# Private Equity

Contributing editor
Bill Curbow







# **Private Equity 2017**

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## **Preface**

### **Private Equity 2017**

Thirteenth edition

**Getting the Deal Through** is delighted to publish the thirteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Saudi Arabia and the United Arab Emirates. The report is divided into two sections: the first deals with fund formation in 21 jurisdictions and the second deals with transactions in 25 jurisdictions.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.



London February 2017

## **United Arab Emirates**

#### James Stull and Macky O'Sullivan

King & Spalding LLP

#### Formation and terms operation

#### Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

Financial services are generally provided in the UAE from three hubs, namely onshore in the UAE (ie, outside of a designated free zone), the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), each of which has its own rules and regulations. The DIFC and the recently created ADGM are economic free zones within the UAE that have been created to encourage foreign investment by offering foreign businesses attractive concessions and a number of investment incentives, including a zero per cent tax rate and the ability to own a 100 per cent subsidiary (as foreign ownership restrictions apply to companies established outside of the designated free zones).

There are few private equity investment funds that are domiciled onshore in the UAE. This is primarily because of an onerous licensing process (for both the manager and the fund) and the costs (relative to the DIFC and ADGM options). Onshore private equity funds are regulated by the UAE Securities and Commodities Authority (SCA) and can only be established by an SCA regulated manager. Under SCA regulations, onshore funds take a contractual form (ie, a contract between the investors and the manager) although the SCA regulations state that funds shall have a corporate personality and the UAE Companies Regulations provide that investment funds shall have an 'independent personality, legal entity and financial ability'. As such investors in onshore funds generally enjoy limited liability and are liable to the fund only up to the amount of their subscriptions or contributions.

Private equity funds in the DIFC and the ADGM are typically structured as investment companies and limited partnerships and have separate legal personality under law. Private equity funds in the DIFC and the ADGM are generally established as either 'exempt funds' or 'qualified investor funds'. Both classifications require that the fund be offered to professional clients only and such offering be made by private placement only. While exempt funds must have a minimum subscription amount per investor of US\$50,000, qualified investor funds require a minimum subscription amount per investor of US\$500,000. Exempt funds established in the DIFC may only be offered to a maximum of 100 investors, while qualified investor funds established in the DIFC may only be offered to a maximum of 50 investors. The qualified investor fund regime was introduced to provide a lower cost and less regulated alternative to the exempt fund. Fund managers of qualified investor funds are exempt from many of the detailed requirements applicable to exempt funds.

#### 2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

Pursuant to the UAE Regulation of Investment Funds, companies who wish to establish a private equity fund onshore in the UAE must apply to the SCA for authorisation. The SCA will issue its decision on

the submitted application within a period of no more than 30 business days from the date of submission of the complete application. The SCA may restrict the approval decision by any controls or conditions it deems necessary.

The following fees are payable to the SCA in order to establish an investment fund onshore in the UAE:

- fee for examining the application for incorporation: 5,000 UAE dirhams;
- the license fee: 10,000 UAE dirhams; and
- the annual renewal fee: 5,000 UAE dirhams.

The capital of the company that seeks to establish the fund onshore in the UAE must be at least 10 million UAE dirhams. Banks, financial investment companies, branches of foreign banks and any entity licensed by the UAE Central Bank shall be exempt from the capital condition provided that such entities submit an unconditional bank guarantee in favour of the SCA in the amount of 10 million UAE dirhams issued by a bank operating in the UAE. SCA may cash such guarantee or any part thereof at any time to cover any financial liabilities that the SCA may decide in relation to any investors.

It takes approximately two to three weeks to incorporate a fund vehicle in the DIFC. There is also a two-business day (in the case of a qualified investor fund) or a five-business day (in the case of an exempt fund) notification process with the Dubai Financial Services Authority (DFSA). The notification process may take longer if the DFSA has any queries or raises any objections. There is no application fee payable to the DFSA. However, there is an annual fee of US\$4,000 payable to the DFSA. An initial registration fee of US\$8,000 is payable to the DIFC Authority along with an annual fee of US\$12,000 (although we understand that the DIFC Authority is considering reducing these amounts).

The ADGM is a relatively new jurisdiction and there are currently no private equity funds established in the ADGM, therefore timing for such an entity cannot be provided with any level of certainty. The registration fee for establishment of a fund entity vehicle in the ADGM is US\$1,500, and US\$2,250 where the required documents are delivered in paper form or US\$1,875 where the required documents are delivered in paper form other than for same day registration.

#### 3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

Funds domiciled onshore in the UAE must appoint an independent custodian to hold the fund's assets and may not change or remove the custodian without the approval of the SCA. An independent administrator is not required and most managers perform this function. Further, the managers generally maintain books and records and perform the corporate secretarial functions.

Private equity funds established in the DIFC as exempt funds are not required to entrust the fund property to an independent custodian, instead it must appoint an investment committee to the fund and make certain disclosures in its prospectus relating to the method of holding the fund's assets. The investment committee must consist of at least three experts who are independent of the fund manager

to sit on an investment committee of the fund. The aforementioned does not apply to qualified investor funds established in the DIFC. Additionally, where the DIFC fund is managed by an 'external fund manager' (a fund manager from a recognised jurisdiction (the list of which can be accessed at dfsa.complinet.com/en/display/display\_main. html?rbid=1547&element\_id=8287) other than the DIFC permitted by the DFSA to establish a domestic fund without having to obtain a DFSA licence), such external fund manager must appoint a DFSA-licensed fund administrator or trustee in relation to the fund.

The fund manager of a fund established in the ADGM is not required to appoint an independent custodian for the fund where there are arrangements in place that enable the fund manager to have unfettered control of the fund property and such arrangements are to the satisfaction of the ADGM Financial Services Regulatory Authority (FSRA) legally effective in the ADGM and the jurisdiction where the real property is located. The fund manager and service providers engaged by the fund manager in relation to the fund must maintain records to show and explain transactions in relation to each activity or function performed in relation to the fund and these records, if requested by the FSRA, should be capable of being produced within three days.

In the ADGM, the fund manager of a qualified investor fund that is not an investment trust must ensure that the legal title to fund property is registered with a custodian (which includes a custodian authorised by the FSRA or a financial services regulator in a jurisdiction recognised by the FSRA to provide custody services – these include Australia, Canada, EU member states, the United Kingdom, Jersey, Singapore and the United States).

#### 4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

There is no public register of private equity investment funds domiciled onshore in the UAE.

Investment funds established in the DIFC are listed on the public register of the DFSA, which can be accessed at dfsa.ae/Public-Register/Funds

Investment funds established in the ADGM are listed on the public register of the FSRA which can be accessed at www.adgm. com/doing-business/financial-services-regulatory-authority/fsra-public-register/.

Investor information is not publicly available in the UAE, DIFC or the ADGM.

#### 5 Limited liability for third-party investors

In what circumstances would the limited liability of thirdparty investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

The SCA funds regulations are silent as to the liability of investors. However, the regulations do provide that funds shall have a 'corporate personality'. Shareholders in corporate vehicles in the UAE and the free zones generally enjoy limited liability except for certain circumstances where the corporate veil can be pierced, such as instances of fraud.

#### 6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

An SCA-regulated manager must manage the fund in a 'manner that preserves the rights of the fund and its holders'. The manager may not obtain any 'special gains or privileges' from the fund other than the agreed disclosed fees. Finally, the manager must 'exert due care' in the performance of all tasks.

In the DIFC and the ADGM, the fund manager must, among other things, manage the fund including the fund property in accordance with the fund's constitution and its most recent prospectus; perform the

functions conferred on it by the fund's constitution and applicable laws; and comply with any conditions or restrictions imposed by the DFSA or the FSRA (as applicable) including those on its licence or in respect of the fund. In exercising its powers and carrying out its duties, a fund manager is required, among other things, to do the following:

- act honestly;
- exercise the degree of care and diligence that a reasonable person would exercise if he or she were in the fund manager's position;
- act in the best interests of the unitholders and, if there is a conflict between the unitholders' interests and its own interests, give priority to the unitholders' interests;
- treat the unitholders who hold interests of the same class equally and unitholders who hold interests of different classes fairly;
- not improperly make use of information acquired through being the fund manager in order to gain an advantage for itself or another person; or
- not cause detriment to the unitholders in the fund.

These duties can be expanded in the fund's constitutional documents. However, the relevant statutory duties cannot be reduced or removed.

#### 7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

There is no definition of gross negligence applicable to the management of a private equity fund. However, generally under UAE law, contracting parties cannot exclude liability in situations involving gross negligence. Under DIFC and ADGM laws, which are based on common law, there is no separate concept of gross negligence and such term generally has a specific meaning set forth in the fund's constitutional documents.

#### 8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The funds regulations in the UAE do not contemplate redomiciliation. The regulations do contemplate mergers of foreign funds and locally domiciled funds (the resulting fund being either a local fund or a foreign fund). Such process requires approval from the SCA after providing investors in the UAE fund a grace period to redeem their units. SCA shall provide its approval (or rejection) of the proposed merger within 30 days from the date application.

Redomiciling in DIFC and ADGM is possible (particularly from other jurisdictions based on English law) and is a process overseen by the DFSA and the DIFC Authority. There have been, however, few fund vehicles that have redomiciled in the DIFC and the ADGM to date.

#### 9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

SCA regulations are silent as to the consequences if a fund sponsor is deemed bankrupt or insolvent, which is not surprising as the first bankruptcy laws in the UAE only became effective in December 2016 and do not contemplate or address funds. As such, there are no automatic triggers unless the fund documents address such events (which they generally do not). However, a manager can be removed or replaced under the SCA fund regulations with the approval of 75 per cent of the fund's unitholders after obtaining SCA approval.

Under the DIFC Collective Investment Law, the DFSA, a unitholder or a trustee of a DIFC fund may make an application to a court for the removal of the fund manager where the fund manager no longer meets the requirements of the DIFC Collective Investment Law and the Collective Investment Rules (eg, because of bankruptcy or insolvency) or where the fund manager engages, or has engaged in, any activities that may constitute misconduct, default or breach of any duty of the fund manager. The ADGM Funds Rules do not provide automatic triggers unless the fund documents address such events.

#### Regulation, licensing and registration

#### 10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

Primary responsibility for overseeing the licensing, regulation and marketing of investment management was transferred from the Central Bank to the SCA with the SCA confirming the implementation in the UAE of a 'twin peaks' model of financial services regulation and supervision. Under this model, the Central Bank remains responsible for systemic stability, prudential oversight and monetary policy, while the SCA is responsible for conduct of business matters (including consumer protection and financial markets oversight). Any firm (whether based inside or outside the UAE, including free zones in the UAE) that intends to conduct investment management activities in the UAE outside of a free zone must obtain a licence from the SCA prior to conducting such activities.

Pursuant to Board Resolution No. 37 of 2012 on the Regulation of Investment Funds (as amended) (the Regulation of Investment Funds), the SCA shall take all necessary actions to protect investors, including in particular, supervision, oversight and inspection of funds with respect to trading made by the funds, redemption of units and relation between brokerage companies and all concerned parties. The board of directors of the fund, the investment manager and all other concerned parties must immediately respond to all data and periodical reports requested by the SCA that enable it to determine the real financial position of the fund and ensure that the officers managing the fund comply with the provisions of relevant laws.

In the DIFC and the ADGM, the DFSA and the FSRA respectively have regulatory authority over private equity funds and their managers in the said jurisdictions. Fund managers are required to make accounts, records demonstrating compliance with the relevant laws and regulations, and delegation and outsourcing agreements available to the DFSA and the FSRA for inspection.

#### 11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

All onshore private equity funds must be registered with the SCA as a 'private mutual fund'. This registration must be renewed on an annual basis.

Private equity funds in the DIFC and the ADGM must be regulated by the DFSA and the FSRA (as applicable) as an exempt fund or qualified investor fund (as described above). Most private equity funds are established as either an exempt fund or qualified investor fund. In the DIFC, if the fund is an exempt fund, it must receive an additional annotation on its licence that it is a private equity fund (meaning it satisfies the following criteria: it invests in unlisted companies, by means of shares, convertible debt or other instruments carrying equity participation rights or reward; or it participates in management buyouts or buyins).

Private equity funds in the ADGM must be regulated by the FSRA as an exempt fund or qualified investor fund.

#### 12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

There are no requirements for managers or any of a fund's officers, directors or control persons to be registered as investment advisers in the UAE or the free zones.

#### 13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

#### Onshore UAE

The manager of an onshore fund must be licensed with the SCA as an investment manager and must obtain a licence from the SCA to establish the fund, such licence being renewable on an annual basis. A manager is required to have the following positions, each of which must be registered:

- · chief executive officer;
- · investment manager;
- · financial analyst;
- · compliance officer;
- · anti-money laundering officer; and
- risk management officer.

The individuals filling these positions must satisfy 'fit and proper' criteria relating to their financial capability, competence, honesty and integrity and compliance with laws.

The following conditions must be satisfied by any company that wishes to establish an onshore fund in the UAE:

- the company must be a shareholding company incorporated in accordance with the provisions of the UAE Commercial Companies Law or a branch of foreign company licensed by the concerned authorities;
- the capital of the company or the foreign branch must be at least 10 million dirhams. Banks, financial investment companies, branches of foreign banks and any entity licensed by the Central Bank shall be exempted from the capital condition provided that such entities submit an unconditional bank guarantee in favour of the SCA in the amount of 10 million dirhams issued by a bank operating in the UAE. The SCA may cash such guarantee or any part thereof at any time to cover any financial liabilities that the SCA may decide to perform towards any investors;
- the approved activity of the company under its articles of association must be to set up mutual funds. Banks, financial investment companies, branches of foreign banks and any entity licensed by the Central Bank shall be exempted. Such company may practise activities related to mutual funds according to the rules prescribed by the SCA in this regard;
- the company must invest in each local mutual fund it establishes by at least 3 per cent of the fund's capital. The company's investment together with its subsidiaries may not exceed 49 per cent of the capital of the fund established by it unless the fund is closed-ended and does not offer or allow the trading of its units by the public;
- the company must have the capital adequacy required to practise its activity and enable it to perform its liabilities according to the criteria prescribed by the SCA in this regard; and
- any other requirements, conditions or controls set by the SCA must be observed.

#### DIFC

A manager in the DIFC must be regulated by the DFSA with a 'category 3C' licence, which allows for management of collective investment funds. There are four positions that are mandatory and must be registered with the DFSA, namely the following:

- · the senior executive officer;
- · the finance director;
- · the money laundering reporting officer; and
- the compliance officer.

The minimum capital requirement in relation to a fund manager set up in DIFC is the higher of either the base capital requirement of US\$500,000 or the expenditure-based capital requirement equal to 13/52 multiplied by the annual audited expenditure.

For new entities, the annual audited expenditure is based on the forecast expenditure as reflected in the budget for the first 12 months. The fund manager must at all times maintain an amount that exceeds its expenditure-based capital requirement in the form of liquid assets.

Under the applicable requirements, a fund manager coming from a reputable jurisdiction may establish and manage a DIFC fund without having to obtain a DFSA licence provided it satisfies the following criteria:

- it is a body corporate;
- it manages the DIFC fund from a place of business that is in a jurisdiction either included in the DFSA's recognised jurisdictions list or assessed by the DFSA as providing an adequate level of regulation;
- it subjects itself to the DIFC laws and courts; and
- it appoints a DFSA licensed fund administrator or trustee, who will
  be required to undertake certain functions (ie, acting as the local
  agent of the external fund manager to receive process and deal with
  the DFSA for regulatory processes), and also to undertake certain
  investor relation functions relating to the fund (such as maintaining
  the unitholder register and making the fund's prospectus available
  to investors in the DIFC). A fund manager that satisfies the aforementioned requirements is an external fund manager.

#### ADGM

A fund manager in the ADGM must be regulated by the FSRA with a 'category 3C' licence in order to carry out the financial service of managing a collective investment fund. The fund manager would be required to appoint the following:

- a senior executive officer responsible for day-to-day management;
- · a finance officer;
- a compliance officer;
- a senior manager (the FSRA would expect the fund manager to appoint at least one individual other than the senior executive officer to carry out senior manager functions in relation to the fund such as managing operational risk and other internal controls); and
- · a money laundering reporting officer.

The minimum capital requirement in relation to a fund manager set up in DIFC is the higher of either the base capital requirement of US\$250,000 or the expenditure-based capital requirement equal to 13/52 multiplied by the annual audited expenditure.

#### 14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are no restrictions in the UAE (or the economic free zones) that restrict or require disclosure of political contributions.

#### 15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are no restrictions in the UAE (or the economic free zones) that restrict or require disclosure of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. The offering of private equity funds to public pension plans and governmental entities is generally exempt from registration with the SCA.

#### 16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

Banks in the UAE are subject to liquidity regulations issued by the Central Bank in 2012, which ensure that banks are holding sufficient liquid assets to withstand substantial liquidity stress. The liquidity regulations do not restrict investments in private equity funds, but limit the amount of illiquid assets that can be owned by banks. Banks in the UAE are not restricted from sponsoring private equity funds.

#### **Taxation**

#### 17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Historically, the UAE has been a tax-free jurisdiction. However, in 2015, in an effort to bolster state revenues, the UAE enacted regulations introducing a value added tax (VAT) that would become effective in January 2018. This has been perceived as a major shift in policy in the UAE, which has long promoted its low or no-tax environment to investors. Notwithstanding the introduction of VAT, the following taxes are not applicable in the UAE: withholding tax, corporate tax, personal income tax and capital gains tax. Oil, gas and petrochemical companies and branch offices of foreign banks are, however, required to pay taxes.

Entities established in the DIFC and the ADGM and their employees are subject to a zero rate of tax (income tax, corporate tax, withholding, capital gains, etc). It is not expected that the new proposed taxes will be assessed on free zone entities. Therefore, it is hoped that the tax regulations will have a negligible effect on the asset management industry in the UAE.

#### 18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

There are no income or withholding taxes that would apply to non-resident investors receiving dividends.

#### 19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

No tax rulings are required. The UAE Federal Tax Authority was established in 2016 and does not currently assess any taxes on funds.

#### 20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are currently no taxes imposed in the UAE, DIFC or ADGM in respect of funds domiciled in these jurisdictions.

#### 21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

There are no taxes imposed in the UAE, DIFC or ADGM in respect of funds domiciled in these jurisdictions. Additionally, there are no withholding taxes payable on payments originating in the UAE to foreign entities.

#### Update and trends

Regional and international managers see the UAE as the logical regional centre for the banking and asset management industry. While the private equity funds industries have not yet taken off in full in the UAE, the DIFC is seeking to capitalise on the UAE's position as a financial services hub to grow the funds industry. In particular, it is seeking to spur growth by introducing simpler funds regulations and reducing fees and bureaucracy. In Abu Dhabi, the authorities have sought to emulate this success and make the ADGM a competitor to the DIFC as a regional funds jurisdiction. Regardless, in the short term, we expect that most regional managers will continue to utilise typical offshore jurisdictions as the domicile for their private equity funds because of investor familiarity, price and predictability. However, over the medium to long term, we believe that regional and international investors will begin to grow more comfortable with UAE fund vehicles and will appreciate the moderate but serious positions and protections offered by the DFSA and FSRA.

#### 22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

The UAE has signed double tax treaties with France, Germany, India, Luxembourg, Singapore and Switzerland. The tax treaty signed with the UK on 12 April 2016 entered into force on 25 December 2016 and took effect (i) with regard to taxes withheld at source, in respect of amounts paid or credited on or after 1 January 2017, and (ii) with regard to other taxes, in respect of taxable years (and in the case of UK corporation tax, financial years) beginning on or after 1 January 2017.

As the UAE does not charge corporate or income tax, stamp duties or withholding taxes, the double taxation treaties have had limited impact on fund vehicles.

#### 23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Not applicable – there are no taxes imposed in the UAE, DIFC or ADGM in respect of funds domiciled in these jurisdictions.

#### Selling restrictions and investors generally

#### 24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

#### Onshore UAE

Onshore UAE domiciled funds can be marketed in the UAE, subject to SCA approval and licensing. Onshore UAE funds are treated as foreign in the DIFC and ADGM and so must be registered in these free zones as described below.

To be marketed onshore in the UAE, DIFC and ADGM, funds must be registered with the SCA and offered by a licensed distributor unless the offer to an onshore investor is made on the basis of reverse solicitation or the offer is made to certain sovereign-related entities.

#### DIFC

In the DIFC, exempt funds and qualified investor funds may only be offered on a private placement basis only and may only be offered to 'professional clients' (see question 25).

Article 50 of the DIFC Collective Investment Law provides that no person is permitted to offer a unit of a fund to prospective or existing unitholders unless the following is true:

 a prospectus that complies with the relevant requirements in the DIFC Collective Investment Law and Collective Investment Rules is made available to the person to whom the offer is made;

- the person making the offer of the unit is either the fund manager of the fund or a firm authorised by the DFSA whose licence authorises it to do so; and
- the offer is made in accordance with the applicable requirements in the DIFC Collective Investment Law and Collective Investment Rules.

DIFC domiciled funds must have a prospectus that must satisfy the following requirements:

- the prospectus must not contain any provision that is unfairly prejudicial to the interests of unitholders generally or to the unitholders of any class of units;
- the prospectus must contain material information. Information is material if it is either within the knowledge of the directors or partners of the fund manager or which such directors or partners ought reasonably to have obtained by making reasonable enquiries;
- the prospectus must be in the English language; and
- the expiry date of a prospectus must be no later than 12 months after the date of the prospectus.

#### ADGM

Private equity funds domiciled in the ADGM may only be offered or sold by a firm authorised by the FSRA to carry out such activity and provided that such firm has notified the FSRA within 30 days of commencing marketing such fund in the ADGM, with details relating to the fund being as follows:

- · the name of the fund;
- · the structure and type of vehicle of the fund; and
- the investment policy and strategy of the fund.

The fund manager of a domestic fund shall produce a prospectus that satisfies the following requirements:

- the presentation of the information in a prospectus shall be clear, fair and not misleading;
- a prospectus shall contain all the information that a person and his
  or her professional advisers would reasonably require and expect
  to find in a prospectus to be able to make an informed decision on
  becoming a unitholder of the fund; and
- if at any time after the issue of a prospectus there is a material change affecting any matter contained in the prospectus or a significant new matter arises, the fund manager shall, either before or promptly following the effective date of such material change or new matter, issue a supplementary or replacement prospectus;
- the prospectus must not contain any provision that is unfairly prejudicial to the interests of unitholders generally or to the unitholders of any class of units;
- the prospectus must contain 'material' information in relation to the fund (see 'DIFC');
- · the prospectus must be available in the English language; and
- the expiry date of a prospectus must be no later than 12 months after the date of the prospectus.

#### 25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

#### Onshore UAE

There are no restrictions on the types of investors who may acquire units in an onshore UAE domiciled fund.

#### DIFC

Investment in DIFC private equity funds are only open to 'professional clients', who must satisfy the following requirements:

- if the client is a natural person, have net assets of at least US\$1 million (excluding the value of the person's primary residence) or, if the client is an entity, have cash and investments of at least US\$1 million or called up capital of at least US\$1 million;
- have sufficient experience and understanding of relevant financial markets, products or transactions and any associated risks; and
- · not elect to be treated as a retail client.

#### ADGM

ADGM domiciled private equity funds can only be invested in by professional clients. The criteria to be classified as a professional client is a detailed one based on the net worth and sophistication of the client. For example, an individual with net assets of at least US\$500,000 who has sufficient experience and understanding of relevant financial markets, products or transactions and any associated risks and has not elected to be treated as a retail client would be classified as a professional client.

#### 26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

Yes. All investors (and transfers) in an onshore fund must be reported to the SCA. The identity of investors and any transfers in a DIFC fund (along with certain identification documentation) must be provided to the DIFC Companies Registrar and a notification must be made with the DFSA. Similarly, the identity of investors and any transfers in an ADGM fund (along with certain identification documentation) must be provided to the ADGM Registrar and a notification must be made with the FSRA.

#### 27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Generally, such person must be authorised by the SCA, the DFSA and the FSRA (as applicable) to carry out such marketing activity. There are no private placement exemptions in the DIFC or ADGM. Private equity funds can be offered onshore without SCA registration if the offer to an onshore investor is made on the basis of reverse solicitation or the offer is made to certain sovereign-related entities.

#### 28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The UAE money laundering rules are implemented and administered by the UAE Central Bank. The regulations require client due diligence including a verification of investor identities using a risk based approach.

Each of the DIFC and ADGM have separate money laundering regulations that apply to funds established in the relevant free zone that

supplements the federal regulations. ADGM requires record-keeping for 10 years and DIFC requires record-keeping for six years.

#### **Exchange listing**

#### 29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

There are three stock exchanges in the UAE: Abu Dhabi Securities Exchange (ADX), Dubai Financial Market (DFM) and Nasdaq Dubai.

Private equity funds regulated by the SCA are not currently permitted to list on any exchange. The only onshore funds that may be listed are open-ended mutual funds and real estate investment trusts (REITs).

Currently, Nasdaq Dubai does not permit the listing of private equity funds (only listed equities, bonds, hedge funds, exchange traded funds and REITs). ADX and DFM only allow the listing of open-ended funds. Therefore, the typical private equity fund cannot be listed in the UAF.

#### 30 Restriction on transfers of interests

## To what extent can a listed fund restrict transfers of its interests?

Statutorily there are no restrictions on transfers of interests in a listed fund by ADX, DFM or Nasdaq Dubai. Such arrangements are contractual matters that shall be set out and agreed in the fund's constitutional documents. However, because of certain prevailing policies and political concerns at the UAE federal level, we understand that there may be restrictions on investors of certain nationalities owning interests in UAE domiciled funds.

#### Participation in private equity transactions

#### 31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Statutorily there are no restrictions on the jurisdictions into which funds domiciled in the UAE, DIFC or ADGM may invest. Funds operating on a Shariah compliant basis may be restricted from investing in certain asset classes or investing in companies with certain levels or types of debt financing.

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#### 32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Under SCA, DIFC and ADGM regulations, there are no restrictions on the sponsor's compensation and profit-sharing arrangements. Such arrangements are contractual matters that shall be set out and agreed in the fund's constitutional documents. As all funds in the UAE are subject to the review and approval of one of the SCA, DFSA or FSRA, the relevant regulator may withhold its approval if it believes certain fee arrangements are contrary to public policy.

# **United Arab Emirates**

#### Osama Audi, Yousef Farsakh and Nabil Issa

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#### 1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Both private equity buyouts and venture capital transactions occur in the United Arab Emirates (UAE). Typical private equity transactions are structured as acquisitions of controlling interests or 100 per cent acquisitions, though there have been recent examples of private equity transactions for significant minority interests. On the other hand, venture capital transactions are typically structured as acquisitions of significant minority interest with options for additional share purchases.

The UAE is a tax-free jurisdiction in respect of corporate income tax, capital gains tax, withholding tax and similar. Accordingly, the tax structuring involved with private equity transactions that would be applicable in other jurisdictions is not required for transactions that are wholly focused on the UAE. However, targets with footprints covering the wider Gulf Cooperation Council (GCC) countries (ie, Bahrain, Kuwait, Qatar, Oman, Saudi Arabia and the UAE) and the wider Middle East and North Africa region, may have tax liabilities that can be reduced or eliminated with diligent structuring.

In addition to the foregoing, quite a few foreign ownership restrictions apply to parties establishing entities 'onshore'. Such restrictions typically apply to non-GCC nationals but, in certain circumstances, also apply to non-UAE nationals. By way of background, dozens of free zones, where 100 per cent foreign ownership is permitted, have been established across the UAE. However, entities established in such free zones may face certain restrictions including a prohibition on undertaking commercial activities onshore. As with tax issues, diligent structuring can reduce or eliminate the issues relating to foreign ownership restrictions in the UAE.

The Dubai International Financial Centre (DIFC), one of two financial free zones, has typically served as the jurisdiction through which private equity investors have structured their investments. The DIFC has served in this role primarily because the DIFC courts that have been established within the free zone are independent commonlaw courts, which turn to English law in the event that an issue has not been legislated under DIFC law. Perhaps most importantly, self-help remedies, which are not available elsewhere in the UAE, are available in the DIFC (eg, a party that has registered a pledge over the shares of a company incorporated in the DIFC can immediately transfer such shares in accordance with the pledge documentation, without a requirement for a separate court order).

In the DIFC, private equity investors typically utilise companies limited by shares or, financings undertaken with special purpose companies, to undertake their investments into targets incorporated onshore or in other UAE free zones. Onshore targets are typically established as limited liability companies, which, pursuant to foreign ownership legislation, require either 100 per cent GCC national shareholding or a minimum of 51 per cent UAE national shareholding. In addition, targets are, on occasion, incorporated as joint stock companies or in free zones as limited liability companies (or similar).

#### 2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Private equity transactions to acquire listed companies are extremely rare with only a handful of such transactions having ever occurred in the UAE. Notwithstanding the foregoing, a listing is one of the many exit options for private equity investors.

The Securities and Commodities Authority of the UAE, the UAE federal regulator responsible for regulating companies listed on the Dubai Financial Market (DFM) exchange and the Abu Dhabi Securities Exchange (ADX), has issued a set of governance rules that apply to public joint stock companies. Among the detailed list of requirements set out in the governance rules as well as the Commercial Companies Law are the following:

- members of the board of directors are elected through secret, cumulative voting by the members of the general assembly;
- the chairperson and a majority of the members of the board of directors must be UAE nationals;
- the chairperson may not hold the position of manager, executive manager or any other executive function in the company;
- at least one-third of the members of the board must be independent and a majority must be non-executive board members;
- a minimum of 20 per cent of members of the board of directors must be female. If a listed joint stock company is unable to meet this requirement, it must disclose the reason why to the Securities and Commodities Authority;
- members of the board of directors must not have been dismissed from their position on the board of directors of another publicly listed joint stock company in the 12 months prior to the date of nomination to sit in such position. In addition, candidates must not be board members in more than five companies or be chairperson or vice chairperson in more than two companies or be the managing director of more than one company;
- resolutions of the board of directors are passed by the majority of votes of those members and representatives present at the meeting. In the case of a tie, the chairperson shall have a casting vote; and
- shareholders who own at least 10 per cent of the issued share capital of a public joint stock company may call for an urgent general assembly meeting to discuss urgent matters. In addition, shareholders who own at least 5 per cent of the issued share capital of a public joint stock company may make a request to the Securities and Commodities Authority to include items in the agenda for a meeting of the shareholders of a public joint stock company.

#### 3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

While going-private transactions or private equity transactions involving public companies are rare, the issues that a board of directors would have to consider for such a transaction relate to potential conflicts of interest or joint interest with the publicly listed company or other transactions required to be submitted to the board of directors of the listed company. A member of the board of directors must inform the board of directors of the conflict or joint interest and must not participate in the voting in respect of such matter. In addition, if the director fails to inform the publicly listed company of his or her conflict, the company can move before the competent court to invalidate the contract or to order the director who acted in contravention of the provisions to account to the company for any profit or benefit obtained as a result of entering into the conflicted transaction.

In addition to this, a publicly listed company may not enter into a transaction with a related party where the contract value exceeds 5 per cent of the company's capital without the approval of the general assembly of the company. In addition, the publicly listed company must obtain an evaluation of such transaction by an assessor certified by the Securities and Commodities Authority.

The board must set up a committee of non-executive board members responsible for reviewing issues that may result in a conflict of interest for board members including verifying financials and the review of transactions concluded with stakeholders.

In addition, there are no squeeze-out or compulsory acquisition provisions on the two main UAE exchanges.

#### 4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

Going-private transactions are rare. However, if a party reaches an ownership interest of 5 per cent or more of the shares of a listed company or 10 per cent or more of the shares of a parent company or subsidiary to the listed company the relevant party must inform the market on which the relevant company is listed. In addition, the relevant party must commit to declare every additional 1 per cent interest that they acquire in the listed target and in accordance with the above. Other than this, there are no specific disclosure requirements to acquire a privately held company incorporated either onshore in the UAE or in a specific free zone.

#### 5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

The timing to complete an acquisition of a company incorporated in the UAE will vary depending on the jurisdiction of incorporation of the target (ie, whether the company is incorporated onshore or in one of the many free zones established in the UAE) and the nationality of the shareholders of the target (ie, whether the shareholders are UAE nationals, nationals of the countries of the GCC, or non-GCC nationals) and whether approvals from regulators are required for the commercial sector in which the target is operating. High-level timing considerations for some of the most common UAE corporate forms are as follows:

#### Share transfers of 'onshore' limited liability companies

For this, the parties will need to prepare a resolution amending the articles of association of the target company to reflect the change in shareholding and, thereafter, arrange to execute such resolution before the competent notary public in the UAE. Following execution and

notarisation of the resolution, the resolution will need to be submitted to the Dubai Department of Economic Development in order to amend the commercial licence or trade licence of the target to reflect the change in shareholding. If the target is being acquired by a non-GCC national, they will need to comply with the foreign ownership restrictions relating to most commercial sectors as well as any regulatory requirements applicable to regulated sectors (eg, transactions for entities operating in the education sector require additional approvals from the relevant regulator). Such foreign ownership restrictions provide that non-GCC nationals can own no more than 49 per cent of the share capital of a limited liability company (or joint stock company) incorporated onshore. There are a limited number of sectors where such restrictions do not apply (eg, if the approval of the Supreme Petroleum Council is provided, non-GCC nationals can own 100 per cent of entities undertaking certain commercial activities in the oil and gas sector). Accordingly, non-GCC national parties that are acquiring onshore entities will need to consider structuring alternatives that provide effective control over 100 per cent of an onshore entity. Parties are also typically required to provide legalised and attested documentation for the acquiring company. That said, the process to transfer shares in an onshore limited liability company can run from a couple weeks to more than a month depending on the documents required, the pre-closing structuring that is required to be put in place and the regulatory approvals required prior to closing.

#### Transfers of shares of 'onshore' private joint stock companies

For this, the parties will need to prepare a share transfer instrument and arrange to update the share register of the joint stock company to reflect the transfer of shares. The restrictions that apply to share transfers of onshore limited liability companies also apply to private joint stock companies. Share transfers for private joint stock companies can typically be completed in a day or less.

#### Target companies operating in a free zone

In this situation, the share transfer procedure is typically more straightforward as non-GCC nationals can own 100 per cent of the share capital of such free zone entities. Accordingly, the level of pre-closing structuring or restructuring is significantly reduced. In most free zones, except for the DIFC and the Abu Dhabi Global Market, the seller and the buyer must execute a share transfer instrument before the relevant regulator of the free zone. Accordingly, the share transfer process can typically complete in a week or less.

#### 6 Dissenting shareholders' rights

What rights do shareholders have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Shareholders in limited liability companies have a statutory pre-emption right for new share issuances. Such a pre-emption right typically works to provide dissenting shareholders with the ability to block a share transfer if they do not approve. That being said, no such statutory pre-emption right exists for private joint stock companies. Accordingly, there is little risk that a dissenting shareholder will be able to block a transaction in respect of shares held by another shareholder.

#### 7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

Typical provisions included in share purchase agreements include representations, warranties, conditions to closing, gap-period covenants and, in many transactions, restrictive covenants on the sellers. The provisions found in most share purchase agreements reflect international norms. However, depending on whether UAE law is selected as the choice of law in the share purchase agreement, the enforceability of the provisions of a share purchase agreement will likely not be given the same meaning by a local court as under, for example, English law or New York law. In addition, the types of damages available under UAE law are typically limited in most circumstances to actual damages incurred with consequential damages being extremely limited or unavailable. Accordingly, purchasers will have to give serious consideration to the choice of law and forum for settling disputes.

#### 8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity buyer should discuss management participation following the completion of a going-private transaction?

Management of UAE companies is typically incentivised through their employment agreements. Accordingly, private equity investors will typically put in place new employment agreements with key personnel as a condition to the closing of the acquisition of the shares in the target. Such employment agreements typically include restrictive covenants and details of performance-linked compensation. However, there has been a movement in recent years for entities established in the DIFC to provide key personnel with employee share option plans to ensure that key personnel are incentivised to grow the business of the target and are aligned with shareholders in this regard. The issue with employee share option plans for most entities incorporated in the UAE, for example, onshore limited liability companies, is that the manner in which such employee share option plans are enforced is not entirely clear. In addition, the significant ability held by shareholders in a UAE limited liability company to block a share sale or issuance by not showing up at the notary public to execute the amendment to the articles of association places a significant disincentive to entrench management rights at the UAE limited liability company level.

#### o Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

The tax issues involved with private equity transactions will depend on the structure. At the moment, the UAE does not apply income or capital gains tax to any transactions. The UAE did recently announce that a value added tax regime will be implemented by year-end, but at this stage it is not clear how such a regime will impact private equity buyers and sellers.

#### 10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Senior secured debt can be put in place, post-acquisition, to fund the purchase price paid for the shares of the target. Existing indebtedness is typically settled prior to closing or soon after with a purchaser typically putting in place new debt facilities for the target entity. To the extent that debt is not settled prior to closing, the sellers will typically be required to request and receive change-of-control approvals from lenders as a condition to the closing of the transaction. Provisions in relation to financial assistance are in place in the UAE Commercial Companies Law but a number of structures have typically been put in place to enable upstream guarantees or similar.

#### 11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements? What other documents typically set out the financing arrangements?

Typical financing documentation involves the relevant loan agreement as well as security documentation. It should be noted that while pledges can be registered over the shares of onshore limited liability companies, the process to enforce such a pledge is not entirely clear.

# 12 Fraudulent conveyance and other bankruptcy issues Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Private equity transactions do not typically raise fraudulent conveyance issues. However, the directors and management of entities that are operating in the zone of insolvency will face additional scrutiny in respect of sale transactions that negatively impact on creditors.

#### 13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms? Are there any statutory or other legal protections for minority shareholders?

Shareholders' agreements typically include provisions relating to, among other things, the following:

- contributions of the parties (including debt and equity funding and the timing of and conditions for such funding);
- · board and shareholder approvals;
- compulsory transfer provisions (eg, drag-along and tag-along provisions and put and call options);
- · restrictions on transfer and exit provisions; and
- restrictive covenants.

In addition, minorities typically entrench key protections in the relevant shareholders' agreement by, for example, agreeing on board representations and setting out voting thresholds that provide minorities with veto rights over an agreed list of reserved matters.

A number of statutory protections are given to all shareholders in a limited liability company. For example, any amendment to the articles of association will require the approval of all shareholders. Accordingly, a capital increase or decrease, which is implemented by amending the articles of associations, effectively requires the approval of all shareholders of a limited liability company.

The enforcement of compulsory transfer provisions is quite difficult to achieve if shareholder arrangements are entrenched at the onshore limited liability company level. Accordingly, parties are best advised to push their shareholder arrangements into a jurisdiction such as the DIFC and to interpose an entity incorporated in the DIFC between the shareholders and the onshore limited liability company (ie, the entity that undertakes commercial operations). As the DIFC has its own corporate regime and courts that use English common law for purposes of interpreting the DIFC laws, there is significantly greater certainty if parties structure their shareholder arrangements through the DIFC.

Another key issue that investors should consider is the extent to which it is possible to entrench provisions of the shareholders' agreement in the articles of association of the limited liability company. Certain provisions relating to voting thresholds can typically be entrenched in the articles of association to the extent they do not provide for lower voting thresholds than those set out in the Commercial Companies Law.

#### 14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

UAE law does not contain a provision for mandatory takeover or squeeze-out of onshore companies. Accordingly, the ability of a private equity firm that acquires a company listed on the DFM or ADX to squeeze out minorities is limited.

Notwithstanding the foregoing, the DIFC Companies Law does contain a provision relating to takeovers if the purchaser acquires 90 per cent of the outstanding shares of the particular class of shares or of all classes of shares. The purchaser must exercise the squeeze-out within 120 days of the close of the takeover offer provided that the purchaser gives notice within two months of acquiring 90 per cent of the shares of the relevant class (or of all classes).

#### 15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity buyer?

To the extent a private equity firm acquires shares in an onshore limited liability company, as a practical matter, approval of all other shareholders will be required before an exit can be implemented as, in practice, all shareholders must attend an appointment at the notary public in order to execute the articles of association that reflects the transfer of shares. In addition, only onshore joint stock companies are capable of listing on the DFM or the ADX. Accordingly, all shareholders must approve the conversion of a portfolio limited liability company into a joint stock company prior to a listing. Such a conversion can take a number of months to complete.

In relation to post-closing recourse, private equity players typically negotiate into the relevant transaction documentation that all claims pursuant to the share purchase agreement will be limited and capped at a pre-agreed percentage of the total purchase price. In addition, all claims are typically time-barred after an agreed time period (typically 18 months to three years after closing). While warranty and indemnity insurance is available in the UAE, it is not typically utilised by private equity firms when exiting portfolio companies.

#### 16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

In relation to joint stock companies listed on the DFM or ADX, following the statutory two-year lock-up period, founding shareholders would be permitted to sell-down their interest in the listed company through a secondary offering. There are limitations to this approach as companies that are listed on the DFM or ADX are only permitted to sell-down up to 30 per cent of the total share capital through a secondary offering. A work-around to this limitation is to first list on an overseas exchange, which permits a sell-down greater than 30 per cent and to, thereafter, list on the DFM or ADX. Also worth exploring is the possibility of an indirect sell-down of shares in the entity listed on the DFM or ADX.

#### 17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Going-private transactions are not common in the UAE. The only going-private transaction of which we are aware in recent memory is the delisting of Aabar PJSC, an Abu Dhabi-based private equity firm. The procedures for a delisting are not well defined.

#### 18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Limited liability companies and joint stock companies incorporated onshore in the UAE must be either 100 per cent owned by GCC nationals or, if a non-GCC national shareholder holds a direct interest, at least 51 per cent owned by a UAE national. While there are some exceptions to such limitations for certain activities, the limitations apply to nearly all sectors. In addition, certain sectors (eg, the ownership of real estate in non-designated areas) have additional limitations. Notwithstanding the foregoing, many private equity firms are capable of structuring their interest in onshore entities so that they maintain significant control over such onshore entities. The structures utilised to maintain such control vary depending on, among other things, the sector in which the target entity is operating and the emirate in which the target is incorporated.

#### 19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

There are no specific regulations in place in the UAE in relation to club or group deals. However, the structuring of any club or group deal will have to take into consideration the relatively recently issued Competition Law.

#### 20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

Private equity purchasers typically include detailed closing conditions and broad termination rights for their benefit while limiting the ability of sellers to terminate the purchase agreement. On the other hand, well advised private equity sellers typically restrict the list of conditions and

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the termination rights for a purchaser so that they maintain some modicum of certainty that the transaction will proceed to closing. While such trends are common, the terms of each deal will vary depending on the relative negotiating strength and sophistication of the parties to the purchase agreement.