

THE INTERNATIONAL
CAPITAL MARKETS
REVIEW

ELEVENTH EDITION

Editor
Jeffrey Golden

THE LAWREVIEWS

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CAPITAL MARKETS
REVIEW

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PREFACE

Well, is that light at the end of the tunnel?!

When the 10th edition of this volume appeared a year ago, it included an admission that we had been caught unawares by the pandemic, lockdowns and working from home (WFH).

Yes, there were then capital market challenges that had been anticipated, many of which continue. We knew, for example, that key interbank offered rates (IBORs), benchmarks on which so much financial market activity relies, would be undergoing a period of change and that market participants would have to face up to the adoption of alternative rates and consider adjustments to legacy transactions based on LIBOR or other previously used pricing sources. No one said LIBOR migration would be easy; and that challenge has not gone away. The message from many key regulators is that, pandemic and other operational complications notwithstanding, the shift remains on track. LIBOR, supporting as it does hundreds of trillions of dollars of market activity, is slated for replacement around the time that this edition is scheduled to appear!

However, we did not see and anticipate other challenges brought about by the covid-19 pandemic, basic as some of these may have been – hidden as they may have been also in notice provisions and other boilerplate buried in the back recesses of our transaction documents. How do you give effective notice to offices closed (often with the force of law) and with the decentralisation of WFH? If none of the methods contemplated by the parties' agreement can be used, may a different method be used instead?

Furthermore, is the pandemic itself an excuse for non-performance of financial market obligations? Does it trigger *force majeure* clauses in our contracts? Does it frustrate a relevant commercial purpose?

The global health – not to mention environmental – challenges around us at the moment beg a coordinated international strategy. However, the all-too-often fragmented response we have been seeing has been anything but encouraging. Fragmentation in the financial market regulatory arena also, including Brexit and other devolutionary pressures and juridical competition that have followed, now seems to be the order of the day.

Challenges though there may be, however, the capital markets continue to show their resilience. As I write this preface, share prices and indices are at, or have recently reached, record highs in leading global markets. IPOs for the likes of Robinhood Markets and Krispy Kreme continue to cause excitement and capture headlines.

International capital markets lawyers are still in business, still relevant, although, our *modus operandi* may have changed slightly. While financial institutions and law firms are cautiously encouraging a return to the office (at least for the fully vaccinated), technology and our recent experience by necessity of remote working has encouraged more self-sufficiency.

In a world of WFH, we keep company with the books on our shelves more than the other lawyers in the building. In such circumstances, there are ever more compelling reasons to keep this particular book on that shelf or otherwise remotely accessible through the digital platform maintained by *The Law Reviews*. We can expect to turn more often to published answers when we cannot as easily consult the practitioner in the office next door.

As I have written before, 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 (even WFH), no longer enjoys the luxury – if ever it did – of focusing solely on a home market within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology increasingly 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. 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 – and now the coronavirus pandemic and its impact on the global economy.

Is that light at the end of the tunnel? Let's hope so.

In the meantime, best wishes for this difficult period. Stay safe, stay well and stay alert.

Jeffrey Golden

Joint Head of Chambers

3 Hare Court

London

October 2021

UNITED ARAB EMIRATES

*Silvia A Pretorius*¹

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 (the 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.

Similarly, the Abu Dhabi Global Market (ADGM) was established pursuant to Abu Dhabi Law No. 4 of 2013 as a financial free zone in the Emirate of Abu Dhabi, with its own civil and commercial laws. The ADGM commenced operations in 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 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.

1 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.

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. In 2020, the UAE's Insurance Authority was merged into the Central Bank and the latter has now also assumed the supervisory and regulatory responsibilities of the insurance sector. A government agency, the Central Bank's 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 and ADGM). 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 (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.

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).

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

One prominent development was the issuance of the SCA Decision No. 13/RM/2021 On the Rules Handbook of Financial Activities and Mechanisms of Status Regularisation (the Decision No. 13/RM). Decision 13/RM came into effect the day following its publication on 17 May 2021, and one of the main changes it has introduced is to the SCA's regime that regulates the promotion of 'financial products' (defined as securities, foreign securities, commodities' contracts and structured products) in the UAE (but outside the financial free zones, the DIFC and ADGM), and it includes a Financial Activities Rules Handbook (the Rulebook). Decision 13/RM repeals 17 SCA Board Decisions, including those in relation to financial promotions, which are now incorporated into the Rulebook.

The Rulebook continues 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 the Rulebook;
- 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; and
- d* the marketing of a foreign fund to investors in the UAE requires the appointment of a UAE-licensed local promoter.

The new SCA's financial promotions' regime introduced by the Rulebook is a new, wider exemption for promotions made to 'professional investors' (New Exemption), which replaces the exemption regarding promotions to institutional 'qualified investors' under the previous regulations. The New Exemption is available for promotions made to professional investors, which now expressly includes regulated firms and private investment vehicles, and natural persons who meet the criteria to be classified as professional investors; namely, individuals with a net worth of more than 4 million dirhams, or those with sufficient experience and understanding of the relevant investments.

Under the Rulebook, a 'promotion' is defined as financial activity of communication with any person in any form or way and includes an invitation or inducement to buy or subscribe to a Financial Product.

The promotion provisions in the Rulebook do not apply to the following:

- a* a broker who trades for his customers in the foreign markets and the trading broker of OTC derivatives and currencies in spot market;
- b* financial products listed in the market;
- c* financial products promoted to the professional investor;
- d* securities, contracts of commodities or derivatives issued by the Federal Government, local government, governmental institutions and authorities or the companies wholly owned by any thereof;
- e* reverse promotion, by initiative of an investor in the UAE, that requests the offering or buying of any specific foreign securities abroad, not based on the promotion of the foreign issuer or its promoters or distributors. This, however, shall be recorded by the concerned entity;

- f* promotion between the company and its financial group or the related parties, the parties related to mutual funds or associated group;
- g* the introducing broker according to the system of listing and trading of commodities and contracts of commodities;
- h* the issuer, foreign issuer or financial advisor according to the system of offering and issue of stock of public joint stock companies, except in connection with the general obligations of the promoter; or
- i* the promotion of financial services.

Promotion of the foreign fund in the private placement shall be confined to the professional investor and the counterparty.

The three new categories of professional investors under the Rulebook are as follows.

Per-se professional investor

A per-se professional investor should fulfil one of the following requirements:

- a* international corporations and organisations whose members are states, central banks or national monetary authorities;
- b* governments and their investment and non-investment entities, institutions and corporations or companies wholly owned by either thereof;
- c* central bank or other national monetary authority in any country, state or legal authority;
- d* capital market institutions licensed by SCA or supervisory authority equivalent to SCA;
- e* financial establishments;
- f* regulated financial institution, local or foreign mutual fund or regulated pension fund management company or regulated pension fund;
- g* any entity whose key activity is the investment of securities, securitisation or financial transactions;
- h* any company whose stock is listed or whose stock trading is admitted in any market of a state member of IOSCO;
- i* trustee of a trust who has during the past 12 months assets of not less than 35 million dirhams;
- j* licence holder under (Single Family Office) laws in connection only with the practice of activities to perform duties (as Single Family Office) and has assets of not less than 15 million dirhams;
- k* particular partnerships or private establishment that has or had at any time in the past two years net assets of not less than 25 million dirhams. This amount shall be calculated in cases of particular partnerships without deduction of the loans payable to any partner; or
- l* a person who handles a large undertaking, if at least two of the following requirements are fulfilled on the date of the last financial statements:
 - total assets are not less than 75 million dirhams before deduction of long and short-term liabilities;
 - net annual revenues are not less than 150 million dirhams; and
 - total cash and investments in the balance sheet or total authorised capital minus the paid capital is not less than 7 million dirhams.

Professional investor (service-based)

A service-based professional investor should fulfil the following requirements:

- a* a person who practises activity that involves the provision of credit facilities for commercial purposes for any of the following:
 - outsourced personnel;
 - entity that controls the outsourced personnel;
 - any member in the group to which the outsourced personnel belongs; and
 - any joint venture in which the outsourced personnel is engaged; or
- b* a person who practises the service of arranging credit facilities and investment deals for corporate structuring and financing.

Professional investor (resident)

A resident professional investor should fulfil the following requirements:

- a* a natural person who owns net assets – except the value of his or her main housing – of not less than 4 million dirhams;
- b* a natural person who is approved by SCA or the equivalent supervisory authority, employee at the licensee or regulated financial institution or employee at either of these in the past two years or has adequate knowledge and experience in the investment field and its risks as per suitability criteria, or is represented by an entity licensed by SCA according to the conditions of licensing;
- c* a natural person who has a joint account with a natural person who represents a resident professional investor according to (a) (owner of the primary account). The following conditions shall be met:
 - (account participant) is a family member (owner of the primary account) within the second degree of relation;
 - account is used to manage investments of the owner of the primary account and other participants; and
 - written confirmation by the account participant that investment decisions of the joint account are taken on his or her behalf by the owner of the primary account;
- d* any establishment of special purpose or special legal form such as a trust and the establishment established only to facilitate the management of investment portfolio of a natural person represents a resident professional investor according to (a);
- e* an undertaking person who meets the following conditions:
 - total cash and investments in the balance sheet or total authorised capital minus the paid capital is not less than 4 million dirhams; and
 - has adequate experience and understanding of the markets and the related financial products and financial transactions and the associated risks according to suitability criteria; or
- f* an undertaking person who meets the following requirements:
 - a controlling natural person who holds the majority of shares in the company, someone who is capable of controlling the majority of voting rights or has the capability to appoint or remove the majority of directors on the board;
 - a holding company or subsidiary; or
 - a joint venture.

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 2021:

- 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 Concerning the Exchange-Traded Fund, regulating the incorporation and prospectus requirements for exchange-traded funds;
- c* Administrative Decision No. 52/RT of 2016 Concerning the Controls of Cash Investment Fund, regulating the investments permissible for CIFs;
- d* Administrative Decision No. 1/RT of 2017 Concerning Real Estate Investment Fund Controls; and
- 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; and
- f* Administrative Decision No. 3/RT of 2017 Concerning The Venture Capital Fund Controls;
- g* Administrative Decision No. 57/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Mutual Funds;
- h* Administrative Decision No. 58/RT of 2017 Concerning the Adjustment of Positions Mechanisms for Promotion and Introduction Activities;
- i* Administrative Decision No. 123/RT of 2017 Concerning the Regulatory Controls for Financial Activities and Services;
- j* Decision of the Chairman of the SCA Board of Directors No. 32/RM of 2017 Concerning the Regulation of General and Limited Partnership Funds;
- k* Decision of the Chairman of the SCA Board of Directors No. 5/RM of 2018 Concerning the Imposition of Sanctions;
- l* Decision of the Chairman of the SCA Board of Directors No. 12/RM of 2018 Concerning the XBRL;
- m* Chairman of the SCA Board of Directors' Decision No. 19/RM of 2018 Concerning the Regulation of the Central Depository Activity;
- n* Chairman of the SCA Board of Directors' Decision No. 20/RM of 2018 Concerning the Issuing and Offering of Islamic Securities;
- o* Chairman of the SCA Board of Directors' Decision No. 8/TM of 2019 on the Mechanism of Investment Funds;
- p* Chairman of the SCA Board of Directors' Decision No. 21/Chairman of 2019 on Procedures of Anti-Money Laundering and Combating the Financing of Terrorism and Illegal Organisations;
- q* Administrative Decision No. 63/RT of 2019 Concerning Evaluation of In-Kind Shares of Investment Funds;

- r Administrative Decision No. 59/RT of 2019 Concerning the Capital Adequacy Criteria
of Investment Managers and Management Companies; and
s Chairman of the SCA Board of Directors' Decision No. 23/RM of 2020 Concerning
Crypto Assets Activities Regulation.

In addition to regulations relating to investment funds, the SCA has been active on a number of other fronts. 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 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;
- 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

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.

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 April 2014, the SCA issued two new sets of 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 Regulation 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 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 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.

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 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 previous 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 Private Joint Stock Companies Register and SCA Board of Directors' Decision No. 3/R of 2000 Concerning the Regulations as to Disclosure and Transparency.

The new UAE Commercial Companies Law (Federal Law No. 2 of 2015) that was issued on 1 April 2015 and that came into force on 1 July 2015, significantly enhanced the provisions relating to corporate governance. 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 bookbuilding.⁷ The concerned authorities have also been

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, and Decision 13/M, amending SCA Board Resolution No. 11/RM of 2016 On the Regulations for Issuing and Offering Shares of Public Joint Stock Companies.

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 dirhams has been increased to 30 million 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.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.

The UAE has recently introduced some significant changes to the foreign ownership restrictions. Federal Decree Law No. 26 of 2020 (Decree Law) came into force on 2 January 2021. The Decree Law significantly amends the Commercial Companies Law. The general long-standing requirement for 51 per cent of the shares in a mainland or onshore company to be held by one or more UAE nationals (natural or legal persons) has been removed. This amendment now means that it will be possible for foreign investors to own up to 100 per cent of shares in UAE companies. The Decree Law also removed the requirement for foreign branches to appoint a local service agent. The provisions relating to foreign ownership and local service agents came into force on 30 March 2021. However, certain sectors such as oil and gas, utilities and companies carrying on activities with a 'strategic impact will continue to be subject to restrictions on foreign ownership.

In September 2018, the SCA issued SCA Chairman Decision No. 28/Chairman of 2018 Approving the Fintech Regulatory Framework (the 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. In December 2019, the UAE Central Bank announced that it will establish a new fintech office to support fintech activities in the banking sector. The fintech office will facilitate the establishment of a regulatory framework in cooperation with the DIFC and ADGM, and with the relevant authorities in the wider Middle East region.

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 sets 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;

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

- c* at least one year must have elapsed since the most recent selling transaction of shares previously bought back (if any);
- d* approval of the general assembly of the company under a special resolution on the buyback 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 buyback transaction until after six months have elapsed since the most recent issuance of any securities in a public offer.

Pursuant to the Commercial Companies Law, the SCA issued Chairman of the SCA Board of Directors' Decision No. 3/Chairman of 2020 Concerning Approval of Joint Stock Companies Governance Guide in April 2016, which sets out new corporate governance rules and corporate discipline standards for public joint-stock companies (the Guide), which replaced the existing resolutions and regulations. The Guide applies to all listed UAE companies, their board members, managers, chairs and auditors to whom the provisions of the Commercial Companies Law apply. The provisions stipulated in the Guide shall not apply to foreign companies listed on the market. Key features of the Guide include:

- a* the obligation to appoint a secretary on the board of directors, and the majority of board members should be independent and non-executive;
- b* bringing more clarity to the mechanism for disclosure of interests of new board members, by means of the submission of a declaration of interest form upon assuming position, and more clarity to the process for handling conflicts of interest;
- c* the introduction of proper and fit criteria for board members;
- d* the development of a new approach to management through the (optional) adoption of the dual governance structure;
- e* bringing more clarity and detail to risk management procedures through the (optional) formation of a permanent committee in charge of handling risks;
- f* the introduction of provisions giving the board the authority to create a technical committee for the purpose of assisting it in discharging its supervisory responsibilities regarding the role of technology in executing the company's business strategy;
- g* bringing more clarity to governance-related disclosures; and
- h* the introduction of provisions regulating the governance of subsidiary companies and corporate social responsibility.

The recently enacted Chairman of the SCA Board of Directors' Decision No. 8 /Chairman of 2021 Concerning Amending the Joint Stock Companies Governance Guide introduced a new requirement that representation of women shall not be less than one member in the formation of the board of directors. Moreover, the company shall be obligated to disclose this representation in the annual governance report.

The SCA recently issued new rules under Chairman of the SCA Board Decision No. 13/RM of 2020 Concerning Procedures of Dealing with Listed Troubled Joint Stock Companies (the New Rules). One of the main objectives of the New Rules is to provide additional classification criteria for local or foreign public joint-stock companies listed on either the Dubai Financial Market or the Abu Dhabi Securities Exchange to highlight to investors public joint-stock companies that are in financial distress.

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 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 (the 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 the 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 out 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.⁹ Instead, corporate taxes are collected with respect to branches of foreign banks (at the emirate level) and courier companies (at the federal level). Furthermore, 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 sales of alcoholic beverages, hotels, restaurant bills and residential leases).

The UAE Ministry of Finance issued Federal Decree-Law No. 8 of 2017 (the 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

⁹ 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.

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 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.

Originally, a personal insolvency framework was suggested and drafted at the same time as the new Bankruptcy Law was formulated, but the draft personal insolvency law was not promulgated in 2016. However, a personal insolvency law was subsequently adopted as Insolvency Law No. 9 of 2019 (the Personal Insolvency Law) and came into effect on 29 November 2019.

Similar to the new Bankruptcy Law, the Personal Insolvency Law is seen as introducing a debtor-friendly regime. The Personal Insolvency Law remains largely untested and it remains to be seen if, and to what extent, this law will be applied in the coming years.

v Role of exchanges, central counterparties and rating agencies

The SCA is responsible for the regulatory oversight of the ADX and the DFM.¹⁰ In addition to the rules and regulations of the SCA, each exchange has its own rules and regulations.

¹⁰ 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.

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 (the 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 carried out 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 is still at risk until payment is actually received. Every broker is required to submit a bank guarantee of at least 10 million 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

Given the recent amendments to the Commercial Companies Law removing the requirement for companies incorporated in the UAE to have majority UAE ownership, it is anticipated that this will strengthen the UAE's standing as an international investment destination. As a result of the removal of these restrictions, the demand from foreign investors for shares in certain publicly traded companies may increase. Many UAE banks hold shares in publicly traded companies on behalf of clients through custodial arrangements, and some investors use an unregulated individual holding UAE nationality as a proxy to hold shares on the investor's behalf. This may now change due to the easing of the foreign ownership restrictions.

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 but with investors now eligible for up to 100 per cent foreign ownership in onshore companies, it is anticipated to boost investment in the UAE. 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. The introduction of the Economic Substance Regulations is another indication of the UAE's willingness to change its tax rules. Furthermore, lower oil prices and a desire to diversify the economy have changed the landscape. While the UAE has historically been a tax-free haven, the implementation of corporate income tax in the future is a possibility, although the Ministry of Finance says the UAE has no plans to do so.

Although still at a 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. Additionally, the Central Bank has announced it is to issue its own digital currency, as part of its 2023–2026 strategy, which it says 'seeks to position it among the world's top 10 central banks'.¹¹

¹¹ *Arabian Business*, 12 July 2021, 'UAE to issue its own 'Govcoin' digital currency amid the rise of cryptocurrency'.

Appendix 1

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