No. (18/RM) of 2018 Concerning the Licensing of Credit Rating Agencies. Pursuant to these regulations, the SCA is now regulating credit rating agencies in the UAE. A credit rating agency may only be carried out in the UAE subject to obtaining a licence from the SCA.

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 number 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 an investor 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 alternative (from the perspective of the secured party) of an unregistered contractual pledge.

III OUTLOOK AND CONCLUSIONS

The pace of legislative and regulatory change in the UAE has generally been slow. Predictions about future developments are difficult to make. At the current time, there is speculation that the government could liberalise laws regarding foreign ownership of businesses in certain yet-to-be-identified sectors. VAT was introduced in 2018 at a rate of 5 per cent, and some commentators believe this rate may be increased in the coming years. More generally, taxation is an area that could see changes in the future. While the UAE has historically been a tax-free haven, the implementation of corporate income tax in the future is a possibility. A new Commercial Companies Law was enacted in 2015 and, at the time of writing, there is speculation that further amendments may be forthcoming in the near future.

While still in its nascent stage, the cryptocurrency market is gaining ground in the UAE. According to the website CoinSchedule, the UAE ranked seventh (tied with Germany) in the world for crypto token sales in 2019 for the period from 1 January 2019 to 8 September 2019. It is anticipated that the cryptocurrency market in the UAE will continue to grow.

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