ALLEN & OVERY

# AIMA Regulatory Deep Dive Programme: Middle East

The key takeaways are based on a webinar with Nick Smith (Partner) and Kamar Jaffer (Counsel), both from the funds and asset management team, and Yacine Francis (Partner) from the disputes resolution team. They discuss the recent trends and developments in the Middle East asset management environment, with a particular focus on the UAE.

## Fund structures, domiciles and key considerations

- No single framework for investment funds in relation to the Gulf Cooperation Council (GCC) states
- Management of investment funds in each of the GCC states is a regulated activity
- GCC states offer a range of fund vehicles (eg contractual, limited partnerships, corporate vehicles, trusts, listed and retail funds etc.)
- Considerations in selecting domicile of the fund include investor base, target investment jurisdictions, investor familiarity, regulatory regime and taxation
- Historically, managers have tended to establish Cayman Islands exempted limited partnerships for PE-style funds
- Choice for domicile of funds is now more diverse with options closer to home including the financial centres such as the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) with legal systems based on English common law
- Managers established in the DIFC and ADGM may manage domestic (ie DIFC and ADGM funds) as well as foreign funds in a jurisdiction acceptable to the DIFC and ADGM regulatory authorities

## Corporate Governance

- Corporate governance is in the spotlight and varies across the Middle East, often in accordance with local regulations and culture
- Corporate governance (or operational risk) is one of the key variables that investors consider when evaluating a commitment to a fund
- At fund manager level, areas of focus include:
  - Who makes the decisions? How are decisions made?
  - Clear delineation on the roles and responsibilities of bodies/entities in the fund structure
  - Checks and balances (eg risk management, compliance and valuation committees)
  - Financial stability of the general partner/manager
  - Transparency and quality of information flow
- At fund level, areas of focus include:
  - Choice of structure and domicile of the fund
  - Role and powers of Limited Partner Advisory Committee (LPAC), including establishment and operation in practice
  - Transparency and ongoing reporting on funds flow, fees and expenses and purpose of capital calls and distributions
  - Valuations
  - Role of fund administrator

## Marketing Funds in the UAE

- No common framework amongst the GCC states that allows for the cross-border marketing of units in funds (however, see below on passporting within the UAE)
- Generally, in each GCC state marketing of units in a fund requires the use of a locally licensed placement agent and approval by the local regulator (subject to limited exemptions)
- Fund marketing passporting has been introduced within UAE onshore, DIFC and ADGM for domestic funds. Please see **here** and **here**

## Market Trends

- Covid-19 complicated fundraisings but commitments continue with investors in the market to re-up and re-allocate to managers they know
- Fundraising is taking longer (eg around 18 to 24 months) with greater focus on operational due diligence
- Managers are approaching investors to change fund terms for greater flexibility (eg investment mandate, flexibility to make follow-on investments and recycle proceeds)
- Private credit is growing
- Bright spot is technology with increase in digital innovation (eg healthcare, education etc.)
- Venture capital funds are raising more institutional capital (eg SWFs, family offices)
- Some general partner/manager restructurings and consolidation may come

## Impact of Foreign Ownership Requirements

- UAE foreign ownership restrictions limit the percentage of shares which a foreign (ie non-UAE company) may own in respect of a UAE onshore company
- Generally, foreign ownership is limited to 49% of the share capital of a UAE onshore company (except for certain sectors where the minimum UAE ownership requirement is higher)
- Ownership of real estate in the UAE is restricted to UAE nationals and, to a lesser extent, GCC nationals (subject to exceptions in areas open to 100% foreign freehold ownership)
- Recent introduction of **UAE Foreign Direct Investment Law** of 2018
  - This results in relaxation of UAE foreign ownership requirements for certain sectors and activities set out in the Positive List (in effect since March 2020)
  - Note restrictions continue to apply in respect of sectors and activities set out in the Negative List
- Foreign ownership restrictions impact foreign funds or UAE onshore funds with foreign investors. This can be mitigated in various ways, eg parallel fund structures

## Economic Substance Requirements

- UAE recently issued **updated Economic Substance Regulations (ESR)**
- UAE investment managers and advisers need to consider impact of the ESR on their business
- Investment funds are exempt
- Consider whether the company:
  - Needs to be managed and directed from within the UAE
  - Needs to have adequate UAE based full-time staff in relation to the activities undertaken or adequate level of expenditure on outsourcing
  - Generates most of its income in the UAE
  - Maintains adequate physical assets in the UAE
  - Demonstrates adequate operating expenditure in the UAE
- Greater focus on scope of activities being undertaken in the UAE and substance requirements relating thereto

## Updates to Insolvency Framework

- **UAE Bankruptcy Law introduced in 2016**
  - For the first time in the UAE, it provides routes to implement court-sanctioned restructuring schemes, including the ability to 'cram down' certain minority dissenting creditors
  - Has remained largely untested since its inception but much more interest now being shown by distressed companies and their stakeholders with regards to the available insolvency processes
  - Establishes a "financial restructuring committee" whose mandate is to broker consensual restructuring agreements between regulated companies and their creditors. Financial restructuring committee is currently actively engaged in a couple of high profile restructuring matters involving onshore UAE companies
- **DIFC Insolvency Regulations 2019**
  - Provides routes for distressed companies to implement court-sanctioned restructuring schemes, including the ability to 'cram down' certain minority dissenting creditors. The "Rehabilitation Plan" process has similarities with the recently announced "super-scheme" in the United Kingdom (allowing for 'cross-class cram-down')
  - Importantly, processes are only available to DIFC registered companies (ie onshore UAE companies cannot avail such processes)
  - Tools for creditors to 'force' a solution are largely limited to insolvent liquidation – ability to appoint an administrator is very limited in scope in this regard
- **ADGM Insolvency Regulations 2015**
  - Law is largely modelled on insolvency laws of the United Kingdom (prior to the 2020 amendments to the UK's insolvency laws)
  - Provides routes for distressed companies to implement court-sanctioned restructuring schemes, including the ability to 'cram down' certain minority dissenting creditors
  - Provides a route for a company or its creditors to appoint an administrator over an insolvent company. Recent amendments have introduced additional flexibility for administrators to raise priority financing within an administration (modelled on US Chapter 11 equivalent)
  - Importantly, processes are only available to ADGM registered companies (ie onshore UAE companies cannot avail such processes)

## Enforcement

- Two types of jurisdictions in the UAE:
  - Onshore (civil law approach)
  - Offshore: DIFC / ADGM (common law approach)
  - Each has a different court system and constitutes a different arbitration seat
- Supervisory courts for arbitration:
  - Onshore: new federal arbitration law
  - Offshore: very 'arbitration friendly' arbitration laws and approach
- Enforcement of court judgments:
  - Reciprocal enforcement between onshore and offshore courts
- Enforcement of arbitral awards:
  - Onshore enforcement under the new federal arbitration law
  - Offshore enforcement under ADGM/DIFC arbitration laws
  - Reciprocal enforcement between onshore and offshore courts
- Wider enforcement:
  - All UAE court judgments: GCC Convention and Riyadh Convention
  - Offshore court judgments: non-binding memoranda of understanding
  - Arbitral awards: New York Convention
  - Specific bilateral/multilateral treaties
- There have been significant developments and improvements to the UAE enforcement landscape over the past two years. Notable differences remain between the dispute resolution options, so the 'pros' and 'cons' should be considered carefully when drafting dispute resolution clauses in contracts relating to the UAE

*Please note that the information in this flyer is provided for information purposes only and does not, and is not intended to, constitute definitive advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances.*

Listen to a recording of the session that took place on 29 September 2020 **here**


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