The International Capital Markets Review

Fourth Edition

Editor
Jeffrey Golden

Law Business Research

The International Capital Markets Review

The International Capital Markets Review

Fourth Edition

Editor
Jeffrey Golden

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITORS
Jo Morley, Anna Andreoli and Caroline Rawson

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-30-1

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

ACKNOWLEDGEMENTS

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

ADVOKATFIRMAET GRETTE DA

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY LLP

ATTORNEYS AT LAW BORENIUS LTD

BBH, ADVOKÁTNÍ KANCELÁŘ, S.R.O.

DE PARDIEU BROCAS MAFFEI

ENSAFRICA

FENXUN PARTNERS

INTERNATIONAL COUNSEL BUREAU

KIM & CHANG

KING & WOOD MALLESONS

KOLCUOĞLU DEMİRKAN KOÇAKLI ATTORNEYS AT LAW

LOYENS & LOEFF NV

MAKES & PARTNERS LAW FIRM

MAPLES AND CALDER

MEYERLUSTENBERGER LACHENAL ATTORNEYS AT LAW

MIRANDA & AMADO ABOGADOS

MKONO & CO ADVOCATES

MNA MARTINEZ ABOGADOS

MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS

MORRISON & FOERSTER LLP / ITO & MITOMI

OPPENHOFF & PARTNER

PINHEIRO NETO ADVOGADOS

PLESNER

P.R.I.M.E. FINANCE FOUNDATION

REED SMITH

RUSSELL McVEAGH

SIDLEY AUSTIN LLP

SYCIP SALAZAR HERNANDEZ & GATMAITAN

UGHI E NUNZIANTE STUDIO LEGALE

URÍA MENÉNDEZ ABOGADOS SLP

VIEIRA DE ALMEIDA & ASSOCIADOS,
SOCIEDADE DE ADVOGADOS RL

CONTENTS

EDITOR'S PREFACE TO THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor's Preface to each of the previous editions of *The International Capital Markets Review*. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the 'resilience' of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a 'big freeze' on capital market transactional work was 'thawing' were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or 'confirmation' that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor's Preface to the fourth edition of the work, we have just witnessed the successful launch of the world's largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US$25 billion. Meanwhile, *The Times* reports a buoyant London braced for a 'listing stampede'. Hong Kong is rivalling New York for the greatest number of cross-border deals. The *Financial Times* also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting 'fatter'. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of *The International Capital Markets Review*!

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2014

EDITOR'S PREFACE TO THE THIRD EDITION

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

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

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

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

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

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

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

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

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

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

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

EDITOR'S PREFACE TO THE SECOND EDITION

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

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

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

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

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

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

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

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

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

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

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

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

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

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

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

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

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

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

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

Chapter 17

KUWAIT

Abdullah Al Kharafi and Abdullah Alharoun[1]

I INTRODUCTION

A seismic shift in the regulation of capital market activities in the State of Kuwait took place on 21 February 2010, the date the National Assembly (the Kuwaiti parliament) enacted the Capital Markets Authority Law (the CMA Law).[2] The CMA Law created a new and independent body (the Capital Markets Authority or CMA) and provided the basis of the CMA's establishment, aims and goals, in addition to a new legal framework to fill a lacuna in the law.

The CMA Law is considered by prominent experts and practitioners in the legal community as the most complex law promulgated in the recent history of the State of Kuwait, especially concerning its interpretation, application and enforcement. The primitive infrastructure of capital markets' regulation prior to the CMA,[3] coupled with the hasty, unplanned enactment of the law, led to inevitable obstacles preventing a smooth transition into the new regulatory framework and resulted in its rigid impractical application. This was especially the case since the CMA Law interrelates with many public and private laws, such as the Civil Law, the State Audit Bureau Law, the Penal Law, the Commercial Companies Law and the Central Bank's Law and its respective by-laws and regulations.

On 13 March 2013, CMA's Council of Commissioners, in implementation of Article 152 of CMA Law, declared its Resolution No. 2-4 of 2011 to issue executive by-laws and published them in the Official Gazette. The CMA Law and its executive by-laws

1 Abdullah Al Kharafi is a senior legal counsel and Abdullah Alharoun is a legal counsel at the International Counsel Bureau.

2 Law No. 7 of 2010 on Establishing a Capital Markets Authority and Regulating Securities Activities.

3 A few fragmented Laws such as Law No. 31 of 1990 and the Kuwait Stock Exchange regulations.

have been followed, during the course of the four-year history of the Law, with several resolutions and regulations overseeing securities activities.

i Structure of the law

The CMA Law consists of 13 chapters. It starts by outlining the organisational structures and regulatory frameworks of the CMA, securities exchanges and clearing agencies. In Chapters 5 to 9, it regulates organised securities activities, licensing of parties engaging in capital market activities, acquisitions and minority rights, collective investment schemes, and the formalities and procedures related thereto. The CMA Law also provides extensive guidance on the conditions and requirements for disclosures and market announcements. The legislation is concluded by general and transitional rules.[4]

ii Structure of the courts

CMA Law provides language for the creation of 'specialist courts', which have jurisdiction over all matters subject to the CMA Law. Article 108 stipulates that the court of first instance will be called 'the Capital Markets Court, the location of which shall be decided by virtue of a decree from the Minister of Justice with the approval of the Supreme Judiciary Council'. The Capital Markets Court comprises two circuits:

a a penal circuit that has jurisdiction over all penal cases arising from matters subject to CMA Law; and
b a circuit that oversees civil, commercial and administrative matters subject to the CMA Law.

In addition, Article 112 of the CMA Law stipulates that penal and non-penal circuits at the Court of Appeal will have jurisdiction over appeals arising from the court of first instance. The highest court of appeal with respect to matters subject to the CMA Law is the Court of Appeal, and the Court of Cassation, normally the highest court of appeal, has no jurisdiction. The purpose of such approach is thought to be to streamline the process and reach final judgments in an expeditious manner.

II THE YEAR IN REVIEW

i Debt and equity offerings

The capital markets in Kuwait have suffered in the past few years from economic stagnation. Equity offerings have been on the shy side. Except for a few public shareholding companies in which the state is the main investor, there have been no other

4 For example, Article 155 of the CMA Law stipulates that 'the supervisory and control role referred to under this Law shall be transferred to the CMA within six months from the date of publishing the CMA Law executive by-laws. Thus the supervisory and control role of the Executive Committee of the Kuwait Stock Exchange shall be brought to an end.'

initial public offerings (IPO) (i.e., there have been no private sector IPOs in 2014).[5] With respect to debt offerings, Kuwait's capital markets' performance is also lacking. As of the third quarter in 2014, the market has only announced the offering of bonds to the total value of US$750 million, which was limited to the following two companies: Kuwait Projects Company (Holding) KSC and Kuwait Energy KSCC.[6] Furthermore, the Kuwaiti market has continued its inactivity with respect to Islamic debt instruments with the issuance of no new *sukuk* in 2014 (compared with last year's small total value of US$43.75 million).[7] While there have been no complaints with respect to the CMA's attitudes and speed with respect to bonds issuance, the same could not be said when it comes to *sukuk*. The former correlates to the fact that CMA has yet to streamline the rules for *sukuk* issuance. Having consulted market experts in Kuwait, we have been informed that the stagnation with respect to equity offerings is likely to change, and several private sector IPOs are soon expected.[8]

ii New regulations

The CMA has issued a bundle of new regulations and resolutions in late 2013 and throughout 2014. It is clear that the regulators focused their attention this year on three main topics, mainly revolving around the process of acquisitions, investment fund rules and rules concerning the listing of companies in the stock exchange.

Regulation of acquisitions

Regulation No. 7 of 2013

This regulation came into force on 30 December 2013 to regulate mandatory acquisitions. The application of the regulation is triggered when a person (natural or otherwise) directly or indirectly (through subsidiaries or affiliates) acquires 30 per cent of a listed company's share capital.[9] The regulation contains the formalities that an offeror, subject to making a mandatory acquisition offer, must satisfy in addition to some procedural requirements pursuant to the provisions of the CMA Law. The regulation specifies the minimum offer amount, whichever is higher, as follows:

a the weighted average of the daily price in the stock exchange of the offeree company during the six months prior to the date of disclosing the mandatory acquisition offer, and the stock exchange will calculate the mentioned price; or

b the highest paid price by the offeror (or any of its subsidiaries or affiliates) during the six months prior to the date of disclosing the mandatory acquisition offer.

5 An example of the aforementioned IPOs is the newly established Kuwait Health Assurance Company, which has a 24 per cent government ownership and capital of 230 million dinars.

6 Kuwait, general information on the bond market, http://cbonds.com/countries/Kuwait-bond.

7 Rasameel Structured Finance Co (2014), Quarterly global *sukuk* report, www.rasameel.com/downloads/RSFGlobal*Sukuk*Report1H2014-sep11.pdf.

8 International Counsel Bureau, consultations with market experts, September 2014.

9 Article 74 of the CMA Law, which stipulates 'a person shall be committed within 30 days from obtaining, whether directly or indirectly, an ownership that exceeds 30 per cent of the tradable shares of a listed company, to submit an offer for all the remaining tradeable shares...'.

The announcement of the mandatory acquisition offer has to be published on the website of the Kuwait Stock Exchange (KSE), the websites of the offeror and offeree, and in two daily newspapers. The regulation lists the procedures to execute the mandatory acquisition, which are easily intelligible to the average practitioner; the following of which are of note:

a both the offeror and the offeree are obliged to obtain independent specialist advice, which must be in the Arabic language[10] and includes what would be the offeror's share in the specific market pertaining to the acquisition following closing;

b if the proposed acquisition triggers the 35 per cent threshold of market control as mandated by Law No. 10 of 2007, the offeror must notify the Protection of Competition Agency;

c the CMA must be provided with the offer document and paid the fees,[11] and once all the requested information is provided the CMA must issue its decision within 10 days;

d an 'acquisition process manager', defined as a person licensed by the CMA to practise the management of investment portfolios activities, must collect the shares of the parties desiring to take part in the acquisition process within 30 calendar days of the date of announcing the collection period; and

e in the event the CMA approves the transaction, the offeror must provide proof of available cash or evidence of financing for the 'deal's consideration'; the acquisition is executed through the KSE via what the regulation refers to as the 'minutes of shares sale', which is different from the customary system for direct market transactions.

Regulation No. 3 of 2014

This Regulation was issued on 16 February 2014 to regulate voluntary acquisitions. It is applicable to all offeree companies that are publicly traded on the stock exchange and only applies to unlisted companies in the event of reverse acquisitions.[12] In addition, these regulations apply in the event of a party's intention to acquire a percentage in excess of 30 per cent of the shares of listed companies that are not subject to the mandatory offer rules stipulated in Article 74 of the CMA Law. Article 6 of this regulation lists in detail the procedures that should be followed to execute a voluntary acquisition. The former Article creates a 180-day maximum time limit, from the date of disclosing the 'preliminary agreement' (e.g., a memorandum of understanding or a term sheet) during which the offeror must submit the acquisition offer.

The offeror may, however, request an extension to the aforementioned period from the CMA. Should the offeror retract its offer, it will be banned from submitting any acquisition offer in respect of the offeree company for six months. Furthermore, the retracting offeror must be precluded from taking part in any transactions with the offeree (i.e., purchasing the offeree's stock directly from the market) that would result in

10 Section 8(3) of Regulation No. 7 of 2013.

11 The fees are regulated by CMA Resolution No. 19 of 2013.

12 This area is governed by Articles 289 and 290 of the CMA executive by-laws.

triggering a mandatory acquisition offer. The regulation also provides the procedures that have to be followed to adjust the acquisition offer. For such adjustment to be effected, it must be carried out for the benefit of the shareholders. The CMA has to decide on the updated offer document (i.e, either by approving or refusing it) within 10 working days. If the CMA refrains from issuing its approval, the offeror has to continue on the original basis.[13] Finally, the regulation further sets out the procedures the offeror has to undertake in order to retract the acquisition offer. As the case is for the adjustment of an offer, the CMA must approve such retraction. In any event, even if the CMA approves the retraction, the fees paid to carry out the acquisition are non-refundable.

Regulation No. 4 of 2014

This regulation was issued on 27 April 2014. It outlines the rules regarding the allowable annual trading percentages of parties controlling listed companies (otherwise known in the market as 'Creeping Rules'). It is applicable to persons (natural or otherwise) categorised as 'controlling parties' of publicly traded companies. Therefore, it is applicable to persons who either previously executed an acquisition under the CMA rules or persons who obtained 'control' prior to the promulgation of the CMA Law. The regulation, therefore, is applicable to all shareholdings exceeding 30 per cent of voting rights in a publicly traded company. The regulation provides a cap on the annually permitted purchase and sale of shares. It sets a 2 per cent limit on the increase or decrease of the annual shareholding of a controlling party in the event such shareholding is in excess of 30 per cent but less than 50 per cent.

In the event, however, that the shareholding constitutes a percentage over 50 per cent, the former allowance is increased to 5 per cent. The regulations introduces a new standardised disclosure form for controlling parties, which should be submitted to the CMA when the allowable annual sale percentage is exceeded or when the shareholding is increased in accordance with the allowable annual increase percentages.[14] It is crucial to point out that in the event a controlling party purchases shares in excess of the allowable percentages, it must submit a mandatory acquisition offer.

Regulation of funds

Regulation No. 2 of 2014

This regulation issued on 16 February 2014 is applicable to all promotional and marketing announcements of investment funds licensed by the CMA relating to public offerings or approved in order to be sent by third parties. The regulation includes the formalities and information that must be included in the promotional materials. It creates an obligation that any information regarding a promise or expectation must not be misleading in form or content; in such event, the assumptions behind this information must also be included. Furthermore, the information required is outlined when the announcement intends to include the performance of the fund or its managers.

13 Article 7(4) of Regulation 3 of 2014.

14 Form H.A.M/Q.T.A/A.A/4/2014.

The regulation also instructs fund managers to refrain from including the future price (expected or probable) of the units of the investment funds. Another prohibition precludes the inclusion of testimonials from the actual or potential unit holders in the promoted fund, or any others managed by the same manager.

The Regulation also deals with the criteria to be met when promoting the fund through direct contact (i.e., phone call or a face-to-face meeting) such as refraining from pressure-selling methods and misrepresentation. In addition, materials that the regulation deem 'prepared in advance of being distributed' (e.g., either by post or electronically) must contain specific details in the event the fund provides, *inter alia*, guarantees, comparisons with other funds or services, or past performance information, or whether the fund invests in foreign currency.

All expenses arising out of the promotional materials and announcements for investment funds are borne by the investment fund manager.

Resolution No. 9 of 2014

This resolution was issued on 3 March 2014, and replaces Resolution No. 20 of 2013, issued less than a year earlier, to regulate investment funds trading with some categories of 'related parties'. The general rule in Article 345 of the CMA by-laws lists the activities that an investment fund is precluded from engaging in, including '… 2. Purchase of any security issued by the entity managing the fund or any of its affiliated companies unless within the prescribed rules by the CMA in this regard. 3. Purchase of any securities for the entity which the fund manager acts as its subscription manager or its sales agent, unless within prescribed rules...'. This resolution 'prescribes' the rules that exempt certain activities from the aforementioned general rule. With respect to the prohibition under Article 345(2) of the by-laws, the fund can circumvent it if its articles of association allow such activities, if it obtains the fund's board approval prior to the purchase, and if the investment does not exceed 10 per cent of the total value of securities issued by the entity managing the fund, or any of its subsidiaries, except if the investment fund follows a certain index, according to its articles of association. The Regulation kept the prohibition under Article 345(3) intact, but it is further explained that the prohibition will not apply once the fund manager ceases to be a subscription manager to the entity's securities or its sales agent. In any event, the regulation prohibits investment funds from purchasing a security in a public or private offering that the entity managing the fund or any of its subsidiaries have committed to cover.

Listing regulations

Resolution No. 23 of 2014 was issued on 15 May 2014 in an effort to regulate all matters relating to the listing and delisting of shareholding companies. It replaces Resolution No. 3 of 2011 (the Old Resolution). The resolution regulates the precedent conditions for companies applying for listing in the main and parallel exchange markets and subsequent conditions for maintaining their listings. The resolution, of course, differentiates between the listing requirement for public companies and closed companies. The resolution further deals with listing of foreign companies in the KSE and the requirements for Kuwaiti companies (which are already listed on the KSE) to be listed in foreign stock exchanges. Events triggering mandatory delisting (e.g., not adhering to corporate governance requirements)[15] and grounds for discretionary delisting are also dealt with by this resolution. In addition, some amendments were introduced regarding the conditions required from closed companies that wish to be listed. For example, it is currently required that a company applying for listing should have generated a net profit of at least 5 per cent of the paid-up capital in the two fiscal years prior to listing. The Old Resolution required a percentage of 7.5 per cent.

Other notable regulations

Regulation No. 6 of 2013 outlines in detail the process of treasury share buy-back, pursuant to Law No. 25 of 2012,[16] which confers the authority to regulate such matters with respect to shareholding companies to the CMA. The regulation applies to all listed companies in the KSE with the exception of entities that are subject to Central Bank oversight.[17] The regulation lists in detail the permitted uses of treasury shares, such as stabilising companies' share prices, reduction of companies' paid-up capital and paying outstanding debts.

The regulation contains the current overarching controls and procedures, including:

a the maximum permissible share buy-back percentage being 10 per cent of the market value of issued shares;

b restrictions on using company's capital to finance share buy-back.

c minimum disclosure requirements;

d a 10-day restriction on trading treasury shares prior to the disclosure of (interim or annual) financial information or any material information that may affect the share price;

e in the event of capital increase in exchange bonus shares, a company will have the same rights as any other shareholder therein; however, in the event the company executes a capital increase by offering new shares, the company will be precluded from exercising preemptive rights by virtue of holding treasury shares; and

f treasury shares not being able to be used as a security for a loan (i.e. no liens or charges may be imposed on them).

Furthermore, the resolution makes it an obligation for companies to use IFRS standards of financial reporting.

iii Cases and dispute settlement

Kuwait does not adhere to the doctrine of binding precedents and the CMA Law, being only four years old, has yet to establish accepted legal principles as is the case with more developed areas of the law. Kuwait does not report the majority of its cases, and there is no publicly available database that one is able to consult in order to ascertain the latest

15 As per article 25(1)(c) of Resolution No. 23 of 2014.

16 New Companies Law Decree No. 25 of 2012 (as Amended by Law 97 of 2013).

17 Such as banks and some investment companies.

decisions in a given area of the law.[18] The Ministry of Justice, issues an annual book, however, that contains the statistics from all the circuits of the courts (number of cases, number of decisions, etc.). As previously mentioned, the capital market circuits have only two levels of appeal. In 2013, the Court of Appeal had a total of only 116 cases under review in the capital market circuits, mainly revolving around the issues of the licensing of individuals, companies and funds to practise capital markets activities.[19]

For the purpose of expeditious resolution and settlements of disputes, the CMA, as mandated by CMA Law, has also formed the Complaints and Grievances Committee (CGC), which is concerned with receiving, processing complaints against persons subject to the CMA Law and grievances appealing decisions by the CMA. The CGC has the right to decide, reserve the matters it reviews or refer them to a Disciplinary Council within the CMA.[20]

The Disciplinary Council, which is presided over by a member of the judiciary, has the objective of hearing grievances referred from the CGC and has the power to reverse such decisions, *inter alia*. Further, the CMA by-laws allow the CMA to amicably settle cases for which the courts have yet to issue a ruling.

iv Relevant tax and insolvency law

Taxation

Kuwait has a very simple and clear tax regime, which is not as convoluted as those in many other jurisdictions that are more dependent on the taxpayer for purposes such as funding national programmes and balancing budgets. Kuwait has a tax department at the Ministry of Finance called the Department of Income Tax (DIT), which oversees all matters relating to taxation. As a general rule, taxation in Kuwait is always imposed on net profits (e.g., there is no tax imposed on capital gains or inheritance).

Income tax

The most substantial applicable tax is corporate income tax, regulated by Decree No. 3 of 1955 (as amended by Law No. 2 of 2008) (the Income Tax Law). The Income Tax Law stipulates that all corporate bodies, notwithstanding their form (whether shareholding (KSC) or with limited liability (WLL) compared with other tax laws mentioned below) operating in Kuwait are subject to a 15 per cent net income tax. Income tax is applied on earnings arising from activities such as profits realised on any contract partially or fully executed in Kuwait, commissions from commercial representation or intermediary agreements, provision of services, or commercial or industrial activities. Income tax is calculated after deducting certain expenses such as depreciation, wages, salaries and

18 With the exception of the 'Collection of legal principles issued by the Court of Cassation', published by the Ministry of Justice, which often lags behind by about a year.

19 Ministry of Justice (2014). Annual statistical book for the year 2013. Statistical and Research Department. The State of Kuwait.

20 The Disciplinary Council was established pursuant to Article 140 of the CMA Law. In 2013 the CGC had a total of 77 complaints and grievances, 58 of which were concluded in 2013.

employees' end-of-service indemnities, and head office expenses, in accordance with the specifications of the applicable regulations.

Dividends, however, realised as a result of deals in the KSE either directly, indirectly, through portfolios or investment funds are exempt from income tax. Pursuant to the Income Tax by-law, all ministries, authorities, public bodies, companies, societies, individual firms, any natural person and others as specified by the executive rules and regulations may retain 5 per cent of the contract price or each payment made to parties with whom they entered into contracts, agreements or transactions. Non-adherence to such obligation by the parties concerned will subject them to a penalty of bearing the tax not paid by the company subject to the tax law. Finally, although the Income Tax Law does not differentiate between foreign and local persons with regards to its applicability, its current method of enforcement only applies to foreign corporate persons and equities in Kuwaiti companies. The former application does not does not consider GCC[21] nationals foreign.

National labour support tax

Law No. 19 of 2000 concerning the support and encouragement of Kuwaitis to work in the private sector creates a National Labour Support Tax (NLST). The NLST is applied on companies listed in the KSE and imposes a 2.5 per cent tax on their annual net profits. The purpose of this tax is to fund national programmes to support the part of the Kuwaiti workforce that opts to work for the private sector.

Zakat tax

The *zakat* tax imposes an obligation to pay 1 per cent of the annual net profit generated by any Kuwaiti shareholding company, whether public, closed, listed, non-listed (i.e., WLLs are not subject to *zakat* tax).[22] The *Zakat* Tax Law exempts certain shareholding companies from the payment of the *zakat* tax, such as companies wholly-owned by the state and companies that are subject to the aforementioned Income Tax Law.

Contribution to the Kuwait Foundation for the Advancement of Science

Kuwaiti shareholding companies (closed or publicly traded) contribute 1 per cent of their annual net profits to the Kuwait Foundation for the Advancement of Science (KFAS). This contribution is the main source of funding of the KFAS. It is debatable whether this contribution constitutes a tax duly levied by the State of Kuwait, but in practice most companies comply with such contribution.[23]

Insolvency laws

The Kuwait insolvency and bankruptcy regime is mainly housed in Decree Law No. 68 of 1980 issuing the Commercial Code. It deals with the topic as a whole and has a few

21 Gulf Cooperation Council.

22 Law No. 46 of 2006, Concerning Payment of *Zakat* Tax.

23 Kuwait Government Online (2013), 'Introduction to doing business in Kuwait', www.e.gov.kw/sites/kgoenglish/portal/pages/visitors/DoingBusinessInKuwait/GoverningBody_OverView.aspx.

special rules dealing with the bankruptcy of companies (in Articles 670 to 684); however, given the current commercial climate the law has been subject to severe criticism and is considered to hamper progress as it is still based on the old Egyptian Commercial Code and has not been updated. Therefore, Kuwait had seldom declared bankruptcies with respect to big companies and the law in its current status overlaps very little with capital market activities.

In response, however, to the financial crisis, Kuwait promulgated Decree Law No. 2 of 2009 (the Financial Stability Law). The Financial Stability Law lists the conditions under which, if satisfied, the state will guarantee the decline in the 'balances of the financial investments portfolio and the balances of the real estate investment portfolio, outstanding in the banks records as at 31 December 2008'.[24] The Financial Stability Law has also created a new circuit at the court of appeal to oversee requests for the restructuring of companies and provides language that such requests must be met on an urgent basis. If a company makes a request pursuant to the aforementioned law and the judge who presides over the circuit has registered his approval thereon, the company will be temporarily protected from all judicial and enforcement proceedings in respect of its obligations. This temporary period is valid until the court approves the restructuring plan of the company or rejects the request for restructuring. Some companies have made requests without merit just to be covered by the legal protection period (which, due to the slow nature of the judiciary, lasted longer than was intended according to the provisions of the law);[25] however, very few companies genuinely in this situation have chosen to benefit from this law as a result of market-specific characteristics and unfavourable local attitudes towards the notion of bankruptcy. This, in addition to the gap between local and international standards, has prompted the World Bank to take part in a new project launched in March 2014 to work directly with the Kuwaiti government. The project aims to ameliorate the main issues concerning Kuwait's insolvency law and the frameworks regarding debtors and creditor matters. The result of such collaboration would be to provide support on a new legal framework for enterprise bankruptcy and streamlining judicial approvals for 'distressed debt workout plans' in addition to the creation of a specialised commercial court run by a commercially savvy and trained judiciary, which is something the country lacks.[26]

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

Prior to the enactment of the CMA Law, the KSE, by virtue of the Amiri Decree issued on 14 August 1983, was created and granted an independent legal personality. It was also

---

24 Article 4 of Law No. 2 of 2009.

25 The court's Company Restructuring Circuit decided on 24 July 2014 to remove the Investment Dar (once the country's flagship financial institution) from the protection given under the Financial Stability Law soon after its enactment.

26 The World Bank (2013). Press release: 'World Bank supports strengthening of Kuwait's insolvency and creditor/debtor regime', www.worldbank.org/en/news/press-release/2013/06/03/world-bank-supports-strengthening-of-kuwait-insolvency-and-creditor-debtor-regime.

entrusted with regulatory securities activities through the KSE Executive Committee (KSEC). The KSEC issued all the rules and regulations regulating securities' activities, but following the enactment of the CMA Law, the KSE came under the CMA's oversight, rolling back its authority to regulate.

On 27 April 2014,[27] and in accordance to the CMA Law, in an effort to privatise the stock exchange, a public shareholding company, the Stock Exchange Company, was established. Pursuant to Article 33 of the CMA Law, 50 per cent of the Stock Exchange Company's shares will be offered to the public and the right to purchase the remaining 50 per cent will be divided into 5 per cent segments and offered for sale through an auction in which only listed companies are allowed to participate.

In terms of central counterparties, according to the CMA Law establishing, licensing, managing and operating a clearing houses, is subject to the CMA's approval and continuous oversight. The law confers to the CMA substantial authority to regulate licensed clearing houses to the extent that no rule, policy or amendments shall be considered valid unless approved to by the CMA.[28] The Kuwait Clearing Company is the most prominent clearing house in the State of Kuwait. It provides several services, among which are; clearing and settlement services, derivatives market's clearing and risk management, dematerialisation and rematerialisation of securities, pledging and mortgage accounts, trustee services, and subscription management services of IPOs.[29]

III OUTLOOK AND CONCLUSIONS

The CMA, as a relatively new regulator, has been increasingly busy in the past few years organising its internal structures and phasing in its regulatory activities in order to become effective and to bridge the gap between accepted local practices and international standards. What has been the subject of increasing criticism during its short lifespan has been the attitude it has adopted, characterised by the rigid application of the law and often slow response times when it comes to granting the required licences for persons to carry out their business.[30] The responses from the regulators must be better outlined, explained and substantiated.

It has also been recommended that clear and easily accessible databases be created for such decisions. This is consistent with the CMA's published goals of increasing the awareness of stakeholders from investment and legal perspectives, in addition to the CMA's mandate of improving the authority's performance in all its departments and raising its levels of efficiency and effectiveness.[31] This must also be done in collaboration with other governmental and private sector entities.

27 The date the notice of the company's establishment was published in the Official Gazette.

28 As per Article 54 of the CMA Law.

29 Kuwait Clearing Co, KSC (2014), services, www.maqasa.com/index_e.htm.

30 Some highly publicised investment funds originating from reputable institutions took longer than two years to get licensed.

31 Capital Markets Authority (2014), 2nd Annual Report for the fiscal year (2012–2013), State of Kuwait.

On the positive side, many developments have taken place. The most publicised of these has been the steps towards the privatisation of the KSE; on 20 July 2014 a new board was voted in for what became the first private exchange in the history of Kuwait: the Stock Exchange Company KSC.[32] Furthermore, the market has announced large-scale acquisitions, and there are positive expectations with respect to several private sector IPOs in 2014.

Securities activities and their regulation is a topic of continual debate. This is especially true since the National Assembly has publicly considered amending several provisions of the CMA Law, such as the percentages triggering mandatory acquisitions. The CMA Law is still in the development stage and it remains to be seen how its principles will be utilised in time to achieve legal certainty.

32 The KSE is still in operation as an entity and the transfer of responsibilities to the new Stock Exchange Company has been planned.

Appendix 1

ABOUT THE AUTHORS

ABDULLAH AL KHARAFI

International Counsel Bureau

Abdullah Al Kharafi is a senior counsel at the International Counsel Bureau (ICB). At ICB, he is a leading corporate commercial lawyer, advising numerous clients on various aspects of both commercial and civil law.

A seasoned professional, Mr Al Kharafi's expertise spans a number of areas, such as capital markets, mergers and acquisitions, investments, corporate restructuring, joint ventures, project finance and dispute resolution. He advises both local and international clients on various projects and matters.

Mr Al Kharafi acts as a board secretary and general legal counsel for the board of directors of several companies, including the flagship EQUATE Petrochemical Company. He has advised on the first acquisition, with a value of US$238 million, to take place under the new rules of the newly promulgated Capital Market Authority Law, which became effective in 2010.

Mr Al Kharafi holds a bachelor of laws degree of from Kuwait University and in 2007 he completed a pre-MBA degree from Kuwait Maastricht Business School. In 2013, he obtained a postgraduate degree in Islamic finance from Kuwait University. He is a member of the Kuwait Bar Association.

ABDULLAH ALHAROUN

International Counsel Bureau

Abdullah Alharoun is a legal counsel at the International Counsel Bureau (ICB). He has worked and studied in four different countries, giving him a multi-disciplinary professional background.

Since coming on board at ICB, Mr Alharoun has worked with a number of major local and multinational corporations across a multitude of sectors and industries, offering legal counsel and advice on various aspects of corporate commercial law, in addition to the practices of capital markets, energy, banking and finance, and privatisation and projects.

Prior to joining ICB, he served as a legal advice team volunteer in Toynbee Hall in London, the world's oldest surviving free legal advice centre. He held the position of legal practice assistant at Pillsbury Winthrop Shaw Pittman LLP, in Washington, DC. Mr Alharoun has also gained work experience at Ashurst LLP in London and as an environmental health and safety intern at Hunt Oil Company in Dallas, Texas.

He obtained his bachelor of laws from Queen Mary University of London. He also holds a bachelor of science in environmental sciences (specialism in neuroscience) from Dalhousie University in Halifax, Canada. He is a member of the Kuwait Bar Association.

INTERNATIONAL COUNSEL BUREAU
Dasman Commercial Complex
Block 3 – 6th, 8th and 10th Floors
Al Sharq
PO Box 20941
Safat 13070
Kuwait
Tel: +965 2244 0191
Fax: +965 2246 6790
ayk@icbkuwait.com.kw
aah@icbkuwait.com.kw
www.icbkuwait.com.kw