The Private Equity Review

Seventh Edition

Editor
Stephen L Ritchie

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PREFACE

The seventh edition of *The Private Equity Review* follows a turbulent and at times nerve-wracking 2017. It was also a year in which private equity demonstrated its strength as an asset class in spite – perhaps because – of that turbulence. Deal activity and fundraising were strong in almost every major market despite fierce competition from public strategic buyers and strong returns in other asset classes, demonstrating private equity's ability to adapt quickly to changing conditions to find profitable investment opportunities. As a result, we expect private equity will continue to play an important role in global financial markets, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. In addition, we expect the trend of incumbent private equity firms and new players expanding into new and less-established geographical markets to continue, although recent protectionist trends remain a risk factor.

While no one can predict how 2018 will unfold, one can confidently say that private equity will continue to play an important role in the global economy, and will likely seek to expand its reach and influence. It remains to be seen how local markets and policymakers respond.

Private equity professionals need – now more than ever – guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 27 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this seventh edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2018

Part I

Fundraising

Chapter 21

UNITED ARAB EMIRATES

James Stull, Macky O'Sullivan and Sayf Shuqair[1]

I GENERAL OVERVIEW

Despite the financial downturn and the decline in oil prices that characterised 2016 and early 2017, the UAE has weathered the storm and maintained its position as the centre for private equity in the MENA region. It is projected that the partial recovery in oil prices in the latter part of 2017, coupled with the ongoing all-out diversification drive and the landmark tax reform, will help the UAE economy to gain increased momentum in 2018. Over the past couple of years, the UAE has emerged as the preferred investment destination for the majority of private equity and venture capital participants in the MENA region. This positive sentiment may in part be explained by the UAE's relatively diversified economy, and also be connected to increased concerns over economic and political factors in other leading MENA countries in the private equity arena such as Saudi Arabia, Qatar and Egypt.

During the global financial crisis, Dubai, with a focus on real estate and financial transactions, was particularly hard hit, resulting in a near-default on its debt payments and a subsequent bailout from Abu Dhabi. Many predicted the financial crisis would be the end of Dubai and would result in a transformative change to Dubai's free-spending and 'casino-like' culture. However, following certain significant restructurings and policy changes, Dubai has entered a period of sustainable growth, with significant projects in the tourism and real estate sectors announced in anticipation of the World Expo in 2020. Abu Dhabi weathered the financial crisis by implementing a patient economic vision, buoyed by high oil prices. This approach resulted in four straight years of double-digit fiscal surpluses in the lead up to 2015, which in turn led to massive budgets for the government to invest in mega projects, and to focus on important sectors of the economy such as healthcare and education. With an economy predominantly based on oil and related hydrocarbon revenues, the recent slump in oil prices has drastically reduced revenues for Abu Dhabi, which appears to be entering a stage of economic transition toward a more sustainable and diversified economy highlighted in the Abu Dhabi Vision 2030.

There has been a continued shift away from previously favoured sectors such as the oil and gas sector given the decline and volatility of oil prices. Private equity general partners have been focusing increasingly on key consumer-driven sectors such as healthcare, education, retail and food and beverage with these sectors accounting for the majority of investments by value. There has also been a shift in expectations as far as active investment by sovereign wealth funds is concerned with many expecting more cautious investment by

1 James Stull is a partner, Macky O'Sullivan is a senior associate and Sayf Shuqair is an associate at King & Spalding LLP.

such entities compared to previous years given the decline in petrodollars. Across the region, although investment values decreased marginally, disclosed transactions rose by over 100 from 72 to 175, reflecting growth in investments in both private equity and more markedly in venture capital. According to MENABytes' 2017 MENA Venture Report, 2017 saw a continued rise in venture capital activity in the UAE with the UAE accounting for 57 out of the total 133 deals in the MENA region. UAE start ups secured US$400 million in investments representing 84 per cent of the whole deal value of the MENA region in 2017. Key transactions include investments by leading industry investors such as Starz (a Lionsgate company) in on-demand video streaming service Starz Play, the US$150 million investment by carmaker Daimler and Saudi Arabia's Kingdom Holding in car booking service Careem and the acquisition of Souq.com by Amazon.

Other fundraising highlights include the announcement in December 2016 by Gulf Capital, one of the largest and most active alternative investment firms in the Middle East, of the successful final close of its second private debt and mezzanine fund, the Gulf Credit Opportunities Fund II, over its target cover of US$250 million. Additionally, Dubai-headquartered private equity firm the Abraaj Group, a leading investor in growth markets raised US$526 million for its dedicated Turkey fund, while NBK Capital Partners, a private equity and mezzanine fund manager focused on the Middle East and North Africa, held a first close with US$110 million in capital commitments for the NBK Capital Partners Mezzanine Fund II.

Investors are increasingly less tied to the formal general partner or limited partner structures prevalent in Western markets, thus, announced funds understate the level of raised capital in the industry. Nevertheless, there appears to be a consensus that fundraising is becoming more difficult. Figures show that disclosed fundraising levels declined against the peak experienced in 2014 but remained above levels achieved in 2012 and 2013. Fund managers have had to become more and more creative when it comes to fundraising and there has been an increase in the popularity of the deal-by-deal approach to fundraising. This rise in popularity of the deal-by-deal model may be indicative of the challenges of blind pool fundraising in the MENA region given the political instability in certain parts of the region. This method provides investors with access to direct deal flow and therefore more flexibility. Additionally, the deal-by-deal model offers lower fees than investing via a fund. While this method may be more labour-intensive from the perspective of a general partner, the prospect of quicker access to carried interest offer by this method is particularly appealing.

The slump in oil prices has taken a considerable bite out of the total market capitalisation as many of the companies listed on the stock exchanges in the UAE (NASDAQ Dubai, the Dubai Financial Market (DFM) and the Abu Dhabi Securities Exchange (ADX)) derive substantial revenues from oil production and related-energy industries. Stock exchanges in the UAE have recorded lower net profits. The total trading value on ADX fell 18 per cent in 2016 to 49 billion dirhams from 60 billion dirhams in the previous year while the DFM recorded a net profit of 253.5 million dirhams for 2016, 3 per cent lower than the previous year. The performance report issued by ADX for 2017 provides that the ADX index declined by 3.25 per cent at the close of 2017 compared to 2016. Although oil prices have recovered from early 2016's multi-year lows, they remain well below the average prices of previous years. In response to the new reality of decreasing oil revenues, the UAE has reformed its budget by cutting spending through a reduction in fuel subsidies and electricity subsidies. In Abu Dhabi, for example, electricity subsidies have been scaled back and water tariffs increased. To create additional income to cover the decrease in oil revenues, the government

is imposing corporate taxes on onshore companies and implementing value added tax (VAT). The International Monetary Fund has hailed this decision, which it believes will strengthen the country's fiscal position. It is not expected that taxes would be imposed on companies operating in a free zone in the UAE, where most funds and investment managers are domiciled. Accordingly, it is not expected that the proposed taxes will have a substantial negative impact on the asset management industry in the UAE. On 21 January 2017, the President of the UAE, His Highness Sheikh Khalifa bin Zayed Al Nahyan, issued a law creating the Mubadala Investment Company, a company wholly owned by the government of Abu Dhabi. The new company is the merger of two of Abu Dhabi's sovereign wealth funds, the International Petroleum Investment Company (IPIC) and Mubadala Development Company (Mubadala), and their respective assets. The law formalised the announcement made in 29 June 2016 that IPIC and Mubadala would merge, thereby creating an entity with assets worth an estimated US$130 billion. The merger is viewed as part of a larger government strategy to diversify the economy and create stronger entities for the growth of the economy. The merged entity reported a net profit of US$1.14 billion for the first half of 2017. While some cost-saving measures have been put in place and attempts have been made by the government to rein in spending, there has also been investment into other regional asset managers – the completion of the acquisition of an aggregate 20 per cent stake by Mubadala in Bahraini investment manager Investcorp being an example of this.

II LEGAL FRAMEWORK FOR FUNDRAISING

To be marketed onshore in the UAE, foreign funds (including funds established in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM)) must be registered with the Securities and Commodities Authority (SCA) and offered by a licensed distributor unless the offer to an onshore investor is made on the basis of a reverse solicitation or the offer is made to certain sovereign-related entities. Reliance on the reverse solicitation exemption is common place in terms of private equity fundraising in the UAE. In February 2017, Chairman Decision No. 3/R.M of 2017 concerning Promoting and Introducing Regulations (PIR) came into effect. Importantly, the PIR expressly provides an exemption in relation to the promotion of foreign securities (including fund interests) onshore in the UAE based on a documented reverse solicitation. Foreign fund interests are otherwise generally not permitted to be promoted onshore in the UAE unless such promotion is to a qualified investor or the securities are registered with the SCA and an agreement with a locally licensed promoter is concluded. On the other hand, in the DIFC there are no exemptions under DIFC law that allow the marketing or offering of fund interests on a reverse solicitation basis. A unit of a 'foreign fund' (a fund that does not meet the following criteria: (1) a fund established or domiciled in the DIFC or (2) a fund established or domiciled in a jurisdiction other than the DIFC and is managed by a fund manager who is licensed by the Dubai Financial Services Authority (DFSA)) may only be offered or sold in or from the DIFC by a firm duly authorised by the DFSA to carry out such activities. Similarly, in the ADGM there is no reverse solicitation exemption and the marketing or offering of fund interests to investors in the ADGM may only be carried out by an entity licensed by the Financial Services Regulatory Authority (FSRA) to carry out such activity. Given the flexibility provided by the reverse solicitation exemption onshore in the UAE, it is common place for most fundraising to be carried out physically onshore in the UAE as opposed to in the DIFC or the ADGM.

There are few private equity investment funds that are domiciled onshore in the UAE. This is primarily due to an onerous licensing process (for both the manager and the fund) and the costs (relative to the DIFC and the ADGM). The ADGM was launched in 2015 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 (foreign ownership restrictions apply outside the free zones). The ADGM is in its infancy and is therefore not currently a preferred jurisdiction for investment funds. However, efforts are being made to help grow the jurisdiction as an asset management centre such as reductions in fees payable by firms looking to establish a presence in the ADGM. Private equity funds established in the DIFC, however, are more commonplace and are typically structured as investment companies and limited partnerships, both of which have separate legal personality under law. Private equity funds in the DIFC 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.

As far as the fiduciary duties owed by managers to investors is concerned, an SCA-regulated manager is required by law to 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. Additionally, 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:

a act honestly;

b exercise the degree of care and diligence that a reasonable person would exercise if he or she were in the fund manager's position;

c 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;

d treat the unitholders who hold interests of the same class equally and unitholders who hold interests of different classes fairly;

e not improperly make use of information acquired through being the fund manager in order to gain an advantage for itself or another person; or

f 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.

III REGULATORY DEVELOPMENTS

Primary responsibility for overseeing the licensing, regulation and marketing of investment funds was transferred from the UAE Central Bank (Central Bank) to the Emirates Securities and Commodities Authority (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. 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.

Historically, the UAE has been a tax-free jurisdiction. However, in October 2016, the UAE federal law establishing the UAE Federal Tax Authority (FTA) was issued. The FTA has been tasked with oversight over taxation in the UAE and, in particular, the implementation of the newly introduced VAT at a rate of 5 per cent, which became effective in January 2018. The FTA is responsible for formulating UAE federal tax rules and regulations, including VAT, and will oversee the UAE's application of international tax obligations pursuant to tax treaties, tax information exchange treaties and global tax information exchange programmes. In addition, the FTA is responsible for implementing all aspects of tax laws including assessments, evaluations of returns, audits and the resolution of disputes. In respect of VAT, the UAE Ministry of Finance published a VAT Q&A on its website that clarified some of the points on the VAT regime. Namely, businesses that meet a certain, as of yet undetermined, annual turnover threshold will be required to register for VAT while entities that do not meet such threshold will be exempt from VAT registration. While it is clear that VAT will be chargeable on taxable goods or services supplied, further analysis will be needed in order to determine if the proposed VAT framework will provide for the possibility of 'VAT groups'. If not, intercompany transactions between affiliates of the same group may be subject to VAT.

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.

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.

The UAE signed a tax treaty with the UK on 12 April 2016 that entered into force on 25 December 2016 and took effect (1) with regard to taxes withheld at source, in respect of amounts paid or credited on or after 1 January 2017, and (2) 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. However, as the UAE does not charge corporate or income tax, stamp duties or withholding taxes, the double taxation treaty may have a limited impact on fund vehicles.

IV OUTLOOK

Despite the challenges posed by geopolitical and global economic factors, stakeholders remain optimistic about the private equity terrain in the UAE. Against a backdrop of a financial downturn and the decline in oil prices that characterised 2016 and early 2017, the UAE has shown its resilience. It has proved that its economy operates outside of the oil and energy sectors, and that it has the infrastructure to maintain and grow its private equity and the wider asset management industry. The introduction of VAT in the UAE marks the implementation of a strategy aimed at augmenting and diversifying government revenues. Persistent low oil prices over the past three years has created an urgent need to diversify revenue streams through measures such as taxation. Regional and international players in the private equity arena see the UAE as the logical regional centre for the private equity industry, with Dubai serving as the hub. In an effort to encourage asset managers to establish a presence and launch investment funds in the DIFC, the DIFC has introduced simpler funds regulations and reduced set-up fees. In Abu Dhabi, the authorities have sought to emulate this success and make the ADGM a competitor to the DIFC. Fundraising is becoming more challenging with negative perceptions, particularly from investors outside the region, of current regional geopolitical factors being a key contributing factor. Consequently, general partners are continuing to explore alternative means of fundraising and limited partners are more willing to consider direct or co-investment options as a viable alternative to blind pool investing.

Appendix 1

ABOUT THE AUTHORS

JAMES STULL

King & Spalding LLP

James Stull is a partner at King & Spalding LLP. His practice covers a broad range of corporate, finance and investment matters. He primarily focuses on asset management and the formation of investment funds, including venture capital funds, private equity funds, real estate funds, credit and debt funds, hedge funds and shariah-compliant funds. His practice includes advising domestic and international clients on the corporate and regulatory aspects of structuring, establishing and liquidating various fund structures, and he has substantial experience with securities regulations in the UAE, Saudi Arabia and other Middle East jurisdictions as well as the United States.

MACKY O'SULLIVAN

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Macky O'Sullivan is a senior associate at King & Spalding LLP. Mr O'Sullivan mainly advises clients on financial services regulation, investment funds and cross-border mergers and acquisitions. He has represented and advised clients on a broad range of corporate and investment fund matters, including the formation of and investment in conventional and shariah-compliant investment funds.

SAYF SHUQAIR

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Sayf Shuqair is an associate at King & Spalding LLP, based in the firm's affiliated Riyadh office. Mr Shuqair mainly advises clients on the structuring, formation and governance of various types of investment funds, including private equity, venture capital and real estate investment funds and also generally advises clients on innovative corporate and investment structures. He also advises clients on private equity, capital markets and real estate transactions in the UAE and Saudi Arabia.

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