The International Capital Markets Review

Third Edition

Editor
Jeffrey Golden

Law Business Research

The International Capital Markets Review

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Third Edition

Editor
Jeffrey Golden

Law Business Research Ltd

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EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
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London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 29

UNITED ARAB EMIRATES

Gregory J Mayew[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 of the UAE and is 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 seven emirates retains substantial control over the conduct of governmental affairs within the emirate. With some exceptions, regulation of capital markets is generally a matter of UAE federal law.[2]

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

In contrast, the Dubai International Financial Centre (DIFC) has been established as a financial free zone with its own body of laws and regulations, which are largely separate from the UAE legal system.[3] The DIFC also has its own courts. The DIFC laws

1 Gregory J Mayew is a partner at Afridi & Angell Legal Consultants.

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

3 A second financial free zone, in the emirate of Abu Dhabi, is expected to begin operations in the future. In February of 2013, the creation of a new financial free zone in the emirate of Abu

and rules of court are largely based on English common law and the procedural rules currently in place in England and Wales.

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

The UAE capital markets are young and still developing. There are currently three securities exchanges in the UAE, all of which are less than 13 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 (DMCC) and the Dubai Mercantile Exchange Limited (DME).

Regulation of securities and financial markets in the UAE is a potential source of confusion to investors and financial institutions. Generally speaking, there are two different regulatory schemes. The first is the UAE federal regulatory scheme. The second is the regulatory scheme applicable in the DIFC. With regard to the laws and regulations affecting capital markets, the DIFC is effectively a different jurisdiction altogether, with rules and regulations that differ significantly from the UAE federal regulatory scheme.[4] A detailed discussion of the DIFC scheme is beyond the scope of this chapter, which deals primarily with the UAE federal scheme.

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

In 2000, the Emirates Securities and Commodities Authority (SCA) was created. Until 2009, the SCA generally limited its regulatory oversight to publicly listed UAE companies and the public securities exchanges in the UAE. In recent years, the regulatory

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Dhabi was announced (Federal Decree No. 15 of 2013), although this free zone has not yet become operational.

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

responsibility of the SCA has expanded considerably and the SCA is now the primary regulator of capital markets under the UAE federal scheme.

Financial markets in the UAE are young and still developing. In June of 2013, Morgan Stanley Capital International (MSCI), which maintains the most widely used equity index in the world, upgraded the status of the UAE capital markets from frontier to emerging market status.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

In 2012, the SCA issued Board Resolution No. 37 of 2012 concerning the rules of investment funds, as amended[5] (the Fund Regulations), which became effective on 27 August 2012.

These much anticipated Fund Regulations introduced significant changes to the UAE regulatory scheme, specifically in the following areas:

a primary responsibility for overseeing the licensing, regulation and marketing of investment funds in the UAE was formally transferred from the Central Bank to the SCA;[6]

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 SCA;

c SCA approval is required for the marketing and promotion of foreign funds to investors in the UAE. The Fund Regulations define a foreign fund as 'a mutual fund established outside the UAE under the laws and regulations in force in a foreign country'; and

d with limited exceptions, the marketing of a foreign fund to investors in the UAE requires the appointment of a UAE-licensed local promoter.

The Fund Regulations do not apply to the accumulation of funds for purposes of investment in a joint bank account; concluding group insurance contracts; participation in social security, employee motivation programs, or fund accumulation for the purposes of forming any type of company mentioned in the UAE Commercial Companies Law. They also do not apply to structured or compound products or mutual funds linked with insurance or security contracts or investment portfolios managed by their owners or SCA-licensed companies, or private investment portfolios managed by investment banks and companies.

5 See also SCA Board Resolution No. 13 of 2013 Amending the Regulations for Investment Funds, which amended certain provisions of SCA Board Resolution No. 37 of 2012.

6 However, Article 29 of the Regulations expressly provides for the Central Bank to continue to exercise supervision over the financial position of investment funds established and licensed under the Fund Regulations. The transfer of authority from the Central Bank to the SCA had already occurred but prior to issuing the Fund Regulations, the SCA had not issued any final rules or regulations.

With limited exceptions, no foreign fund may be offered, marketed, advertised or distributed within the UAE prior to obtaining approval of the promotion from SCA. The exceptions pursuant to which a foreign issuer may market mutual funds without SCA approval, are where the fund is marketed to:

a financial portfolios owned by federal or local government agencies; or companies, institutions or entities whose main purpose (or one of their purposes) is to invest in securities for their own account and not on account of their customers;

b corporate entities licensed to practise the activity of investment management provided that the entity is authorised to make and execute any investment decision; and

c UAE-based investors who have approached the fund outside the UAE with regard to an investment in the fund.[7]

As noted above, a foreign entity wishing to promote a foreign fund in the UAE will not be able to do so without appointing a local promoter. The Fund Regulations provide that the local promoter must be a bank or an investment company licensed by the Central Bank or a company licensed for this purpose by the SCA.

Article 38 of the Fund Regulations provides that the units of a foreign fund may be promoted within the UAE in private offerings through the representation or branch office of a foreign company that has already obtained the approval of the fund or its representative to promote the fund, or by an entity licensed by the SCA to promote securities, provided that the promotion is to institutions only and subject to a minimum of 10 million UAE dirhams per subscriber.

The Fund Regulations apply to both private and public placements. A distinction is made however, made between public and private offerings with regard to their methods of promotion and determination of target investors, and the minimum subscription per single investor.

The methods of promotion of foreign fund units approved by the SCA to be promoted within the UAE in a public offering must be made through 'all methods of promotion and for all investors', whereas the methods of promotion of Foreign Fund units approved by the SCA to be promoted within the UAE in a private offering must be confined to 'direct contact with predetermined persons'.

The minimum subscription per single investor in the units of a foreign fund approved by the SCA to be promoted in a private offering shall be the limit set out in the offer document, provided that it is no less than 500,000 UAE dirhams for a foreign fund and 1 million UAE dirhams for a fund established in a free zone outside the UAE.

7 While this reverse solicitation exemption is not included in the Fund Regulations, the SCA released a statement in Arabic on its website explaining that Board Resolution No. 37 of 2012, as amended shall not apply to the transactions involving the sale of units in foreign investment funds to UAE based investors when these investors approach and send enquiries to the concerned fund or its promoters or distributors outside the UAE with the aim of investing in such fund.

There is no restriction on the minimum subscription per investor in the units of a foreign fund approved to be promoted within the UAE in a public offering, as this amount shall be the limit set out in the offer document.

Pursuant to Article 35 of the Fund Regulations, a foreign fund wishing to obtain the approval of SCA to promote its units within the UAE in a public offering must satisfy the following prerequisites: (1) the foreign fund must be established in a foreign country and subject to the control of a supervisory authority similar to the SCA and (2) the Foreign Fund must be licensed to promote public offerings in its home country.

In addition to regulations relating to investment funds, the SCA has been active on a number of other fronts. Over the past year, the SCA has issued a series of regulations governing market making, securities lending and borrowing, short selling and liquidity.[8]

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

a a company established in UAE with at least 51 per cent UAE ownership or the nationality of one of the Gulf Cooperation Council (GCC) states. One of its purposes must be to practise market making; or

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 Authority 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.

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

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.

In March 2013, the SCA amended its regulations regarding disclosure and transparency requirements for listed companies.[9] As amended, the regulations require at least two days advanced disclosure to the SCA and the relevant exchange of the date and times of any meetings of the board of directors in which the board is to discuss resolutions having effect on the price and movement of shares, such as cash distributions, bonus shares, capital increases (or decreases), subdividing the nominal value of shares, purchase by the company of its own shares and quarterly or annual financial statements. All resolutions and financial statements approved by the board of directors in any such meetings must be immediately disclosed to the SCA and the relevant exchange. Trading of shares will be suspended until such disclosure is made. A partial exception exists for banks and other companies that require Central Bank approval before making such disclosures. In such cases, disclosure is not required until the Central Bank's approval has been granted. In addition, listed companies are required to provide the SCA and the relevant exchange with all resolutions passed by a general assembly of shareholders immediately after such resolutions have been passed.

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

ii Developments affecting derivatives, securitisations and other structured products

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

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

iii Cases and dispute settlement

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

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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.

iv Relevant tax and insolvency law

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

Corporate income tax statutes have been enacted in most of the emirates (all of which predate the formation of the UAE in 1971), but they are not implemented.[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). There is no sales tax or VAT in the UAE.

Bankruptcy rules were enacted in the UAE in 1993 pursuant to UAE Federal Law No. 18 of 1993 promulgating the Code of Commercial Practice (the Commercial Code). These rules, set out in Volume V of the Commercial Code, are largely untested in the courts. Instead, insolvency cases are often resolved between debtors and creditors under alternative administrative proceedings or through negotiated settlements.

The economic slowdown that affected the UAE following the global financial crisis highlighted the inadequacy of the existing bankruptcy and insolvency law. While many UAE-based businesses experienced financial duress, the existing laws relating to restructuring and insolvency remain largely untested and a long-awaited modern bankruptcy law has yet to be enacted.

In addition to the Commercial Code, UAE Federal Law No. 8 of 1984 on Commercial Companies, as amended (the Companies Law) contains provisions for the dissolution of a company. The Penal Code of the UAE (contained in Federal Law No. 3 of 1987) also contains criminal sanctions for bankrupts.

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

Existing insolvency law in the UAE is generally recognised as being inadequate. This is perhaps best illustrated by the Dubai World debt crisis in 2009 in which the government of Dubai, in implicit recognition of the inadequacies of existing

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.

insolvency law, created a special law and a special tribunal to deal with debts of one of Dubai's largest companies.[11]

Dubai World is a holding company with a diverse portfolio of investments. Dubai World encountered significant financial difficulties resulting in the promulgation of Decree No. 57 for 2009 (Establishing a Tribunal to decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries). This law provides for the formation of a tribunal that has jurisdiction to, *inter alia*, hear and decide any demand or claim against Dubai World or its subsidiaries. Under the above-mentioned law, any dissolution or liquidation matters relating to Dubai World or its subsidiaries will be dealt with in accordance with such law.

The UAE is expected to promulgate a new bankruptcy law that will repeal the relevant provisions of the Commercial Code in the future, although such a law has been anticipated for several years. The new law is expected to introduce financial reorganisation procedures and a protective composition process. The law is also expected to introduce a personal insolvency regime, including an insolvency procedure for non-traders. The time frame for the realisation of the new law cannot be predicted.

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

The SCA is responsible for the regulatory oversight of the ADX and the DFM.[12] In addition to the rules and regulations of the SCA, each exchange has its own rules and regulations.

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

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

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

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11 Another relevant example is the emirate of Dubai's decision to create a special judicial committee to decide the fate of cancelled real estate projects. Recently, the Ruler of Dubai, issued Decree No. 21 of 2013 concerning the formation of a special judicial committee for the liquidation of cancelled real estate projects in the emirate of Dubai and the settlement of relevant dues.

12 The SCA does not regulate NASDAQ Dubai, which is regulated by the Dubai Financial Services Authority (DFSA) and is part of the separate regulatory regime applicable in the Dubai International Financial Centre (DIFC). As noted above, the regulatory scheme applicable in the DIFC is beyond the scope of this chapter.

All trading is done through licensed brokers. An investor must have at least one Trading Account with a licensed broker and can have accounts with multiple brokers. To open an 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, an investor must transfer the securities from his Custody Account to his Trading Account with a broker. Upon receiving a sell order, the broker will record the order into the electronic trading system. The system matches buy and sell orders of a particular stock based on the price and quantity requirements. The cash settlement is done among brokers through the designated settlement bank. Once the trade is executed, the investor will be notified of the deal confirmation and the transfer of share ownership occurs electronically by debits and credits to the Custody Accounts of the seller and buyer.

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

While each of the ADX and the DFM operates a CSD, neither acts as a 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.

vi Other strategic considerations

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

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

III OUTLOOK AND CONCLUSIONS

The markets in the UAE were adversely affected by the global financial crisis but have since rebounded, aided in part by the resumption of many stalled projects and the perceived recovery of the real estate market. One result of the financial crisis appears to have been the recognition by the authorities of the need for increased regulation that more closely resembles international norms. The SCA has become increasingly active on this front in recent years and the trend is likely to continue. This may include, by way of example, further regulations designed to increase transparency and improve financial disclosure and increased attention to issues such as corporate governance and investor protection. Regulations regarding the responsibilities and obligations of investment managers are also expected.

Two significant, anticipated legislative developments are a new companies law and a new bankruptcy law, each of which could have an effect on local capital markets. Some observers expect a new companies law before the end of 2013; however, despite similar predictions in the past, a law has failed to materialise. The timing of either piece of legislation cannot be predicted nor can enactment be considered inevitable.

Some experts believe that the UAE currently has too many exchanges in relation to the number of listed companies and the volume of traded shares. One proposed solution is to merge the ADX and the DFM. Media reports suggest a merger is under consideration, but there has been no official confirmation of these reports.

Appendix 1

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