The Private Equity Review

Editor

Kirk August Radke

Law Business Research

The Private Equity Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Private Equity Review, 1st edition
(published in April 2012 – editor Kirk August Radke).

For further information please email
Adam.Sargent@lbresearch.com

The Private Equity Review

Editor

Kirk August Radke

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2012 Law Business Research Ltd
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2012, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-31-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

A&L GOODBODY

CAREY Y CÍA, LTDA

DARROIS VILLEY MAILLOT BROCHIER

ENS (EDWARD NATHAN SONNENBERGS INC.)

GIDE LOYRETTE NOUEL AARPI

HENGELER MUELLER

HORTEN

KIM & CHANG

KIRKLAND & ELLIS

KIRKLAND & ELLIS INTERNATIONAL LLP

KIRKLAND & ELLIS LLP

LABRUNA MAZZIOTTI SEGNI – STUDIO LEGALE

LENZ & STAEHELIN

LEXYGEN

LOYENS & LOEFF, AVOCATS À LA COUR

LOYENS & LOEFF NV

MACFARLANES LLP

MAPLES AND CALDER

NISHIMURA & ASAHI

PINHEIRO NETO ADVOGADOS

PLMJ – LAW FIRM

ROPES & GRAY LLP

STIKEMAN ELLIOTT LLP

URÍA MENÉNDEZ

WONGPARTNERSHIP LLP

CONTENTS

Editor's Preface vii
Kirk August Radke

PART I **FUNDRAISING 1–110**

Chapter 1 BRAZIL 3
Enrico Bentivegna, Jorge NF Lopes Jr and Vitor Fernandes de Araujo

Chapter 2 CAYMAN ISLANDS 14
Nicholas Butcher and Iain McMurdo

Chapter 3 FRANCE 23
Stéphane Puel and Julien Vandenbussche

Chapter 4 JAPAN 38
Kei Ito, Taku Ishizu and Akihiro Shimoda

Chapter 5 KOREA... 48
Alex KM Yang, Young Man Huh, Hong Moo Jun and Sae Uk Kim

Chapter 6 LUXEMBOURG... 56
Marc Meyers

Chapter 7 NETHERLANDS 65
Mark van Dam

Chapter 8 UNITED KINGDOM.. 75
Mark Mifsud

Chapter 9 UNITED STATES 87
John Ayer, Susan Eisenberg and Raj Marphatia

PART II **INVESTING** **111–375**

Chapter 1 BELGIUM.. 113
Stefaan Deckmyn and Wim Vande Velde

Chapter 2 BRAZIL.. 126
Álvaro Silas Uliani Martins dos Santos and Felipe Tavares Boechem

Chapter 3 CANADA.. 137
Brian M Pukier and Sean Vanderpol

Chapter 4 CHILE.. 147
Andrés C Mena, Salvador Valdés and Francisco Guzmán

Chapter 5 CHINA.. 158
Pierre-Luc Arsenault, Jesse Sheley and David Patrick Eich

Chapter 6 DENMARK.. 177
Hans Christian Pape, Lise Lotte Hjerrild and Christel Worre-Jensen

Chapter 7 FRANCE.. 187
Olivier Diaz, Martin Lebeuf, Yann Grolleaud, Hugo Diener and Bertrand de Saint Quentin

Chapter 8 GERMANY.. 204
Hans-Jörg Ziegenhain and Alexander G Rang

Chapter 9 INDIA.. 215
Vijay Sambamurthi

Chapter 10 IRELAND.. 228
David Widger

Chapter 11 ITALY.. 242
Fabio Labruna

Chapter 12 JAPAN.. 251
Kei Ito, Taku Ishizu and Tomokazu Hayashi

Chapter 13 KOREA... 261
Jong Koo Park, Hae Kyung Sung, Kyle Byoungwook Park and Jaehee Lauren Choi

Chapter 14 NETHERLANDS 271
Bas Vletter and Lucas Cammelbeeck

Chapter 15 PORTUGAL 281
Tomás Pessanha and Manuel Liberal Jerónimo

Chapter 16 SINGAPORE 294
Christy Lim, Quak Fi Ling and Dawn Law

Chapter 17 SOUTH AFRICA.. 306
Mohamed Sajid Darsot and Tanya Lok

Chapter 18 SPAIN.. 321
Christian Hoedl and Carlos Daroca

Chapter 19 SWITZERLAND 332
David Ledermann, Olivier Stahler and Nicolas Béguin

Chapter 20 UNITED ARAB EMIRATES 342
Amjad Ali Khan and Omar H Ayad

Chapter 21 UNITED KINGDOM.. 347
Stephen Drewitt

Chapter 22 UNITED STATES 362
Norbert B Knapke II

Appendix 1 ABOUT THE AUTHORS 376

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... 397

EDITOR'S PREFACE

This inaugural edition of *The Private Equity Review* contains the views and observations of leading private equity practitioners in 24 jurisdictions, spanning every region of the world. This worldwide survey reflects private equity's emerging status as a global industry. Private equity is not limited to the United States and western Europe; rather, it is a significant part of the financial landscape both in developed countries and emerging markets alike. Today, there are more than a dozen private equity houses that have offices around the world, with investment mandates matching such global capabilities. In addition to these global players, each region has numerous indigenous private equity sponsors.

As these sponsors seek investment opportunities in every region of the world, they are turning to practitioners in each of these regions and asking two key commercial questions: 'how do I get my private equity deals done here?', and the corollary question, 'how do I raise private equity money here?' This review provides many of the answers to these questions.

Another recent global development that this review addresses is the different regulatory schemes facing the private equity industry. Policymakers around the world have recognised the importance of private equity in today's financial marketplace. Such recognition, however, has not led to a universal approach to regulating the industry; rather, policymakers have adopted many different schemes for the industry. The following chapters help provide a description of these various regulatory regimes.

I wish to thank all of the contributors for their support of this inaugural volume of *The Private Equity Review*. I appreciate that they have taken time from their practices to prepare these insightful and informative chapters.

Kirk August Radke
Kirkland & Ellis LLP
New York
April 2012

Chapter 20

UNITED ARAB EMIRATES

Amjad Ali Khan and Omar H Ayad [1]

I OVERVIEW

A private equity fund may be set up by an investment company or bank regulated by the Central Bank of the United Arab Emirates. Funds in the UAE (outside the Dubai International Financial Centre ('the DIFC')) are generally set up as general partnerships of the sponsors as the UAE Commercial Companies Law does not contemplate legal vehicles with multiple classes of shares.

i Deal activity

The global economic downturn has led to a severe decline in the level of private equity activity in the UAE. In the past few years investors have attempted to renegotiate or cancel commitments, citing the economic climate and inability to obtain credit commitments as *force majeure* events. In several transactions, sellers have agreed to negotiate payment terms to close transactions.

One other consequence of the global economic downturn is that fundraising by private equity funds is down; investors are typically more cautious in the current environment. This explains the reduction in the number of transactions. The economic climate has also caused investors to undertake more thorough due diligence of target companies. Finally, transactions are generally taking more time to complete.

There are fewer exits from investments. Rather, where possible, private equity funds are attempting to hold their investment with a view to obtaining a better return in the long term. Exits that are taking place usually experience poor returns due to the high valuations that were agreed before the economic downturn. There have been some exits on a distress basis.

1 Amjad Ali Khan is managing partner and Omar H Ayad is an associate at Afridi & Angell.

ii Operation of the market

Generally, the sales process includes distribution of a teaser to potential buyers and the request for a general interest statement from potential purchasers. Following this, non-disclosure agreements are executed to provide access to further information. After detailed due diligence a final bid is invited, which is normally followed by one-on-one negotiations and selection of a final buyer.

Private equity firms in the UAE continue to incentivise management through generous bonuses upon completion and exits and with participation in the carried interest.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

A private equity fund may secure the right to appoint directors to the board of its portfolio company. When it is a minority, the private equity fund can be granted negative control over fundamental decisions relating to the company, either at the board or shareholder level, or both.

One of the main prerequisites for operating in the United Arab Emirates is UAE national majority ownership in all corporate entities incorporated outside the various specialised free zones established in the UAE. For a sponsor domiciled outside the UAE, a limited liability company ('LLC') is considered the most suitable legal form due to the its flexible management structure, availability of minority shareholder protections and ease of formation. A UAE national, or a company 100 per cent owned by UAE nationals, must own 51 per cent of the LLC's equity. There are, however, mechanisms that can be implemented to limit the UAE national's right to profits and management control.

In the UAE, a company may not issue different classes of shares. This restricts the ability of private equity funds to create suitable structures.

Within the Emirate of Dubai the DIFC has a legal, regulatory and court system that is completely separate and very different from the systems in the UAE. The DIFC is a common-law environment, with its regulatory framework modelled in part upon the United Kingdom's Financial Services Authority. In the DIFC there is no requirement for majority UAE equity ownership. Also, in the DIFC there are a variety of corporate structures familiar to the international investment community such as limited liability companies, companies limited by shares, limited liability partnerships, protected cell companies and investment companies. If the sponsor intends to operate in or from the DIFC, it will require a Dubai Financial Services Authority ('DFSA') authorisation (see Section IV, *infra*). For the purposes of investing in the UAE (outside the DIFC) a company incorporated in the DIFC is viewed as a foreign non-UAE entity.

ii Fiduciary duties and liabilities

There are no fiduciary duties *per se* that the private equity fund owes to other shareholders. It will be liable for its acts, such as, for instance, if it issues a guarantee.

As a director, a private equity fund's representative on the portfolio company's board is liable to the portfolio company, shareholders and third parties for all acts of fraud, any abuse of power, all violations of the law and by-laws and for all errors of

management. Breaches of the applicable UAE law relevant to directors include making dividend distributions in contravention of the law or the company's memorandum and articles, intentionally falsifying the accounts of a company and divulging confidential information obtained through a director's position with the company or utilising such confidential information for a director's own benefit or for the benefit of others.

Furthermore, a director may only act within the authority assigned to him or her by the company and shall be liable to the company for any losses incurred by the company by reason of exceeding such authority. In the case of the company's bankruptcy, there are additional sanctions prescribed for a director's malfeasance.

A director must have the prior consent of shareholders at a general assembly (comprising at least 50 per cent of the shareholders of the company) before he or she may participate in any business that may be in competition with the business of the company, whether on his or her own account or on account of third parties. A director must also disclose any conflicts of interest that he or she may have in relation to any transaction being considered by the board. Such a conflict of interest prohibits the conflicted director from voting in connection with the proposed transaction.

Further, there are general obligations under UAE law in relation to privacy and the divulging of trade secrets as well as the obligation of confidentiality and the duty to avoid causing harm.

There is no liability particular to the UAE that a fund would face.

In the UAE, an exit usually takes the form of a secondary buyout. If a put option is available a private equity fund will invoke it in the event of the occurrence of a trigger event to exit the investment. The fund will often have a put option if certain financial thresholds concerning the company's revenue or net profits are not met on certain milestones.

Deferred payment clauses are also possible. This mechanism is used to tie the purchase price to performance.

III YEAR IN REVIEW

Recent notable UAE private equity deals and reports include the following.

Gulf Capital, one of the largest and most active private equity firms in the Middle East, acquired an 80 per cent stake (valued at approximately $27 million) in an Abu Dhabi regional consultancy business. This marks Gulf Capital's second acquisition of 2012, following its recent purchase of an 82.7 per cent stake in power generation company Sakr Energy Solutions. It has also been reported that Gulf Capital is in the process of selling an oil and gas barge and vessel unit, which is expected to attract offers in the range of $500 million. In July 2011, Gulf Capital sold portfolio company Maritime Industrial Services to regional trade buyer Lamprell for $336 million.

Centurion Investment, an Abu Dhabi-based firm, announced that it purchased a 40 per cent stake in UAE Exchange, a regional foreign exchange firm, in a sale reportedly worth $2 billion.

In 2011, Dubai International Capital sold its 45 per cent stake in KEF Holdings, a valve and casing manufacturer based in the UAE. Dubai International Capital acquired the stake in 2008 for $126 million and sold it for $178 million.

IV REGULATORY DEVELOPMENTS

There is no regulation of private equity transactions in sectors where there is no specialised regulation.

The principal financial services regulator in the UAE is the Central Bank of the United Arab Emirates. The UAE Securities and Commodities Authority ('ESCA') has oversight functions in relation to listed securities. ESCA's role with regard to fund regulation is expanding.

The DFSA is the regulator of all financial services conducted in and from the DIFC.

A UAE Central Bank or ESCA licence or approval, dependent on the activities conducted, is required prior to establishing or marketing a private equity fund in the UAE. A private equity fund can be set up in the UAE by either a licensed investment company or a bank licensed to operate in the UAE. Establishing or managing investment funds requires special approval from the Central Bank on a case-by-case basis.

To establish and manage a private equity fund within the DIFC, a DFSA authorisation is required. To obtain this authorisation, the applicant must demonstrate to the DFSA that there are adequate systems and controls to manage the type of fund proposed to be established and that the individuals performing certain functions within the company (for example, the board members and senior management) meet the relevant suitability and integrity criteria. Once an authorisation has been granted, the DFSA supervises the fund manager's activities on an ongoing basis.

In the DIFC, depending on the type of fund established, there is a requirement to notify the DFSA for initial and subsequent offers of units in the given fund.

For a fund established or domiciled in the DIFC, a special resolution (a 75 per cent majority) is required to approve any fundamental change. The DFSA describes a 'fundamental change' as a change or event that (1) changes the purpose or nature of the fund, (2) may materially prejudice a shareholder in the fund, (3) alters the risk profile of the fund or (4) introduces any new type of payment out of the property of the fund.

The DFSA also requires that a fund manager provide prior written notice to fund shareholders in respect of any significant change to a fund. A 'significant change' falls below the threshold of a 'fundamental change', but is one that still (1) affects a shareholder's ability to exercise rights in relation to his or her investment, (2) would reasonably be expected to cause the shareholder to reconsider his or her participation in the fund, (3) results in any increased payments out of the property of the fund to the fund manager, the trustee or any other director or associate of either or (4) materially increases other types of payment out of the property of the fund.

V OUTLOOK

ESCA recently posted a draft Investment Fund Regulation ('the Proposed Regulation') on its website, which stipulates the requirements for the promotion of foreign investment funds in the UAE. Some of these requirements are fairly onerous and compliance therewith could prove difficult in many cases.

The Proposed Regulation requires that foreign investment funds be established and licensed in a foreign state and be subject to the supervision of an authority similar

to ESCA. Therefore, private equity funds domiciled in such places as the British Virgin Islands or Cayman would be precluded from marketing to investors in the UAE.

The Proposed Regulation also requires that all foreign investment funds retain an ESCA-licensed local promoter and distributor to conduct marketing and distribution activities in the UAE. While such requirements are arguably helpful in protecting retail investors, their use in relation to the placement of fund interests to institutional and other sophisticated investors capable of making independent investment decisions and possessing appropriate risk tolerance is questionable.

The Proposed Regulation requires that foreign investment funds obtain prior approval of the UAE Central Bank and ESCA. Firms based in the DIFC would be subject to assessment audits by both the DFSA and ESCA and would need to commit prudential capital in the DFSA and UAE Central Bank.

The reporting requirements set out in the Proposed Regulation require funds to make available certain pricing data that would be difficult for foreign funds holding illiquid investments to satisfy. It appears to be aimed at funds offered to retail investors, where the fund is investing in publicly traded securities that can be easily valued. However, private equity funds with illiquid holdings are often unable to provide daily net asset value or pricing figures. The Proposed Regulation also requires that each fund provide quarterly audited reports to its UAE investors within 30 days of the end of each quarter and annual audited reports to ESCA within three months of the end of each fiscal year (together with any other reports or data that may be required by ESCA).

Appendix 1

ABOUT THE AUTHORS

AMJAD ALI KHAN

Afridi & Angell

Amjad Ali Khan is a co-founder and the managing partner of Afridi & Angell. He advises foreign and local private equity firms, banks and leading multi-nationals in banking and financial transactions as well as corporate acquisitions in the UAE and other GCC states.

Mr Khan recently advised Citibank NA, as local counsel, on the monetisation of Salik receivables (transaction value of $800 million). He also advised United Bank Limited on a $25 million syndicated quasi-project finance Ijara transaction to finance the expansion of a power plant at Hadramout in Yemen (among the first such shariah-compliant financing transactions in Yemen). Mr Khan also advised the owner on the sale of the Ritz Carlton hotel in the DIFC (transaction value of 1 billion dirhams).

Mr Khan regularly contributes to leading publications. Recent contributions include: *The Banking Regulation Review 2011* (co-author of UAE chapter); *New Penalties for Financial Fraud*, IFLR, March 2010 (co-author); and PLC *Cross-border Handbook: Finance*, 2010

Mr Khan obtained an LLM from Boalt Hall School of Law, University of California, Berkeley and he obtained a LLB from Punjab University Law College in Lahore. He is admitted to practise in New York in and in the Punjab region.

OMAR HAFEZ AYAD

Afridi & Angell

Omar Hafez Ayad is an associate at Afridi & Angell, practising corporate, commercial and regulatory law. Mr Ayad has advised clients on the establishment and marketing of foreign investment funds in the UAE, DIFC and the greater Middle East region. Prior to joining Afridi & Angell, Mr Ayad was associate counsel of CHF International Inc in Washington, DC, where his practice focused primarily on corporate and regulatory matters. Prior to that, Mr Ayad was an asssociate in the litigation department of Pillsbury

Winthrop Shaw Pittman LLP in Washington, DC, where he practised general litigation. Mr Ayad holds a JD from Vanderbilt University Law School and a BA in political science from the University of North Carolina – Chapel Hill.

AFRIDI & ANGELL

Emirates Towers Offices, Level 35
PO Box 9371
Dubai
United Arab Emirates
Tel: +971 4 330 3900
Fax: +971 4 330 3800
akhan@afridi-angell.com
oayad@afridi-angell.com
www.afridi-angell.com