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The International Comparative Legal Guide to:

Lending & Secured Finance 2018

6th Edition

A practical cross-border insight into lending and secured finance

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty one general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 54 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

Based on our observations, as well as feedback from bankers, financiers and market leaders, the lending market in the UAE made slow progress during most of 2017. Factors such as a decline in oil prices, the delay in certain infrastructure projects and a more cautious approach to global trade had an effect on investor confidence and market liquidity. However, economic activity seems to be improving gradually. Attempts are being made to create a "knowledge economy" following the decrease in oil prices and a focus on non-oil growth in the market; for example, a focus on domestic public investment which is set to continue as the Dubai Expo 2020 draws closer. Banks have attempted to adjust to the higher interest rates and lower credit demand as the banks continue to be sufficiently capitalised but the cost of funding for banks remains high.

When reading this chapter it is important to note that the UAE provides the option for companies to incorporate either "onshore" (for which 51% of the company must be owned by a UAE national or 100% by a Gulf Cooperation Council ("GCC") national), or "offshore" (in one of over 35 free zones, including, but not limited to, the Dubai International Financial Centre ("DIFC")). Each free zone typically has its own laws and regulations (with the exception of criminal law) and crucially, companies may be 100% owned by foreign investors. The focus of this chapter will be on onshore UAE companies and companies incorporated in the DIFC (as the DIFC is the most relevant insofar as financial institutions and their activities are concerned).

Practitioners should also be aware that UAE onshore law is influenced by *Shari'a* (Islamic law); this is confirmed by its constitution, which provides that: "*Islamic Shari'a is a main source of legislation in the UAE*." However, the UAE (and certain individual Emirates) have decreed that free zones (such as the DIFC) may enact their own civil and commercial laws, in parallel to UAE onshore law. Nevertheless, any companies operating, lending or taking security in the UAE should be sensitive to UAE law and customs. A key example of this relates to the language used in underlying transaction documentation. Terms such as "lender", "borrower", "debt" and "loan", although used within this chapter to assist the reader, are not *Shari'a*-compliant and should be interpreted as (and used when working on *Shari'a*-compliant deals) "financier", "obligor", "facility" or "financing", as applicable.

On 29 December 2016, Federal Decree Law No. 9 of 2016 on bankruptcy (the "New Bankruptcy Law") came into effect, repealing the former insolvency regime and introducing the UAE's first standalone bankruptcy legislation. The law has sought to introduce restructuring and modernise insolvency procedures in the UAE, and applies more widely than the former regime, covering companies governed by the Commercial Companies Law (Federal Law No. 2 of 2015 concerning Commercial Companies) (the "CCL 2015"), some free zone companies, sole establishments and civil companies conducting professional business.

The New Bankruptcy Law has also introduced three main procedures for a business in financial difficulty: a protective composition; a restructuring scheme; and insolvency and liquidation. The implications of the New Bankruptcy Law on the lending market in the UAE are touched upon in this chapter, particularly with regards to the rights of secured creditors in enforcing their security interests during bankruptcy proceedings. The New Bankruptcy Law remains largely untested and we watch with interest how the legislation will apply in practice.

On 15 December 2016, Federal Law No. 20 of 2016 on the pledge of moveables as security for debt (the "New Pledge Law") was issued in the Official Gazette and came into effect on 15 March 2017. This is a significant new legislative development which substantially changes or regularises the manner in which a charge can be created over moveable assets. The New Pledge Law provides lenders with the ability to register effective pledges over tangible or intangible moveable assets that exist in the present or in the future, a problem both lenders and debtors have struggled with for some time. However, it is not yet clear to what extent the New Pledge Law will replace the current use of commercial mortgages, which also secures an interest over tangible and intangible assets.

The New Pledge Law changes the position of taking a pledge over moveable assets by removing the need to transfer the possession to the mortgagee or third party as bailee. A new electronic security register (the "Security Register") will be set up to record the rights of the parties under the pledge and to establish priority *vis-à-vis* competing creditors. Further detail on the practical effect and operation of the New Pledge Law should be clarified by executive regulations (the "Executive Regulations") which are due to come into effect imminently. At the time of writing, no information has been released regarding the scope and effect of the Executive Regulations and the date on which we can expect the Security Register to be operational. We anticipate that the New Pledge Law will provide greater confidence to both lenders and borrowers in the UAE lending market, although we still have little insight as to how the Security Register will operate and to what extent the Executive Regulations will impact the legislation in its current form.

From an Islamic finance perspective, many leading Islamic banks and financial institutions, including Dubai Islamic Bank, Emirates Islamic Bank and Abu Dhabi Islamic Bank, announced increased profits in 2017 largely due to increased *sukuk* issuance and innovative new banking technology. The asset-based nature of asset financing is well suited to the principles of Islamic financing, and there is a growing trend of *Shari'a*-compliant financing in the aviation, shipping and infrastructure industries. *Ijara* arrangements are often used to replicate conventional lease agreements, providing a viable *Shari'a*-compliant alternative to conventional aircraft and shipping financing. *Istisna*' contracts are also useful in circumstances where aircraft are purchased directly from the manufacturer and the financing is put in place before such aircraft are delivered. In addition, we have witnessed and are witnessing tangible interest by Islamic financial institutions in gaining exposure to asset-backed or asset-based lending in non-Islamic jurisdictions including the United States of America, the United Kingdom, and the European Union.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

In October 2016, Noor Bank PJSC and a syndicate of Gulf Cooperation Council financial institutions made an upsize facility of $230 million available to Ajman Bank PJSC. The deal was structured as a commodity *murabaha* financing and involved complex mechanics to ensure *Shari'a* compliance. It is significant due to the growth of the market for interbank Islamic liquidity management at a time of tightening liquidity and the increasingly cross-border nature of these deals.

In July 2017, Al Ahli Holding Group/Dubai Outlet Mall was advised on *Shari'a*-compliant project financing facilities, structured as a *Wakala* facility and an *Istisna*/forward lease, the proceeds of which are to be applied to corporate purposes and to the financing of the expansion of the Dubai Outlet Mall. The facility is secured by real estate mortgages, assignments of leases and insurances and account pledges. The facility was made available by a syndicate of banks including Noor Bank and Al Hilal Bank and was arranged by Dubai Islamic Bank.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can generally guarantee the borrowings of members of its corporate group in the UAE, subject to certain restrictions as set out in the response to question 4.1.

For both onshore and offshore entities, authority to provide guarantees is predominantly governed by its constitutional documents and obtaining the relevant corporate authorisations (see the response to question 2.3). Guarantees must be in writing and specify the amount secured by the guarantee.

Generally, guarantees provided under certain Islamic financing structures that are subject to *Shari'a* principles may not be permitted, if their objective is to guarantee a specified return to the lenders or investors. The purpose of the guarantee must be clearly defined from the outset, as per the laws of the UAE. Further, all documents relating to a *Shari'a*-compliant transaction must be pre-approved in writing by *Shari'a* scholars who issue compliance certificates (each a *Fatwa* and collectively *Fatawa*) per transaction and are expected to audit the transaction on a regular, often annual, basis to ensure that it continues to comply with *Shari'a* and its requirements, as interpreted by the relevant *Shari'a* scholars and documented in the relevant *Fatwa*.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Whilst no specific restrictions are identifiable, the main concern revolves around a director's fiduciary duties to the relevant company.

Onshore

A director of an onshore company in the UAE is required to act in the company's best interests, as set out in the CCL 2015.

The directors of an onshore company must have regard to the legislative requirement for the pursuit of profit (CCL 2015 Article 8), and to further the company's objectives (CCL 2015 Article 22). With those interests in mind, there are also some distinct provisions to which directors should adhere, including a restriction on guaranteeing any loan agreement with a board member and third party (CCL 2015 Article 153) and entering into any loan agreements (typically interpreted as including guarantees) for a term that exceeds three years (CCL 2015 Article 154) (see the response to question 2.3).

Offshore

Similarly, free zone entities place similar responsibilities on the directors. The DIFC's Companies Law (DIFC Law No. 2 of 2009) (the "DCL") states that directors must, amongst other things, "act honestly, in good faith and lawfully with a view to the best interests of the Company" (DCL Article 53).

Directors for both onshore and offshore companies should therefore take care when committing a company to guarantee the financial risk of another entity, and should conduct appropriate due diligence to ensure the company is able to meet its payment obligations and that the company is not insolvent or likely to become insolvent.

2.3 Is lack of corporate power an issue?

Similar to the Western markets, the first step for both onshore and offshore companies is to review their constitutional documents to ensure that the company can provide a guarantee.

Onshore

By way of its constitutional documents, an onshore company may grant management with broad powers that enable it to run the company without involving its board of directors and shareholders (subject to certain restrictions for public companies – explored in more detail below).

In respect of onshore public joint stock companies ("PJSC"), directors may not enter into a loan agreement (which is interpreted by most practitioners and based on most court rulings to include guarantees) for a term that exceeds three years (CCL 2015 Article 154), unless the constitutional documents expressly permit this. If not expressly permitted, shareholder approval should be obtained. For onshore limited liability companies ("LLC"), which had previously avoided hefty regulation, directors should be aware that CCL 2015 now includes an article (Article 104) that states that the provisions therein, which apply to PJSC and private joint stock companies ("PrJSC"), shall now also apply to an LLC unless otherwise stated. On 29 April 2016, the UAE Ministry of Economy published Ministerial Resolution No. 272 of 2016 (the "Resolution"). The Resolution seeks to clarify which provisions regarding joint stock companies also apply to LLCs. Although the Resolution clarified many provisions in the CCL, certain provisions remain unaddressed, for example, whether Article 153, which prohibits providing loans to directors and their relatives, also applies to LLCs.

Offshore

Offshore companies must similarly act in accordance with their articles, though notably they need not comply with the CCL 2015, except to the extent they also operate onshore within the UAE.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In general, no governmental consents or filings are required in order to give effect to a guarantee in the UAE. However, a guarantee should be properly authorised by the company's constitutional documents and authorisations as previously stated. For onshore companies, a guarantee's form and substance should satisfy the requirements of the Civil Transactions Law (Federal Law No. 5 of 1985, as amended) (the "Civil Transactions Law") and the Commercial Transactions Law (Federal Law No. 18 of 1993) (the "Commercial Transactions Law"), as applicable. Practitioners should also consider that offshore companies may have their own legislation that governs such form and substance.

Additionally, if a transaction needs to comply with *Shari'a* principles, the pre-approval of *Shari'a* scholars is required as more fully described in the response to question 2.1.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

As mentioned above, depending on the *Shari'a* structuring of the transaction, certain guarantees that assure a specified return for the lender may be restricted, and specific advice should be sought in this regard.

Onshore

For onshore companies, the Civil Transactions Law (Article 1061) requires that guarantees must be issued with respect to a specified debt or certain amount. In addition, the guarantee should be within the capacity of the guarantor to discharge. Therefore, whilst there is not a limit *per se*, a guarantor should not guarantee more than it can afford to repay. Guarantees should also be specific in nature, and whilst judgments have been made in the UAE that have recognised 'all-monies' guarantees, the above restrictions should be carefully considered on a case-by-case basis.

Offshore

There are no such limitations placed on DIFC companies, other than those outlined in the response to question 2.2.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls in the UAE that would restrict the enforcement of both onshore and offshore guarantees, aside from certain restrictions arising under international sanctions or local boycott regulations.

Onshore

The interpretation of the limitation period for onshore companies may affect enforcement of guarantees. UAE law states that in relation to surety, a creditor should claim the debt within six months of the date on which payment fell due. Dubai's Court of Cassation interpreted this as applying to all guarantees; however, Abu Dhabi's Supreme Court has suggested that the applicable period may be 10 years for commercial guarantees. It is therefore common practice to disapply the provision that states the limitation period is six months in the relevant transactional documents, though it is not clear if this would succeed in ensuring that the provision would not have effect.

Offshore

Offshore companies will be governed by their own laws. For example, the legislation in the DIFC states that, excluding fraud, a claim cannot be commenced more than six years after the date of the events that gave rise to the claim. However, should the free zones' legislation be silent regarding limitation, the period will be the same as under UAE law.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Although there are differences between the types of collateral available to onshore and offshore companies, both allow (with certain restrictions and limitations) security over: (i) real estate/land; (ii) tangible movable property (e.g., machinery or stock); (iii) shares; (iv) receivables; and (v) cash deposits.

The New Pledge Law is intended to govern the taking of security over a wide variety of moveable property located onshore in the UAE, both tangible and intangible. The law has alleviated the more cumbersome aspects of taking security over movable property, which was previously governed by the Civil Transactions Law and the Commercial Transactions Law. The old system will continue to apply to the taking of security over assets which do not fall within the parameters of the New Pledge Law, including land and shares.

For each free zone, the Federal or Emirate decree that created the free zone should be reviewed, as it may grant authority for that free zone to regulate matters relating to taking and enforcing security. Most free zones will only have the power to regulate and promulgate laws regarding the incorporation of companies, and therefore the relevant Federal laws of the UAE and specific Emirate will continue to apply to all aspects not expressly regulated by the free zone. In relation to the DIFC, the creation, perfection and enforcement of security is governed by the DIFC Law of Security (DIFC Law No. 8 of 2005) and the Security Regulations, and the DIFC Real Property Law (DIFC Law No. 4 of 2007). Such regulations more closely mimic common law-based regulations governing the taking of security.

Foreign lenders should also bear in mind that ownership of land may be restricted to UAE (or GCC) nationals in certain Emirates. Dubai, however, is generally more progressive in this regard as it permits foreign ownership of land in certain designated areas (Regulation No. 3 of 2006 Determining Areas for Ownership by Non-UAE Nationals of Real Property in the Emirate of Dubai). Such restrictions may affect the perceived value placed on any such security by lenders; the ability of a foreign lender to enforce its security package over, for example, real estate in an area that is not designated as freehold, or over shares in a company incorporated onshore up to a percentage that exceeds the maximum that foreigners are entitled to own, should be borne in mind when negotiating the security package for any given transaction. This often triggers the need to consider a structured solution, or the involvement of a security agent or trustee.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Whilst general over-arching security agreements can be provided in the UAE, the general practice and advisable approach is to have separate agreements wherever possible. Further, as certain security documents may have to be notarised and registered with different government entities, particularly in relation to land and shares, it may create uncertainty and result in additional costs if they were to be included in the same agreement.

Additionally, in *Shari'a*-compliant transactions *Shari'a* scholars will insist on the separation of subject matters in documentation to ensure there is a reduced chance of material ambiguity (*Gharar*) in the agreements.

The procedures for the relevant security agreements vary from asset to asset (see the response to questions 3.3 and 3.8).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Onshore

A person or company owning property in the UAE (with the legal capacity to sell) can create a mortgage in favour of a mortgagee licensed by the UAE Central Bank. The mortgage can be over: (i) land and buildings; (ii) a leasehold interest; and/or (iii) a building erected on leased land.

In order to perfect a valid mortgage in the UAE, the land mortgage agreement (generally pre-printed documents prescribed by the relevant authorities) must be: (i) executed in writing in the presence of a public notary or the relevant land department in Arabic; and (ii) provided to the mortgage registrar with the land department or the local municipality of the relevant Emirate. A fee, which is usually payable, is dependent on the specific Emirate; however, it can commonly be linked to a percentage of the mortgage amount (see the response to question 3.9). This can be onerous on the borrower if they are covering the costs of the transaction. Furthermore, enforcement of such security can incur additional fees and expenses which may be prohibitive to the lending entity when it comes to an enforcement scenario and transferring title.

As discussed in the response to question 3.1, foreign lenders should also bear in mind that ownership of land, onshore companies and other assets may be restricted to UAE (or GCC) nationals in certain Emirates and as such, the involvement of a local bank or a local/regulated security agent or trustee may be necessary. Furthermore, regardless of foreign ownership restrictions, certain types of security can only be given in favour of a bank licensed by the UAE Central Bank.

Lenders should also be aware that it is possible to take mortgages over ships and aircraft under the laws of registration of the relevant assets. In the case of mortgages over aircraft, the mortgage instrument may be filed with the General Civil Aviation Authority and a UAE pledge will also typically be taken over these assets. It is also worth noting that, in 2008, the UAE ratified the Convention and Aircraft Protocol on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, commonly known as the Cape Town Convention.

Offshore

Interests in land in free zones are normally subject to their own regulations. The DIFC, for example, is governed by the DIFC Real Property Law, which outlines that land transactions must be registered in a central register administered by the DIFC and should include: i) a description to identify the property; ii) a description to identify the interest to be mortgaged; and iii) a description of the secured debt or liability.

As with land, security over machinery and equipment in free zones may be subject to its own regulation, and the relevant Federal or Emirate decree which created the free zone should be consulted. The DIFC, for example, unlike UAE law, generally allows for the registration and enforcement of a floating charge (see the response to question 3.7).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, typically security over receivables is taken by an assignment of the contractual rights under the agreement giving rise to the receivables.

Onshore

The New Pledge Law will apply to the creation of security over receivables from third parties. The law provides that security may be created over receivables so long as the parties enter into a written agreement that complies with the requirements of the Executive Regulations, which are due to be introduced and become effective imminently. The security interest will be effective against third parties upon registration on the Security Register, which is also yet to be established. At the date of writing, there has been no information on when the Security Register will be set up. In addition to registration, it will also be necessary to notify any possessor of the secured property of the security interest being created if the relevant property is not in the possession of the security provider.

Offshore

Such an assignment is permissible in offshore transactions. Specifically, security in the DIFC is governed and permitted by the DIFC Law of Security. Notably, the DIFC does not provide different rules depending on the asset to be secured (excluding land); hence all security to be taken in the DIFC must 'attach' to be effective. For 'attachment' to occur:

(i) a value must be given;

(ii) the debtor must have rights in the collateral or the power to transfer its rights in the collateral to a security party; and

(iii) one of the following: (a) the obligor must be bound by a security agreement that provides a description of the collateral; or (b) the collateral must be a negotiable document of title, a negotiable instrument, money, deposit account or financial property and the secured party must have control pursuant to the obligor's security agreement.

Perfection of the relevant security is attained once: (i) it is 'attached'; and (ii) a 'financing statement' is filed with the DIFC Security Registrar. The 'financing statement' should be filed within 20 days of the date of the security agreement and will lapse five years from the date it is filed (notwithstanding the term of the security agreement itself), pending a continuation statement.

However, it should be noted that a financing statement is not appropriate for security taken over the assignment of certain receivables (as set out in the DIFC Security Regulations) and monies held in an investment account (as defined in DIFC Personal Property Law).

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Onshore

The New Pledge Law will govern the taking of security over funds deposited in a UAE licensed bank. The law provides that the security shall be created by the parties entering into a written agreement which complies with the requirements of Executive Regulations. The security will need to be registered on the Security Register once it is established. The New Pledge Law provides that future property may be secured, which is particularly relevant in respect of security over cash deposits. The previous position was that the credit balance had to be fixed and identifiable, i.e. no floating charge, which in effect meant that the borrower had to maintain a blocked account. This resulted in some foreign lenders also requiring that additional security be taken over offshore accounts where floating security is recognised and enforceable. The New Pledge Law should therefore be a welcome development to banks when taking local law account pledges.

Non-resident foreign banks should also be aware that, under UAE law, a pledge over funds in a bank account can only be granted in favour of another bank or financial institution licensed in the UAE.

Offshore

Currently, the only free zone permitted to regulate banks is the DIFC, and any relevant account charges are regulated by the DIFC Security Law. The procedure and restrictions (including monies held in an investment account) are set out in the response to question 3.4. For any other free zone, UAE law applies.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Security can be taken over shares in the form of a share pledge in relation to all onshore types of companies, including onshore LLCs and most offshore companies. The pledge documentation should always be governed by the relevant jurisdiction of the pledgor, which would typically be UAE onshore law, or in the case of the DIFC, DIFC law. Security can be granted under a different jurisdiction; however, it is not advisable as the merits of any dispute would have to be looked at again, in accordance with and by the courts of the jurisdiction where the pledgor is located if the security was ever enforced upon (see the response to question 7.1).

Onshore

The procedure for pledging shares in a PJSC or PrJSC is by the physical delivery of the share certificates to the pledgee and entry of the pledge in the company register (though if the shares are not in certificated form, physical delivery is not required). A PJSC will usually be required to be listed at one of the UAE's stock exchanges and the pledge should be recorded in the share register maintained by the relevant exchange. A PJSC will appoint a share register keeper (such as the Dubai Financial Market ("DFM") or Abu Dhabi Securities Exchange ("ADX")) to record the pledge. Upon such registration the pledgee typically has the right to collect dividends and entitlements attached to the shares, though in most cases these are returned to the borrower (with certain limitations) unless the borrower defaults.

Onshore LLCs did not previously have any clear legal guidance on how their shares could be pledged, and the pledge perfected. However, the CCL 2015 implements a new system (under Article 79) that allows pledges of shares in an LLC to be made in accordance with such company's articles, and under an official notarised document to be registered at the companies registrar, for which the Minister of Economy intends to issue specific regulation. It is anticipated in the market in Dubai that pledges over shares will have to be registered with the DED to be effective, which is an important development which may facilitate the extension of credit to SMEs, start-ups and family businesses.

As indicated before, lenders should also bear in mind that foreign investors are still restricted in their ownership of capital regarding onshore companies (at least 51% should be owned by a UAE national) therefore enforcement can be difficult; and typically, a local security agent or trustee will need to be employed.

Offshore

Most offshore companies (including the DIFC) have physical share certificates that can be pledged and delivered, although this is not always the case. Most free zones also have their own registration requirements for such security, which may include execution of certain forms and filing of executed documents with the relevant free zone registrar.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Onshore

The New Pledge Law is intended to govern the validity and enforceability of security over, *inter alia*, raw and primary products and commodities, equipment machinery and work tools. The formalities of registration are as set out above, and the security will have to be registered on the Security Register once established. As the law remains untested, we have yet to understand how the enforceability of such security shall operate.

Currently, security can be taken over machinery and trading stock by way of a commercial mortgage. To register a commercial mortgage, it has to be executed in writing and the agreement has to be notarised and registered in the commercial register of the relevant Emirate's Department of Economic Development. Notice of the mortgage is to be given in two local Arabic newspapers two weeks prior to such registration. The registered mortgage will only be valid for a period of five years unless renewed and updated (notwithstanding the term in the underlying agreement). It is not yet clear to what extent pledges under the New Pledge Law will replace the current use of commercial mortgages.

Offshore

Security over such assets in free zones is permitted but subject to the relevant free zone requirements. In the DIFC, for example, it is possible to create a security interest over future assets/advances, acquired assets and the debtor's right to use, or dispose of all or part of the relevant items in line with the procedure set out in the response to question 3.4.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Both onshore and offshore companies should be able to grant security to secure their own borrowings and those of other borrowers subject to the requirements and restrictions set out herein.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Stamp duty and taxes are not applicable for either onshore or offshore companies given the nil rate of direct tax applicable to most sectors in the UAE (see the response to question 6.1). However, transfers of land may incur registration fees akin to stamp duty, payable to the relevant Emirates' land registry. These costs vary from Emirate to Emirate.

Notarisation is commonplace in the UAE and, even if not expressly required, may be used in order to add authority to documents. Fees in relation to this are normally charged at a very low percentage (approximately 0.25% and subject to a cap) of the secured amount, and importantly notarisation for onshore documentation is always in Arabic.

We have yet to know if the Executive Regulations, once issued, will provide further information on fees in relation to security over moveable property.

Onshore

Onshore mortgage registration varies between Emirates; the Dubai Land Department, for example, currently charges 0.25% of the value of the mortgage amount. The fees for registration of other types of security vary depending on which Emirate the security is registered in, but commonly involve a percentage of the amount secured and are subject to a cap.

Offshore

Registration varies in the DIFC; for example, a mortgage fee is US$100 (or US$273 for an Islamic mortgage), and if the property has not yet been registered with the DIFC Registrar of Real Property an additional fee (currently 5% of the total value of the property) is also payable. The cost of filing a 'financing statement' (see the response to question 3.4) is currently at a cost of US$1 per US$1,000 secured, subject to a minimum of US$250 and a maximum of US$5,000.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In comparison to the United Kingdom and United States, the process of securing assets is generally more complex and expensive. Arguably, the relevant free zones have a more straightforward approach, although it is still more uncertain than the established Western systems. This is somewhat due to a lack of formalised or standard structure of registrars for registration of each type of security in the relevant Emirates. It is hoped that the introduction of the Security Register for the registration of security over moveable property will alleviate some of this uncertainty. Furthermore, a lack of established case law and clarity regarding the perfection of security, and which department security should be registered with, can make it difficult to assess what registration steps to take next.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Typically, no regulatory or similar consents prior to the creation of a security are required. However, to the extent that a regulatory or government-owned body must accept registration of a certain security, this may be deemed a form of consent. Moreover, in circumstances where the secured assets are equities or other forms of securities, certain approvals may be required and structural considerations may need to be taken into account. Further, any security against government-owned assets or certain individuals within government organisations will require consent.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no specific concerns or case law relating to such matters that are apparent.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

The procedures and requirement for security are set out in the answers to the questions above. For both onshore and offshore companies it should be noted that signing in counterparts is generally accepted practice; however for enforcement purposes, there should always be a 'counterparts' provision in the documentation.

For onshore entities executing specific security documents, including power of attorneys, it may need to be executed in front of the relevant notary public and/or registrar. Notably, the concept of deed is not recognised in the UAE outside the DIFC and therefore security will be by contract. In addition, certain assets will require registration in a form as required by the relevant government or regulatory authority. Though counterparts are generally accepted, it is also advisable, based on judicial precedents, to encourage the signing parties to initial every page and clearly identify themselves and their authorities. In the case of corporate signatories, a company stamp should be affixed. Offshore entities will follow their own relevant execution requirements.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Onshore

There are currently no express provisions regarding the restrictions on a company's ability to guarantee or give security to support the acquisition of itself, its parent, or its subsidiary company.

However, the CCL 2015 states that a PJSC or PrJSC or any of its subsidiaries "*may not provide financial aid to any shareholder to enable the shareholder to hold any shares, bonds or Sukuk issued by the company*" (Article 222). The definition of such financial aid includes any security, guarantee or providing company assets as security. On 28 April 2016, the UAE Ministry of Economy issued guidance, by way of Ministerial Resolution No. 272 of 2016, confirming that the financial prohibition will not apply to LLCs.

Offshore

The relevant rules and regulations of the applicable free zone would need to be reviewed to understand their position in respect of financial assistance, but typically parties tend to err on the side of caution in such matters.

By way of example, within the DIFC, a company limited by shares is prevented from providing financial assistance by granting security and providing guarantees by a company limited by shares in relation to the acquisition of shares in itself or in a holding company unless: (i) such assistance would not materially prejudice the interests of the company or its shareholders or the company's ability to discharge its liabilities as they fall due and must be approved by the shareholders (90% in share value); (ii) finance or financial assistance is part of the company's ordinary business and is on ordinary commercial terms; or (iii) it is specified in DIFC Company Regulations (2009) as exempt. However, in relation to point (iii), should such financial assistance not fall under these exemptions, companies may consider using DIFC-incorporated special purpose vehicles to provide financial assistance, if permitted by the DIFC Special Purpose Company Regulations.

5 Syndicated Lending/Agency/Trustee/ Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The concept of 'trusts' and 'trustees' are more commonly referred to in the UAE as 'agent', 'security agent' or 'security trustee'. They are widely recognised concepts and often utilised in onshore, offshore (including DIFC) and Islamic finance structures. In Islamic transactions, if the deal is structured in compliance with *Shari'a*, the addition of an agent is not uncommon, in order for them to represent a group of lenders and protect their interests.

Further, as outlined in the response to question 3.6, onshore and offshore (including DIFC) entities in the region may require that a security agent is employed, particularly in the context of security which is granted in the region and can only be enforced by local institutions or entities that have specific licences. For example: (i) security over accounts – where a bank or financial institution should be the beneficiary of the security; and (ii) a lender who funds an organisation which has a teaching licence and is granted security by way of shares in itself – security can only be enforced over the shares if the lender itself has a teaching licence. Typically, this only becomes an issue upon enforcement; however, lenders should be mindful of this as it may affect the value they place on such types of security.

If a foreign lender is taking security over shares of an onshore entity, it may become difficult for them to enforce their security unless they are represented by a UAE national to ensure they do not contravene any ownership restrictions. This is not an issue for offshore entities for which 100% foreign ownership is permitted.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Agency is recognised, and in the DIFC both agency and trustee roles are, as more fully described in the response to question 5.1.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The UAE is a relatively new financial centre, and the practitioners based here are keen to emulate a system as advanced as those established in the United Kingdom and the United States. Thus, many of the practices and customs for financing transactions (especially for certain advanced offshore entities, including the DIFC to a much larger degree) are similar to those utilised in the Western markets, albeit occasionally with an additional tier of Islamic structuring. Hence, similar to Western markets an amended and restated facility would typically be entered into and the guarantee would be reaffirmed with the new parties.

Nonetheless, the practices for onshore entities and certain free zones are often not as structured or stringent, and a simple side letter or amendment may suffice.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Whilst the UAE has tax laws, the governmental authorities do not currently impose corporate taxes on companies other than on branch offices of foreign banks and certain energy companies (e.g. oil, gas and petrochemical). However, a value-added tax ("VAT") regime of 5% is due to be introduced to the UAE on 1 January 2018 pursuant to Federal Decree Law No. 8 of 2017, (the "VAT Law"). The VAT Law is based on the principles contained in the Unified GCC Agreement for VAT, which was published in the Saudi Arabia Official Gazette in April 2017. Other GCC countries may implement the 5% VAT at the same time, or by 1 January 2019 at the latest. Companies with annual supplies in the UAE above AED 375,000 will have to register for VAT. If a company has annual supplies above AED 187,500, they can voluntarily register. VAT registration will be compulsory from the final quarter of 2017. Similar to Western markets, it is intended that if a company is engaged in the supply of goods or services that are subject to VAT (including at the zero rate), the company will be entitled to reclaim VAT that it incurs on its costs. Where the company is engaged in activities that are exempt from VAT and it cannot reclaim VAT incurred on costs, VAT will be a cost to its business (as suppliers will charge VAT that cannot be reclaimed). A number of regional experts have been unable to predict the impact the VAT introduction will have on economic growth, the outcome remains to be seen.

No withholding tax is currently payable in relation to principal, interest payments and other fees associated with the granting of loans. Currently, customs duties are typically very low, and personal income tax is not applicable; however, there are municipality service charges on individuals in the UAE by way of hotel and service (food) charges.

Various fees are payable for transferring property or land from one name to another (akin to stamp duty), registration and notarisation fees (see the response to question 3.9). Notably, no income tax regime is in place, which makes the region an attractive market for both individuals and corporations.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No preference is given to foreign lenders or financiers; however, the nil tax rate (subject to some exceptions as outlined in the response to question 6.1) is viewed as an incentive to invest in the region.

See the response to question 3.3 in respect of costs of registration. It should be noted that some free zones do not recognise the registration of security; hence the lenders have to rely on their contractual remedies in a default situation.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?

See the response to question 6.1.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Other than as outlined in the response to question 3.9, the costs to the lender are those that are imposed on them in their own jurisdiction of incorporation, if any.

Additionally, if a transaction is to be structured Islamically in accordance with the principles of *Shari'a*, this may also increase costs due to the document-heavy nature of such transactions and the need to involve *Shari'a* advisory boards.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Onshore

Yes, both the UAE Civil Procedures Law (Federal Law No. 11 of 1992, as amended) (the "Civil Procedures Law"), and the Civil Transactions Law provide for the recognition of foreign governing law in contracts, provided that the conditions set out in the Civil Procedures Law are satisfied. However, if a UAE Court accepts jurisdiction, especially in an enforcement scenario where assets are located in the UAE, it may ignore the choice of foreign governing law in a contract and apply UAE law insofar as enforcement relates to the domicile of the parties, and the location of assets in the UAE. There are some claims where the parties cannot contract out of the application of UAE law, for example real estate disputes where the real estate is onshore in the UAE.

Offshore

In the DIFC, Article 6 of the DIFC Judicial Authority Law (Dubai Law No. 12 of 2004 (as amended)) provides that the DIFC Courts may apply the laws of another jurisdiction where the parties to a dispute have explicitly agreed that such laws shall govern a dispute between the parties, provided that such law does not conflict with the public policy and morals of the UAE.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Onshore

The UAE Civil Procedures Law sets out in its Article 235 the basis upon which UAE Courts will recognise and enforce foreign judgments or orders.

Article 235 provides that a foreign judgment may be recognised and enforced if:

(i) the law of the country in which the judgment was issued would recognise and enforce a UAE Court judgment. This usually means that the two countries either have a bilateral treaty providing for recognition and enforcement of judgments. As neither the United States nor the United Kingdom have such treaties with the UAE, judgments would not be automatically enforceable without re-examination of the merits;

(ii) the UAE Courts have no grounds for jurisdiction to try the case in which the order or judgment was made;

(iii) the foreign court had jurisdiction in accordance with the rules governing international judicial jurisdiction within that country's own laws;

(iv) the parties to the action in which the foreign judgment was issued received proper notice;

(v) the judgment is final and not subject to appeal in the jurisdiction in which it was issued;

(vi) the judgment does not conflict with a judgment already made by a UAE Court; and

(vii) enforcement of the judgment does not conflict with the morals or public order of the UAE.

As a result, although a UAE Court may enforce a foreign judgment if it satisfies all of the conditions set out in Article 235, it is usually difficult for these requirements to be met. The fact that an applicant is seeking to enforce a judgment in the UAE implies that there is a nexus to the UAE in the factual circumstances underlying the case. On that basis, it is likely that a UAE Court may assert jurisdiction and reopen the merits of the case. A common pitfall for potential enforcement is to prove that the UAE Courts did not have jurisdiction to try the case, and even if all the other conditions set out in Article 235 are satisfied, the courts may refuse to enforce the foreign judgment on these grounds.

The UAE is signatory to many bilateral treaties and international conventions for the mutual recognition of judicial and arbitral awards.

Offshore

The DIFC Courts Law (DIFC Law No. 10 of 2004 (as amended)) provides the DIFC Courts with discretion to ratify judgments of foreign courts. The DIFC Courts Law also requires that the DIFC Courts abide by any mutual enforcement or judicial cooperation treaties entered into between the UAE and other countries. The DIFC Courts have entered into a Memorandum of Guidance with each of the United States District Court for the Southern District of New York, and the Commercial Court, Queen's Bench Division, England and Wales, Australia and Singapore (amongst others). These memoranda address only money judgments, are not legally binding, and set out guidelines to be followed by the respective jurisdictions when assessing whether to enforce the judgments of the courts of the other jurisdiction.

However, a decision in the DIFC could impact the manner in which foreign judgments are enforced onshore going forward. The DIFC Court of Appeal in the case of *DNB Bank ASA v Gulf Eyadah* [CA-007-2015] (25 February 2016) held that a foreign judgment which has been granted recognition in the DIFC Courts becomes a judgment of the DIFC Courts and therefore should be treated as such by the Dubai Courts (onshore Courts). This case involved the recognition of an English Commercial Court judgment in the DIFC Courts using the Memorandum of Guidance between the English Commercial Court, Queen's Bench Division, England and Wales and the DIFC Courts. There is also a system for enforcement between the DIFC Courts and the Dubai Courts (onshore) without review of the merits of the claim. This decision has therefore made apparent the potential for the DIFC Courts to be used as a "conduit" for an enforcement action in the Dubai Courts (onshore) against assets which are also onshore even where the parties have no connection with the DIFC. However, the practical effect of this decision will not be understood until the enforcement stage and there is currently no certainty as to how the Dubai Courts (onshore) would respond with respect to an enforcement action against assets if this process was followed. A subsequent DIFC Courts case of *Barclays Bank & Others v Essar Global Fund Limited* confirmed that where a claimant has received a foreign court judgment, it can be enforced against a Dubai-based party. This is done by virtue of the DIFC Courts acting as a conduit jurisdiction.

A further development has been the creation of the Judicial Committee under Dubai Decree No. 19 of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts. The Decree came into immediate effect on 9 June 2016. The Judicial Committee has been created to resolve conflicts of jurisdiction between the DIFC Courts and Dubai Courts (onshore). The Judicial Committee determines any jurisdictional disputes between the Courts and also conflicting judgments of the DIFC and Dubai Courts (onshore) involving the same parties on the same subject matter. The Judicial Committee can also suggest rules and regulations to avoid jurisdictional conflicts arising. The Head of the Judicial Committee is the Chief Justice of the Court of Cassation in the Dubai Courts (onshore) and the other six members of the Judicial Committee are made up of judges from both the DIFC Courts and Dubai Courts (onshore). Where there is a conflict between the DIFC Courts and the Dubai Courts (onshore), either a party to the dispute or the public prosecutor can make a request for the Judicial Committee to decide which court should hear the case or, if there are conflicting judgments, rule on which judgment should be enforced. Once a case has been referred to the Judicial Committee both courts must stay proceedings, and the Judicial Committee's decisions will be binding and cannot be appealed.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Onshore

(i) Commencing an action for default is a relatively straightforward process. However, seeking a money judgment at the lower courts and enforcing such a judgment upon assets is usually a lengthy process that requires trying a case on the merits, and defending appeals if any are filed by an interested party. This process may in some instances, and depending upon the form of security and nature of the assets, take up to 24 months or even longer, even if there are no legitimate legal defences to non-payment.

(ii) The enforcement of a non-appealable judgment requires the filing of a separate "execution" case. Execution cases are subject to appeal. If the specific assets of the debtor in the UAE are undetermined, a series of inquiries with various UAE government authorities such as the land registries of the respective Emirate(s), the UAE Central Bank, the Securities and Commodities Authority, and the financial markets (the DFM and the ADX) must be made through the courts to identify assets. Real estate, securities, and (subject to the provisions of the New Pledge Law) certain moveable assets such as vehicles and machinery will be subject to a public auction process.

Offshore

The enforcement of a security interest over assets located in the DIFC does not require a court order. The DIFC Law of Security governs the creation and enforcement of security over collateral located in the DIFC. The secured party must first notify the defaulting party to make payment or otherwise discharge its obligation to the secured party. The secured party must also notify any other priority creditors of which it is aware. If there is no objection by a priority secured creditor, the secured party may take steps to enforce its security interest over assets located within the DIFC. If the collateral is real property located within the DIFC, the secured party may record with the DIFC Security Registrar a written statement that a default has occurred and that the secured party is entitled to enforce the security interest.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Yes.

(i) Whilst enforcement of security previously required a court order, the New Pledge Law also introduces the concept of self-help remedies in relation to certain types of security (for example, secured bank accounts and bonds or endorsable instruments). Articles 28 to 33 of the New Pledge Law provide additional mechanisms that will allow the secured party to enforce its security without recourse to a public auction through the courts. The court does, however, have the right to choose the method of sale or to stipulate a minimum limit to the sale price. Certain collateral that does not fall within the parameters of the New Pledge Law, such as real estate and shares, must be liquidated through a public auction procedure in accordance with the UAE Civil Procedures Law.

(ii) The attachment and liquidation of publicly listed securities must be conducted in accordance with the procedures prescribed by the UAE Securities and Commodities Authority.

In relation to the enforcement of collateral security in the DIFC, see the response to question 7.3.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

There are no foreign lender-specific restrictions relating to filing suit against a company in the UAE or initiating security enforcement proceedings in the UAE.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Onshore

On 29 December 2016, the long-awaited New Bankruptcy Law came into effect. The new law introduces a protective composition process (where the debtor is in financial difficulty but not insolvent) and a restructuring scheme (as part of bankruptcy procedure), both of which are court-driven processes. Once the court has agreed to initiate proceedings for either the protective composition or the restructuring scheme, a moratorium applies to prevent claims against the creditors. Secured creditors will thereafter have to obtain the court's permission to commence enforcement proceedings.

Offshore

The DIFC's Insolvency Law (DIFC Law No. 3 of 2009) governs insolvency proceedings in the DIFC. The Insolvency Law allows the DIFC Courts to grant a moratorium, including in relation to the enforcement of collateral, to an eligible applicant (see question 1.1).

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Onshore

Article 236 of the UAE Civil Transactions Law stipulates that the same conditions set out in Article 235 for the enforcement of foreign judgments are applicable to foreign arbitral awards, which are set out in the response to question 7.2. The UAE is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral awards (New York, 1958), as well as other bilateral treaties and Conventions dealing with the mutual recognition of arbitral awards.

Offshore

In the DIFC, an arbitral award, irrespective of the jurisdiction in which it was made, is recognised as binding within the DIFC and upon application to the DIFC Court, is enforceable. A party may challenge enforcement under certain circumstances including when: a party to an arbitration was under some type of incapacity; the underlying arbitration agreement is invalid under the laws which the parties have subjected it to; the party against whom an award was granted was not provided with proper notice; the dispute in relation to which the award was granted falls outside the scope of issues contemplated by the parties to be submitted to arbitration; the composition of the arbitral tribunal or the arbitration procedures was inconsistent with the agreement of the parties or laws of the jurisdiction in which the arbitration took place; the award is not yet binding or has been suspended by a court of the jurisdiction in which it was made; the subject matter of the underlying dispute would not have been capable of settlement by arbitration under the laws of the DIFC; or if enforcement would be contrary to public policy in the UAE.

Where the UAE has entered into a mutual enforcement of judgments treaty, the DIFC Courts (as a Court of Dubai) will uphold the terms of the treaty.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Onshore

Enforcement actions over secured assets prior to the initiation of the protective composition or restructuring scheme (or the issuance of a bankruptcy judgment) are permissible if: (i) the underlying debts are due; and (ii) the court approves such enforcement. However, once the court has approved the composition or the plan, the trustee becomes entrusted with the sale of assets in line with the restructuring plan. The New Bankruptcy Law clarifies that sale proceedings must be used first to prepay the debts due to secured creditors. However, if a secured asset is essential to the continuance of the business, the court may provide that the secured assets be substituted with other assets, provided that it does not prejudice the rights or interests of the secured creditors.

Should the preventive composition or restructuring scheme prove unsuccessful and the debtor is declared bankrupt, all debts become due and the debtor's assets must be sold in order to repay the secured creditors. If the sale does not occur within one month from the date of the bankruptcy judgment, the secured creditor may request to approve the enforcement over the secured assets.

Offshore

In the DIFC, the Insolvency Law allows the DIFC Courts to grant a moratorium, including in relation to the enforcement of collateral, to an eligible applicant.

Dubai World – Decree 57

The Special Tribunal related to Dubai World ("Tribunal") was established by Dubai Decree No. 57 of 2009 issued by His Highness Sheikh Mohammed Bin Rashid Al Maktoum, in his capacity as the Ruler of Dubai. The Tribunal was established to hear claims against Dubai World, a Dubai Government-owned holding company, and its subsidiaries. The Tribunal was established following Dubai World's November 2009 announcement of its intention to seek the rescheduling of its debt obligations. The Tribunal applies the DIFC's Insolvency Laws and, as such, allows the granting of moratoria including in relation to the enforcement of collateral.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. Secured creditors will have priority to be paid from the proceeds of the liquidation of the subject assets. It should be noted that the New Pledge Law provides that the date and time of recording the pledge in the Security Register will be effective as against all parties and seek to establish priority *vis-à-vis* competing creditors.

Following payment to secured creditors, costs and expenses incurred in respect of the liquidation process will be payable, prior to unpaid end of service gratuity, wages and salaries of employees of the debtor.

In the DIFC, the Law of Security ranks conflicting perfected security interests according to priority in time of perfection. The Law of Security grants perfected security interest priority over a conflicting, unperfected security interest, and provides for priority of the first security interest to attach if conflicting security interests are unperfected.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The New Bankruptcy Law applies to all commercial companies (except for certain financial free zones), traders/merchants and civil partnerships (set up in accordance with the Civil Transactions Law). Individuals remain outside the scope of the New Bankruptcy Law.

In the DIFC, the Insolvency Law applies to any company that falls under the jurisdiction of the DIFC and has been incorporated pursuant to the DIFC Companies Law (DIFC Law No. 2 of 2009 (as amended)).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

As mentioned in the response to question 7.4, the New Pledge Law introduces the concept of self-help remedies in relation to certain types of security. The direct enforcement of moveable assets is generally permissible by private sale, subject to prior agreement, notification by relevant parties and no other security interest existing. A pledge over claims and receivables may be set off if the pledgee is a bank, and by claim if the account is held at another bank. Bonds and certain written instruments may be directly enforced through delivery or endorsement if their value is equal to the right of pledge, while written papers (e.g. bills of lading) may be directly enforced by application to the summary judge for the issuance of an urgent order.

In order to initiate direct enforcement, the pledgee must notify all concerned parties. There is currently no time limit for such notice. The New Pledge Law also grants authority to summary judges to issue orders for enforcement of a registered pledge.

In the DIFC, a secured party may take steps to enforce its security interest over assets located within the DIFC without a court order.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Yes. However, if there are grounds for a UAE Court to assert jurisdiction, the UAE Courts are likely to do so. See the responses to questions 7.1 and 7.2 for more background on this topic.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

There are no laws in the UAE specifically addressing the issue of waiver of sovereign immunity. The UAE Courts may consider a variety of factors, including public policy issues, before accepting jurisdiction in a case involving a foreign sovereign government or government entity. Insofar as the Federal and local governments of the UAE are concerned, the Civil Procedures Law contains a prohibition on the seizure of "public property" belonging to the UAE Federal Government or the governments of any of the individual Emirates to satisfy a judgment debt.

Some Emirates may also require written consent, and approval of the respective Emirate's Ruler's court or legal department are obtained prior to the filing of a claim against an Emirate's Ruler, government, or government entity. For example, in the Emirate of Dubai, the Dubai Government Lawsuits Law (Dubai Law No. 3 of 1996, as amended) requires the prior approval of the Ruler of Dubai before filing a lawsuit against the Ruler or a Dubai Government entity. Article 3*bis* explicitly states that no debt or financial obligation against the Ruler or the Government may be collected by means of detainment, public auction sale or possession by any other legal procedures of the properties and assets of the Ruler or of the Government, whether such debt or financial obligation has received a final and conclusive judgment or not. The requests for such approvals must be made to the Dubai Government's legal department.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

Onshore

Licensing requirements in the UAE:

The Central Bank and the Securities and Commodities Authority ("SCA", also known as "ESCA") are the main regulatory bodies for financial services in the UAE. Pursuant to Federal Law No. 10 of 1980 (the "Banking Law"), the Central Bank regulates the financial institutions, including those who wish to provide financing in or from the UAE.

Whilst there are no local licensing requirements for foreign lenders which lend to UAE companies, if such entity wishes to be based in the UAE, it must be appropriately licensed. UAE lenders including commercial banks, investment banks, investment companies, finance companies, Islamic banks, Islamic finance companies and real estate finance companies based in the UAE are regulated by the Central Bank and require a licence. Each of the institutions listed above must be 51% owned by a UAE national if incorporated in the UAE; however, for finance companies, commercial banks and investment banks, the minimum UAE national shareholding is 60%. Branches of foreign banks can also be licensed as commercial banks in the UAE.

In order to obtain a licence from the Central Bank, a letter of application, certain corporate documents of the applicant and a business plan are submitted to the Central Bank. The specific documents required for the licence are not listed by the Central Bank but the applicant should expect to be notified if additional documents are necessary for the process to be finalised.

UAE lenders who enter into financial arrangements with a borrower in the UAE without a licence may face imprisonment for up to three months and/or be fined up to AED 2,000. Additionally, the institution may be liable for civil and criminal claims.

Additionally, an agent for a syndicate of foreign lenders is also not required to be licensed unless it is operating from and based in the UAE. Please note the requirements in respect of local agents relating to security as addressed in sections 3 and 5.

Offshore

Licensing requirements in the DIFC:

The principal regulator for regulating financial services within the DIFC is the Dubai Financial Services Authority ("DFSA"). An individual or entity based in the DIFC which provides a financial service must be authorised by the DFSA by obtaining the appropriate licence. If both the lender and the borrower are based in the DIFC, a Category 2 licence must be obtained, whereas if the lender is foreign, providing a credit facility to a borrower in the DIFC, licensing requirements do not exist.

An entity who wishes to satisfy the eligibility requirements in the DIFC must be structured as any one of the following forms of business: limited liability company; company limited by shares; limited liability partnerships; protected cell company; investment company; branch of foreign company or partnership; or special purpose company.

The consequences of licensing violations can be severe. If a lender does not satisfy the requirements, DFSA, under the Regulatory Law and DFSA's Enforcement (ENF) Rulebook, can enforce the following actions as punishment: a fine of US$100,000 per contravention; damages or restitution; injunctions and restraining orders; corporate penalties – unlimited fines through the Financial Markets Tribunal (the FMT); and a banning order through the FMT. As a consequence of violating the Financial Services Prohibition section of the Regulatory Law, lenders will also face censure by way of publication of any enforcement action leading to critical reputational damage and the loan agreement will be considered unenforceable.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

The UAE banking market is still relatively young, and whilst there is extreme wealth and numerous opportunities in the region, obligors or borrowers may often be limited in the types of transactions and financings they can enter into, particularly in cases where the relevant funding transaction is highly structured and involves the issuance of debt securities. Nonetheless, the New Pledge Law, although untested, should attract more foreign investment to the region and instil more confidence in lenders, as the once grey area of taking security onshore should now be more akin to more developed jurisdictions' security perfection regimes in protecting lenders' interests.

Further, limitations arise when the relevant financiers and/or borrowers are *Shari'a*-compliant. However, most of the major international lenders now have their own Islamic banking desks and many retain *Shari'a* advisory boards. Such institutions are growing more comfortable with the main Islamic financing mechanisms, and view Islamic finance assets, which are forecast to reach US$3.2 trillion by 2020, as an area of major opportunity and growth notwithstanding the additional costs.

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