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The International Comparative Legal Guide to:

Lending & Secured Finance 2015

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A practical cross-border insight into lending and secured finance

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1 Overview

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

Based on our observations, as well as feedback from market leaders, foreign banking institutions in the UAE had a mixed 2014, and some struggled to compete with local UAE banks' high liquidity and depth of local knowledge. In some cases foreign banking institutions refocused services or withdrew from their UAE operations. This created room for local UAE banks and certain pro-active foreign banks to flourish, enabling strong profits and growth. Inroads were also made into the Sukuk market, with issuances made by the United Kingdom and Hong Kong governments.

In addition, we have witnessed alternative lenders, in the form of credit and mezzanine funds, and investment vehicles supported by regional family offices gain prominence, particularly in attempting to plug the gap left by conventional lenders in the context of the finance needs of small and medium enterprises ("SMEs").

Unfortunately, 2015 has so far seen low oil prices affect the sector and these are likely to limit further profits and growth in the region, as well as reduce short-term lending. However, due to increased regulation and capitalisation, banks and alternative lenders are positive going forward, and despite a slowdown in the first quarter of 2015, there has been a flurry of activity since the start of the second quarter of 2015 and this trend looks set to continue.

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. However, 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.

1.2 What are some significant lending transactions that have taken place in the UAE in recent years?

A number of significant lending transactions have been arranged by local UAE banks, which have profited from the withdrawal of foreign lenders, as discussed above.

In fact, in recent years, local UAE banks have also been able to work together in seamless market collaboration. For example, a club of local UAE banks involving Mashreqbank, Abu Dhabi Islamic Bank ("ADIB"), Noor Bank, Dubai Islamic Bank ("DIB") and United Arab Bank came together in March 2013 to make available term loan facilities of AED2 billion to finance the expansion plans of GEMS Education, the largest education provider in the region. The financing was structured as a combination of conventional and Islamic facilities tied together by a common terms agreement and secured by GEMS' school fees receivables. In 2014, the facilities made available to GEMS were increased to AED3 billion with two new financial institutions, First Gulf Bank and Siemens, joining the club. Also, in 2014, a US$425 million financing was arranged between ADIB, Commercial Bank of Dubai ("CBD") and DIB for two A380 Airbuses for Emirates airlines. The significance of such deals are highlighted in the banks' ability to pool resources and regional expertise (including shared Shari'a principles) to provide substantial facilities to companies operating in the region.

In the same year, ADIB purchased Barclays Bank's retail business for around AED650 million, and established (late in 2014) a AED1 billion finance facility for Baniyas Investment & Development Company LLC, the investment arm of Bani Yas Sports Club. The facility was provided in order to refinance the company's existing conventional financing.

Though, not *per se* a lending transaction, it is also important to point out the buying power and appetite of the local UAE banks. Following Royal Bank of Scotland's ("RBS") 2010 sale of its UAE retail business to Abu Dhabi Commercial Bank, and the reported sale of debt in the global investment holdings company, Dubai World, RBS has now, (in 2015) sold approximately AED3 billion worth of various UAE company loans to the CBD.

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).

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. 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 new Commercial Companies Law (Federal Law No. 2 of 2015) ("CCL 2015") which was published on 31 March 2015 and came into force on 1 July 2015, replacing the previous Commercial Company Law (Federal law No. 8 of 1984) ("CCL"). Notably, as this legislation is still new it is yet to be tried and tested in the courts; however, it is still heavily premised on the CCL.

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 that the directors should adhere to, including a restriction on guaranteeing any loan agreement with a board member and third party (CCL 2015 Article 153) and entering 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. Further, the DIFC's Companies Law (DIFC Law No. 2 of 2009) ("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, or articles of association, 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) with 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. However, the scope and application of this article is not yet known.

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, there are not any governmental consents or filings 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 guarantees form and substance should satisfy the requirements of the Civil Transactions Law (Federal Law No. 5 of 1985, as amended) and Commercial Transactions Law (Federal Law No. 18 of 1993), 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, 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 offshore or 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) movable property (e.g., machinery or stock); (iii) shares; (iv) receivables; and (v) cash deposits.

A key difference is that an onshore company cannot provide a conventional 'floating charge', but instead may seek to utilise a commercial mortgage (see the response to question 3.7).

In respect of any assets located onshore in the UAE over which security is to be granted, local UAE law will typically govern the enforceability and validity of the relevant contract. 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.

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 could 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, 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, registration (typically by a simple pre-determined form) needs to be made in writing and 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. Further, 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 aircrafts under the laws of registration of the relevant assets. In the case of mortgages over aircrafts, 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.

UAE law does not provide for security in the form of a floating charge; however, market players have attempted to secure inventory by use of a commercial mortgage (see the response to question 3.7).

Offshore

Interests in land in free zones are normally subject to their own regulations. The DIFC for example is governed by Real Property Law (DIFC Law No. 4 of 2007) 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

Under a strict interpretation of local UAE law, an acknowledgement of assignment by the counterparty of the underlying receivables agreement is required, following notice from the assignor. Notably, in relation to the assignment of rights (not obligations) there have been a number of court decisions that have allowed notice only. However, judgments on the topic are not consistent, and as there is no system of precedent in the UAE it is advisable for lenders to obtain the relevant acknowledgement in any assignment.

Offshore

Such an assignment is permissible in offshore transactions. Specifically, security in the DIFC is governed and permitted by the Law of Security (DIFC Law No. 8 of 2005). 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

Typically, security over funds in a bank account is by way of an account pledge and assignment agreement. An assignment of rights in relation to the relevant accounts (which normally include signing rights) is important, as the balances within them are likely to fluctuate.

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 the UAE? 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 its shares can 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. However, this legislation has not yet been tested and moreover, the procedures for registration still need to be determined. That said, this 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

For onshore companies, security over inventory that fluctuates does not exist along the lines of a 'floating charge', hence market players have attempted to use a commercial mortgage in its place. We are not aware of a case in which the enforceability of such mortgage has been tested, and local practitioners generally believe it may only apply to mortgages over businesses that are owned by unincorporated entities.

However, if enforceable, the commercial mortgage can provide security over goods, contract rights, goodwill, trade name, IP and licence rights. To register a commercial mortgage it must be executed in writing and the agreement must be notarised and registered in the commercial register of the relevant Emirate's Department of Economic Development. Notice of the mortgage should 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).

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.

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 involves a percentage of the amount secured and is subject to a cap.

Offshore

Registration at the relevant free zone again 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$5000.

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. Further, 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 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. Further, if such a facility is secured by an assignment of an account, in the UAE such assignment is absolute, there is no room for a floating security (see the response to question 3.7) or second ranking security over the relevant account.

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 stamped 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. Notably, as mentioned in the response to question 2.3, the law includes a provision (Article 104) that states the laws applying to PJSCs also 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); or (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 the UAE 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 license 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 upon this 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 the UAE, 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 the UAE and guaranteed by a guarantor organised under the laws of the UAE. 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 progressed 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, currently the governmental authorities do not impose corporate taxes on companies other than on branch offices of foreign banks and certain energy companies (e.g., oil, gas and petrochemical). 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. Nonetheless, as of the date of this publication, it has been reported that the UAE authorities have been discussing the introduction of corporate and value-added tax laws in the UAE, drafts of which are currently under review. The applicable rates and scope of these proposed laws have yet to be disclosed, although the target date for drafts to be completed has been set for the third quarter of 2015. If implemented, these laws would reflect a major change in policy and may have a detrimental effect on foreign investment in the market.

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 the UAE solely because of a loan to or guarantee and/or grant of security from a company in the UAE?

See the response to question 6.1. Although there are tax laws, they are not commonly applied.

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

Onshore

Yes, both the UAE Civil Procedures Law (Federal Law No. 11 of 1992), 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 the UAE 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 treating 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) the 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. 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.

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 the UAE, 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 the UAE 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 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 (DIFC Law No. 8 of 2005) 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) Certain collateral such as real estate and movable property including vehicles, vessels, machinery, shares, and financial instruments 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 the UAE 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 the UAE provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Onshore

As of July 2015 the UAE does not have a standalone bankruptcy law. The Commercial Transactions Law contains bankruptcy procedures in relation to both individuals and companies. Articles 704 to 710 of the Commercial Transactions Law provide for a stay on all actions by creditors following the declaration by the court that the debtor is bankrupt. The assets of the debtor will thereafter be distributed by a court-appointed administrator.

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.

7.7 Will the courts in the UAE 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, when the underlying arbitration agreement is invalid under the laws to the parties have subjected it to, when the party against whom an award was granted was not provided with proper notice, when 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, when 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 to 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

The concept of a "secured lender" as the term is generally understood, does not exist in the UAE to the extent that it denotes a lender having the benefit fixed or floating liens or charges over the assets of the debtor. However, creditors that have the benefit of registered mortgages or pledges over assets in relation to which such registration is available (real estate, vehicles, listed securities, and vessels) will have priority over other "unsecured" creditors insofar as those assets are concerned.

The Commercial Transactions Law allows for creditors with registered security rights to enforce their rights pursuant to their registered mortgages and pledges under the supervision of the court appointed bankruptcy administrator. Such enforcement will be through sale by public auction pursuant to the procedures for such auctions set out in the Civil Transactions Law.

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. Creditors with registered mortgages and pledges will have priority to be paid from the proceeds of the liquidation of the subject assets. The employees of a debtor also have priority over other debtors in respect of assets that are not subject to registered mortgages or pledges.

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 Commercial Transactions Law does not bar any specific type of entities from applying for or being declared bankrupt. However, as stated in previous responses, the bankruptcy provisions of the Commercial Transactions Law are rarely used, and restructurings, informal arrangements, the enforcement of money judgments, and the enforcement of registered mortgages and pledges on real estate, listed securities, and certain movables are the usual means of recourse for creditors and debtors.

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?

No. All enforcement measures must be conducted through the courts. The concept of "self help" or "self remedies" are not recognised in the UAE. Furthermore, seeking to seize assets outside of the court mandated procedures may expose the creditor to criminal liability.

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 the UAE?

Yes. However, if there are grounds for a UAE Court to assert jurisdiction, the UAE Courts are likely to do so. See the response 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 the UAE?

There are no laws in the UAE specifically addressing the issue of waiver of sovereign immunity. The UAE Court's 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 the written consent and approval of the respective Emirate's Ruler's court or legal department is 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. Failing the approval, the claim will not be accepted at the court. The requests for such approvals must be made to the Dubai Government's legal department.

10 Other Matters

10.1 Are there any eligibility requirements in the UAE for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in the UAE need to be licensed or authorised in the UAE or in their jurisdiction of incorporation?

Other than as outlined above in respect of taking security, no additional requirements are imposed.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in the UAE?

The UAE banking market is relatively young, and whilst there is extreme wealth and numerous opportunities in the region, the 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. In addition, limitations arise when the relevant financiers and/or borrowers are Shari'a-compliant. However, most of the major international lenders 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 reached US$1.35 trillion in 2012, as an area of major opportunity and growth notwithstanding the additional costs.

Acknowledgment

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