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Banking & Finance 2021

United Arab Emirates: Law & Practice
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UNITED ARAB EMIRATES

Law and Practice

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1. LOAN MARKET PANORAMA

1.1 Impact of Regulatory Environment and Economic Cycles

Despite the ongoing economic downturn over the past few years, amplified by the COVID-19 pandemic, the banking sector in the United Arab Emirates (UAE) saw a modest growth in assets, improved profitability and asset quality in 2020. This was primarily due to a combination of an expected decrease in population (principally in the expat population) and economic activity (resulting in businesses being reluctant to commit to any long-term borrowing), due to the impact of COVID-19.

1.2 Impact of the COVID-19 Pandemic

In addition to the schemes to shore up liquidity in the banking sector, the UAE Cabinet introduced various changes to the Bankruptcy Law on 22 October 2020 (primarily aimed at combating the adverse economic impact of COVID-19), including the concept of an Emergency Financial Crisis (EFC), which is defined as a general situation that affects trade or investment in the country, such as a pandemic, natural or environmental disaster, war, etc. On 10 January 2021, the UAE Cabinet declared the existence of an EFC as having effect (retrospectively) from 1 April 2020 through to 31 July 2021 (the EFC Period). During the EFC Period, the following applies:

- debtors are not required to file for bankruptcy if they have failed to pay their debts within 30 days due to the EFC;
- creditors cannot file bankruptcy applications against debtors, and the court will reject any such applications;
- the debtor may still elect to file for bankruptcy, in which case the court (i) can elect not to appoint a trustee if the debtor can show that its financial/business disruption was caused by the EFC and (ii) shall not take any precau-

tionary action in connection with assets that are necessary for the continued operation of the debtor's business operations; and

- if a debtor files for bankruptcy and the application is accepted by the court, the debtor may request 40 days to negotiate a settlement with its creditors, provided that any settlements are in writing, agreed by two thirds of creditors and implemented within a period of 12 months.

Any bankruptcy proceedings filed before the EFC Period shall continue, although the court doubles the time periods for such proceedings, as outlined under the Bankruptcy Law. However, it should be noted that the existence of an EFC does not preclude creditors from initiating civil proceedings (eg, payment orders, precautionary attachments and money judgments).

1.3 The High-Yield Market

While the trend in western markets may have reversed from loans to bonds as the major vehicles for funding, conventional loans continue to retain the lion's share of the financing market in the UAE.

1.4 Alternative Credit Providers

Alternative credit is not a prominent feature of the local financial landscape.

1.5 Banking and Finance Techniques

There is no applicable information regarding how banking and financing techniques are evolving to reflect the investor base and needs of borrowers in this jurisdiction.

1.6 Legal, Tax, Regulatory or Other Developments

UAE Federal Law No 14 of 2018 Regarding the Central Bank & Organization of Financial Institutions and Activities (the Banking Law) came into force on 30 September 2018, and replaced much of the existing banking regime in the UAE.

The Banking Law is discussed in further detail in **2.1 Authorisation to Provide Financing to a Company**.

1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending

ESG is starting to see some modest growth in the UAE. Recently, Majid Al Futtaim (a major retail chain in the UAE) secured its first sustainability-linked loan, with a value of USD1.5 billion. Whilst the UAE and MENA region are lagging in terms of global sustainability reporting, sustainable reporting is now starting to emerge within the UAE. In 2020, the UAE Securities and Commodities Authority (SCA) released a circular indicating that all listed companies must submit a standalone sustainability report for the financial year 2020 no later than six months following the end of the financial year. From 2022, these reports will need to be submitted 90 days after the end of the financial calendar or by the time of the company's annual general meeting, whichever is earlier.

2. AUTHORISATION

2.1 Authorisation to Provide Financing to a Company

Licensing Requirements in the UAE

The Banking Law is the primary legislation giving the Central Bank the authority to regulate financial services in the UAE (including Islamic financial services). According to the Banking Law, the Central Bank has the power to license and regulate a wide variety of financial institutions operating in the banking and financial sector in the UAE, including the following:

- banks, including institutions licensed to primarily carry on the activity of accepting deposits and other licensed financial activities, such as granting loans, issuing and

collecting cheques, placing bonds, trading in foreign exchange and precious metals or carrying on other operations allowed by law or by customary banking practice;

- exchange houses and money intermediaries (ie, foreign exchange dealers who purchase and sell currencies);
- Islamic financial institutions; and
- other financial institutions.

3. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

3.1 Restrictions on Foreign Lenders Granting Loans

There are no restrictions on cross-border lending.

3.2 Restrictions on Foreign Lenders Granting Security

There are no restrictions on domestic and foreign-registered companies granting guarantees. Guarantees must be in writing and must specify the amount they secure.

Security over movable property can be granted to non-resident foreign banks, except in the following cases.

- A business mortgage, whether under the Commercial Code or in relation to assets in the Jebel Ali Free Zone (JAFZ), can only be granted to banks or financial institutions with a commercial banking licence. However, UAE Federal Law No 4 of 2020 on Guaranteeing Rights Related to Movables, UAE Cabinet Decision No 29 of 2021 on the Implementing Regulations for UAE Federal Law No 4 of 2020 on Guaranteeing of Rights related to Movables and all related decrees, decisions and regulations (as issued from time to time) (together, the Pledge Law) should

allow foreign lenders to register a pledge over movable assets (including assets owned by businesses) without the need to either take possession of such assets or appoint a locally licensed security agent.

- Foreign lenders can hold securities in the DIFC, and can be mortgagees on vessel mortgages.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no exchange controls restricting payments to foreign lenders. The UAE dirham (AED) is fully convertible and there are no restrictions on the movement of funds (denominated in dirhams, US dollars or otherwise) into or out of the UAE.

3.4 Restrictions on the Borrower's Use of Proceeds

There are no restrictions on the use of proceeds from conventional loans and/or debt securities, except as contractually agreed. However, in relation to Islamic facilities and/or the proceeds from the issuance of sukuk, such proceeds must be used in accordance with the principles of sharia.

3.5 Agent and Trust Concepts

The concepts of facility and security agents are recognised in the UAE.

The UAE does not provide for the creation of trusts.

3.6 Loan Transfer Mechanisms

Debt can be transferred through participation agreements.

3.7 Debt Buy-Back

There is no restriction against conducting a debt buy-back.

3.8 Public Acquisition Finance

Neither the Companies Law nor the rules and regulations applicable in the UAE's exchanges (the Abu Dhabi Stock Exchange, the Dubai Financial Market and NASDAQ Dubai) provide a separate set of rules governing the acquisition of public companies in the UAE. Accordingly, there is no express requirement that certain funds must be used in acquisitions.

4. TAX

4.1 Withholding Tax

There is no withholding tax in the UAE.

4.2 Other Taxes, Duties, Charges or Tax Considerations

The principal difference in the treatment of local and foreign commercial banks is that local banks are not subject to any taxation on their income, whereas foreign banks with branches in the UAE are subject to tax at the emirate level. Additionally, a foreign bank may not establish more than eight branches in the UAE. The tax paid by banks varies from emirate to emirate; it also varies within each emirate, where certain banks are allowed to make annual payments of an agreed sum without reference to the level of profits or losses. Generally, foreign banks are required to pay a tax of 20% on net profits arising in the particular emirate.

Branches must file an annual tax declaration together with audited financial statements. The financial year for foreign banks operating in Dubai is 1 January to 31 December. Taxes are due and payable to the Dubai Department of Finance no later than 31 March of the following year. The penalty for late payment has been fixed at 1% for each 30-day period that such payment is in arrears.

Value Added Tax (VAT)

VAT was introduced in the UAE on 1 January 2018. All fee-based (but not margin-based) services offered by banks in the UAE are subject to VAT at 5%. Subject to certain conditions, non-resident banks offering services in the UAE are also required to apply VAT.

Fees

Registration fees (to register a security) are payable to the local emirate authority. Fees vary depending on the authority and form a percentage of the secured amount (for example, 0.25% of the value of the loan for a real estate mortgage). These fees can be costly.

Enforcement of a security interest triggers court fees, as prescribed by the relevant courts. If a secured asset is sold by public auction, a public auction fee is also payable.

4.3 Usury Laws

Interest in excess of 12% per annum, compound interest and interest in excess of principal are not enforced. However, unlike other emirates, these limitations are not usually followed by the Dubai courts.

5. GUARANTEES AND SECURITY

5.1 Assets and Forms of Security

The creation of security interests in the UAE (outside the free zones) is principally governed by:

- UAE Federal Law No 5 of 1995 relating to the Law of Civil Transactions, as amended (Civil Code);
- the Pledge Law; and
- the Commercial Code.

There are several free zones in the UAE, each of which has its own regulations for creating secu-

rity interests by entities licensed within that zone and/or over property located within it. However, in relation to free zones, this review is restricted to the creation and enforcement of security interests in the JAFZ, the first free zone in the UAE, around which the laws and procedures of most other free zones are modelled.

The general forms of security over assets include real estate, tangible movable property, bank accounts, financial instruments, claims and receivables, cash deposits and intellectual property. These forms of security and related formalities are outlined below.

Real Estate

Real estate constitutes land and permanent structures on land that cannot be moved without suffering damage or alteration. The most common categories of real estate and real estate interests over which security can be granted include:

- freehold land;
- buildings and constructions on freehold land;
- leasehold interests in land;
- buildings and constructions on leasehold land; and
- usufruct – ie, the right to use/develop, enjoy and occupy land or property belonging to another person for a fixed term.

Mortgages over freehold land are generally registered with the land department in the relevant emirate; for example, in Dubai this would be the Dubai Land Department. In addition, some free zones provide their own mechanism for registering a mortgage over a freehold/leasehold interest relating to property located within that free zone.

There are three types of mortgage over real estate in the UAE:

- a mortgage over land and buildings;
- a mortgage over a leasehold interest in real property; and
- a mortgage over a building constructed on leased land.

A mortgage is defined in the Civil Code as a contract by which a creditor acquires the right to be satisfied from the proceeds of the sale of the mortgaged real estate in priority to unsecured creditors and other secured creditors of the debtor. A mortgage must be registered in order to have effect. The time of registration of the mortgage determines priority among mortgages over the same real estate.

The mortgagor must be the owner of the mortgaged property. It is not essential for the mortgagor to be the principal obligor of the debt that is secured by the mortgage; the mortgagor can be a guarantor of the debt.

Legislation now exists in Dubai that, among other things, governs the registration of property and security interests by expatriates in certain demarcated zones. The Dubai Land Department has exclusive jurisdiction to register the following three types of title in the name of foreign nationals and foreign-owned companies in certain demarcated areas:

- freeholds;
- long-term leases (99 years); and
- usufruct (musataha), to receive the benefit from the property (up to 50 years).

The developer must register any disposition of an off-plan property in the Interim Register, which is maintained by the Dubai Land Department. The disposition of a completed property must be registered in the Real Property Register, which is

also maintained by the Dubai Land Department. A disposition that is not registered in the Interim Register or the Real Property Register is invalid.

In the JAFZ, a mortgage can be created over a building constructed on leased land.

Formalities – real estate

Mortgages over real property must be both in writing and registered with the appropriate real estate authority in each emirate. The registered mortgage deeds are generally pre-printed documents prescribed by the relevant authorities.

In the JAFZ, all land is owned by the government of Dubai. The JAFZ Authority (JAFZA) leases land for the construction of office premises and warehouses. Under the provisions of the standard lease agreement between the JAFZA and a lessee, the lessee can assign its rights under the lease in favour of a lender. All assignments of lease rights must be registered with JAFZA (using prescribed forms).

Tangible Movable Property

Tangible movable property includes machinery, trading stock (inventory), and aircraft and ships.

Under the Commercial Code, all property that is not classified as immovable is considered to be movable property. Tangible property includes goods, inventory, stores and machinery. As with the Commercial Code, most types of immovable assets located onshore in the UAE are classified as movable assets under the Pledge Law.

Business/commercial mortgage

A business/commercial mortgage is a mortgage of movable assets of an entity. It can only be created in favour of banks or other financial institutions.

The mortgaged assets must be described in as much detail as possible. If they are not, only the

following intangible property is deemed mortgaged (Commercial Code):

- the trade name;
- contract rights; and
- goodwill.

Chattel mortgage

Unlike the business/commercial mortgage, the chattel mortgage (also known as a commercial pledge) cannot be perfected through registration, or a mortgage of intangible assets of a company.

A chattel mortgage is a pledge over movable property, and can be created over the following:

- stock in trade or inventory;
- movable plant and machinery;
- receivables; and
- negotiable instruments.

Security over movables under the Pledge Law

The Pledge Law contemplates a purely online registration process, where the lenders can establish a security interest in a specific register, which will be established at a future date (the Security Register). Once the Security Register has been incorporated, it will be possible to register a mortgage in accordance with the requirements under the Pledge Law. In light of the significant benefits of registering a security interest under the Pledge Law, the registered pledge/mortgage has effectively replaced the use of business/commercial mortgages. The following assets can be registered in the Security Register:

- receivables, including cash amounts due currently or in the future to the mortgagor resulting from carrying out its business;

- receivables and deposits with UAE-licensed banks and financial institutions, including current and deposit accounts;
- written bonds, negotiable certificates and title deeds (including commercial paper, bank deposit certificates and shipping documents);
- work equipment and tools;
- inventory ready for sale or lease, raw materials and commodities;
- agricultural crops and animals and their products, including fish or bees;
- fixtures, provided they can be separated from the real estate without being damaged;
- tangible and intangible elements of a commercial business; and
- any other movable property considered by applicable laws in the UAE as being validly subject to a mortgage according to the provisions of the Pledge Law.

Security over movables in the JAFZ

A business/commercial mortgage can be created by a JAFZA-licensed entity over its business, and/or specific assets can be registered with the JAFZA.

Business/commercial mortgage

In order to be valid and effective, a business mortgage must be registered in the Commercial Register maintained at the relevant emirate's Department of Economic Development. Once registered, the mortgage is valid for five years.

Chattel mortgage

To create a chattel mortgage, possession of the pledged asset must be transferred to the pledgee or a third party (ie, the bailee).

Financial Instruments

Shares are the most common financial instruments that may be pledged as security. It is now possible to mortgage shares in a UAE limited liability company.

Commercial pledge

A commercial pledge can be granted over both negotiable instruments and nominative instruments (ie, documents with specified obligees).

Security over shares under the Companies Law

The Companies Law regulates the creation of mortgages and pledges over shares of public shareholdings and private shareholding companies.

Under the Companies Law, the shares of a private shareholding company may be pledged and perfected through registration. However, at the time of writing, the UAE governmental authorities have not yet created a register for such share pledges.

Pledge over shares in the JAFZ

Under the laws and regulations of the JAFZA, the shares of a JAFZ company can be pledged and perfected through registration with the JAFZA.

Formalities – financial instruments

A commercial pledge is created by endorsing the relevant instrument indicating that the instrument has been pledged and perfected by delivery of the relevant instrument to the pledgee.

Claims and Receivables

The most common types of claims and receivables over which security is granted are receivables, income and insurances.

Formalities – claims and receivables

Under UAE law, an assignment of rights only requires notification from the assignor to the third party confirming the assignment to the assignee. Where this is not possible, the banks may require such income to be deposited into a collection account that will be covered by a pledge of the account.

Once the Security Register has been established, it will be possible to perfect the security created under an assignment of income and receivables under the Pledge Law.

Cash Deposits

The most common form of security over cash deposits is a pledge. Once the Security Register has been established, it will be possible to perfect the security created under an accounts pledge under the Pledge Law.

Formalities – cash deposits

The UAE does not recognise the concept of a floating charge; therefore, an accounts pledge that cannot be registered under the Pledge Law will only cover the sums standing in the pledged account on the date of the pledge agreement. Consequently, banks usually require unregistered account pledges to be amended on a periodic basis or at the request of the bank, so as to pledge the new sums standing in credit in the pledged account.

Intellectual Property

It is not common to grant security over IP in the UAE. IP rights are generally only pledged by a commercial mortgage.

5.2 Floating Charges or Other Universal or Similar Security Interests

The concept of security over future assets does not exist in the UAE. However, an interest similar to a floating charge can be created over movable assets under the Pledge Law.

5.3 Downstream, Upstream and Cross-Stream Guarantees

A parent company can guarantee – or grant a security in respect of – a loan given to a related company (ie, a company in the same corporate group), subject to two conditions:

- the parent company's constitutional documents contemplate a grant of this type of security; and
- the necessary corporate approvals are obtained (ie, a board resolution and, where necessary, a shareholders' resolution).

A subsidiary can also guarantee or grant a security in respect of a loan to its parent company, subject to the conditions above and the provisions outlined below in **5.4 Restrictions on Target**.

5.4 Restrictions on Target

Under the Companies Law, it is not possible for a public joint stock company target or any of its subsidiaries (including any limited liability companies) to provide any financial aid (such as loans and guarantees) to assist a purchaser in acquiring its shares. However, limited liability companies are exempt from such restrictions under Ministerial Resolution No 272 of 2016 on the Implementation of Certain Provisions of the Public Joint Stock Companies to Limited Liability Companies (issued by the UAE Ministry of Economy).

5.5 Other Restrictions

The Companies Law prohibits a company from making a loan of any kind to a director of the company and from guaranteeing the payment to a director of a loan made by any other person to that director (including his or her spouse, children or relatives up to the second degree). It also prohibits a company from making a loan to another company if a director of the lending company holds more than 20% of the share capital of the borrowing company (including any shares held by his or her spouse, children or relatives up to the second degree).

5.6 Release of Typical Forms of Security

Most unregistered securities, particularly movable assets, are generally released by passing

possession of the security asset back to the security provider, but they can also be released with a release and discharge letter from the secured party. For registered securities (such as a land mortgage or vehicle charge), it may be necessary to follow the procedure of the relevant regulatory authority. There may also be additional requirements for securities registered with free zones.

5.7 Rules Governing the Priority of Competing Security Interests

Generally, a lender that perfects its security – through either physical possession (in the case of movable assets) or registration – shall have priority over other creditors in an insolvency.

The two common methods of subordination are contractual subordination and intercreditor arrangements.

Please see **7.5 Risk Areas for Lenders** regarding the survivorship of subordination agreements following insolvency.

Registering a mortgage over movable assets under the Pledge Law would make the security effective against third parties and priority would be determined from the date of registration, unless the parties agree otherwise.

6. ENFORCEMENT

6.1 Enforcement of Collateral by Secured Lenders

The creation, registration and enforcement of various types of securities, such as pledges, mortgages over real estate and chattels, assignments and guarantees, are determined by provisions contained in both federal (UAE) and local emirate laws.

At the federal level, the creation and enforcement of various types of securities is contained in the Civil Code, the Commercial Code and other security-specific laws of the UAE – for example, the UAE Companies Law (Federal Law No 2 of 2015) contains provisions relating to pledges over shares, and the UAE Federal Maritime Law (Law No 26 of 1981) contains provisions relating to mortgages over vessels, etc.

At the emirate level, each emirate has its own practices and procedures, the most developed of which are in the emirate of Dubai. The various free zones in the UAE, including the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), have specific laws, rules and practices that apply in the relative free zone.

Each emirate has its own laws in relation to real property. In Dubai, a freehold interest can be mortgaged and the security registered with the Dubai Land Department. However, the mortgagee can only be a bank or a finance company licensed with the Central Bank. Dubai also has special laws allowing the enforcement of land mortgages. The UAE has a number of commercial registers where security interests may be recorded, depending on the type of asset or entity against which the charge is recorded.

With regard to enforcement, there are no self-help remedies in the UAE. For enforcement, a suit in the relevant court in the UAE has to be filed and a UAE court order obtained. The court must be satisfied that all relevant requirements contained in the security document and/or the relevant laws have been complied with by the party seeking enforcement. Although remedies are available in principle, enforcement in practice can sometimes take a long time and court decisions can be unpredictable, especially since the UAE does not adhere to the concept of binding precedent. Furthermore, all proceedings before

UAE courts are conducted in Arabic, and all evidence must be translated into Arabic. There is also no oral advocacy in civil or commercial matters, and all submissions are made in writing.

6.2 Foreign Law and Jurisdiction

UAE law recognises the principle that the parties to a contract may choose the governing law of said contract.

In practice, however, if an agreement with a foreign governing law provision is presented to a court in the UAE for interpretation or enforcement, the court may well apply UAE law regardless of any contrary choice of law by the parties. In circumstances where the court agrees to apply the foreign governing law, the applicable provisions of the foreign governing law will have to be established as a matter of fact.

With regard to a choice of jurisdiction provision in a contract, with the exception of arbitration and the DIFC courts as the choice of jurisdiction, UAE courts may assume jurisdiction as a matter of law (notwithstanding a foreign jurisdiction clause) if the defendant is a UAE national or a resident of the UAE. The UAE courts may also assume jurisdiction as a matter of law, even when the defendant is not resident/domiciled in the UAE, and in specific circumstances, if the dispute has certain minimum ties to the UAE, such as actions involving real estate in the UAE, actions related to an obligation that was made, performed or supposed to be performed in the UAE or related to a contract to be attested in the UAE, and actions where one of the defendants has a residence or domicile in the UAE. These provisions supersede any agreement between the parties.

Real estate actions, labour disputes and any disputes between a principal and an agent regarding a commercial agency agreement are

reserved exclusively for the jurisdiction of the UAE courts.

Although UAE law does not expressly provide for the immunity of UAE government entities, there may be preconditions that must be satisfied prior to filing a lawsuit against a government entity.

At the federal level, the ability of government departments to sue and be sued is recognised.

It should be noted, however, that recovery against UAE government-owned assets is prohibited under UAE law.

6.3 A Judgment Given by a Foreign Court

The enforcement of foreign judgments in the UAE is governed by Cabinet Resolution No 57 of 2018 on the regulations of Federal Law 11 of 1992 (the Cabinet Resolution). The Cabinet Resolution provides that a foreign judgment or order will be enforced in the UAE only if the country issuing such a judgment or order will enforce a judgment or order delivered by the courts of the UAE. In practice, this requirement for reciprocity is interpreted by the courts of the UAE as requiring a treaty for such enforcement. The UAE Federal Supreme Court has also held that a foreign judgment or order can be enforced in the UAE even without a treaty if it can be established that UAE court judgments have or can be enforced in the state in which the foreign judgment was issued. The law also provides for some prerequisites for the enforcement of a foreign judgment. Such conditions include that the UAE courts did not have jurisdiction to deal with the matter, that the foreign court which delivered the decision was authorised to do so and did so in accordance with law, that the litigating parties were summoned to attend and were properly represented, and that the judgment of the foreign court does not conflict with a decision of the state courts nor breach morals or public order.

The enforcement of foreign judgments under DIFC law is made possible under Article 7(4) of Dubai Law No 12 of 2004 (Judicial Authority Law), which provides that judgments from jurisdictions other than the DIFC may be enforced by the DIFC courts in a manner prescribed by DIFC laws if the subject matter for enforcement is within the DIFC. Article 24(1)(a) of DIFC Law No 10 of 2004 (DIFC Court Law) adds that DIFC courts have jurisdiction to ratify the judgments of recognised foreign courts. Furthermore, Article 24(2) of the DIFC Court Law states that if the UAE has a treaty agreement involving the mutual enforcement of judgments, the DIFC Court of First Instance shall comply with the terms of the treaty. Article 7(2) of Judicial Authority Law No 12 of 2004 provides that judgments of DIFC courts are to be enforced through the Dubai courts. Therefore, and subject to the above requirements, the DIFC courts can ratify a foreign judgment, which can then be enforced through the Dubai courts.

However, lately there have been instances where the DIFC courts have permitted the enforcement of a foreign judgment despite the absence of a treaty and the subject matter being outside the DIFC. Therefore, one cannot rule out the possibility of a DIFC court acting as a conduit jurisdiction for the enforcement of a foreign judgment. Whether there will be a retrial on the merits or not will depend on several factors, including whether there is a treaty agreement with the country in which the foreign court sits, whether it provides for the mutual enforcement of judgments and the exact wording of the treaty.

By Decree 19 of 2016, the Ruler of Dubai established the Joint Judicial Tribunal (Judicial Tribunal) to resolve conflicts of jurisdiction that may arise between the Dubai courts and the DIFC courts. The ability to use the DIFC courts to enforce a foreign judgment where the subject matter for enforcement is outside the DIFC is

an issue that has been considered by the Judicial Tribunal. In determining this issue, the Judicial Tribunal has effectively held that the Dubai courts have general jurisdiction to enforce foreign judgments in the UAE (where the subject matter is outside the DIFC) and that the DIFC courts must only exercise this power in exceptional circumstances (eg, where a defendant has assets within the DIFC). Therefore, it is still unclear whether the DIFC court can be used as a conduit jurisdiction to enforce a foreign judgment.

With regard to the enforcement of foreign arbitral awards, the UAE is a party to several international treaties and conventions regarding the recognition and enforcement of arbitral awards, including the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Riyadh Convention on Judicial Co-operation between States of the Arab League, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications, and the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

The UAE ratified the New York Convention in 2006 without making any declarations or reservations. The New York Convention provides a mechanism that allows state parties to enforce arbitration awards made in one country in another country that is also a signatory to the Convention. Accordingly, under Article III of the Convention, UAE courts are required to “recognise” foreign arbitral awards (if issued in another country that is also a signatory to the Convention) “as binding and enforce them”, unless the limited grounds to resist enforcement provided under Article V(1) can be proven by the party against whom enforcement is sought.

However, UAE law provides for certain subjects that are reserved exclusively for the UAE courts

and are therefore non-arbitrable. For example, labour disputes must be referred to the UAE courts. Similarly, Article 6 of Federal Law No 18 of 1981 Concerning the Regulation of Commercial Agencies provides that any disputes between a principal and an agent regarding a commercial agency agreement must be heard by the UAE courts. Therefore, any foreign arbitral award rendered on such subjects is unlikely to be enforceable in the UAE.

With respect to the enforcement of foreign arbitral awards through the DIFC, Article 24(1)(c) of the DIFC Court Law provides that DIFC courts may ratify a recognised arbitral award. This is confirmed in Article 42(1) of the DIFC Arbitration Law of 2008 regarding the recognition and enforcement of awards, which provides that an arbitral award shall be binding on DIFC courts regardless of the jurisdiction in which it was made. However, Article 44 provides various “grounds for refusing recognition or enforcement” of an arbitral award; these include, for instance, that the decision was not valid under the law governing the arbitration, one of the parties was not given proper notice, the arbitral procedure was not in accordance with the agreement of the parties or enforcement of the award would be contrary to the public policy of the UAE.

The ability and willingness of DIFC courts to enforce foreign arbitral awards was confirmed in these two cases.

6.4 A Foreign Lender’s Ability to Enforce Its Rights

There is no distinction between a local lender and a foreign lender with regard to their ability to enforce their rights under a loan or security agreement (save for security agreements that are entered into by its local security agent). See **3.2 Restrictions on Foreign Lenders Granting Security**.

7. BANKRUPTCY AND INSOLVENCY

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

The Bankruptcy Law of the UAE was enacted on 20 September 2016 (Decree Law No 9 of 2016) and provides a framework for the restructuring and insolvency of companies and traders. The Bankruptcy Law came into effect on 31 December 2016 and repealed the previous legislation contained in UAE Federal Law No 18 of 1993 promulgating the Code of Commercial Practice, as amended (the Commercial Code).

Rather than having to proceed directly to bankruptcy proceedings (if at all), the Bankruptcy Law provides for preventative composition, giving the debtor the opportunity to reach an agreement with its creditors for its debts (while under court protection from individual creditor claims). However, a debtor can only take advantage of this process if it has not been in default for more than 30 consecutive business days and is not already insolvent.

The debtor subject to preventative composition proceedings must continue to perform its obligations under any contract, provided the court has not issued a judgment of stay of execution due to the debtor's failure to perform its obligations. However, the trustee designated to facilitate the preventative composition process does have the right to request the court to rescind any contract if it is in the best interests of the debtor and its creditors, and provided that it does not substantially harm the other contracting party's interests.

The debtor will have three years to implement the preventative composition arrangement (which will be approved/rejected by the court), which can be extended for a further three-year period

if a two-thirds majority of the unpaid creditors consents to such an extension.

At the request of an interested party, or at the exercise of its own discretion, the court may initiate the termination of the preventative composition arrangement and convert it into a bankruptcy proceeding in the following scenarios:

- if it is proven that the debtor was in payment default for more than 30 consecutive business days or was insolvent on the date of commencement of the preventative composition proceedings, or if it became clear to the court during the course of such proceedings; or
- if it becomes impossible to apply the arrangement and ending it would result in payment default for more than 30 consecutive business days or in the debtor's insolvency (although there is no guidance in the Bankruptcy Law as to what would constitute impossible).

7.2 Impact of Insolvency Processes

Under the Bankruptcy Law, there is now a minimum threshold of AED100,000 before a creditor (or group of creditors) can initiate bankruptcy proceedings against the debtor, provided the creditor has adequately notified the debtor of such debt and the debtor has still failed to repay it within 30 consecutive business days of notification.

The preventative composition scheme draft is subject to approval by the majority of the creditors.

Once the preventative composition process has begun, a creditor cannot enforce any guarantees it may have on the debtor's properties without prior permission of the court.

When a bankruptcy judgment is pronounced, all monetary debts owed by the bankrupt become payable, whether ordinary or guaranteed by lien. The court can deduct legal interest (9%) for the period from the date of the judgment until the maturity date of the debt for deferred debt where no interest is stipulated. The court can grant approval to the following categories of person to purchase the debtor's properties if that would satisfy the creditors' interests:

- spouse, relative by marriage or up to fourth degree relative;
- any person who was a partner, employee, accountant or agent of the debtor (within two years prior to the date of judgment); or
- any person who works or worked as the auditor following the initiation of bankruptcy proceedings.

7.3 The Order Creditors Are Paid on Insolvency

In the course of bankruptcy proceedings, preference is given to the following:

- any judicial fees or charges;
- wages and salaries due to workers and staff for the period of 30 days prior to the declaration of bankruptcy;
- debts of maintenance paid by the debtor under a judgment delivered by a competent court;
- any amounts payable to governmental bodies; and
- any fees, costs or expenses incurred (i) after the date of the decision to initiate procedures to procure commodities/services to the debtor or to continue the performance of any other contract that fulfils the benefit of business or property of the debtor, or (ii) to continue the course of the business of the debtor after the date of initiating procedures.

7.4 Concept of Equitable Subordination

While the concept of equitable subordination is not specifically recognised, creditors need to be aware that there is still the two-year rule regarding "voidable" or "fraudulent" preferences. What this means is that transactions made by the debtor during the two-year period preceding the initiation of insolvency proceedings can be reviewed by the trustee to determine whether they should be set aside as having been an "unfair preference". The Bankruptcy Law sets out the types of transaction that the court will consider (such as donations or gifts, payment of debts when such payments were not yet due or the creation of any new guarantee on the debtor's properties). The court will consider whether such a transaction was "detrimental" to the creditors and if the transacting party knew (or ought to have known) when entering into the transaction that the debtor was in financial difficulty, and thereafter will make its judgment on whether it should be set aside.

7.5 Risk Areas for Lenders

The Bankruptcy Law gives a trustee the right during bankruptcy proceedings to decide if the revenues generated from the sale of any guarantee-burdened properties would be insufficient to meet its fees (and any related costs of such sale), and can thereafter decide to abort any proposed sale. The creditor only has the right to object to such decision within three business days of receiving notification from the trustee to the creditor. The court will issue its decision in respect of the creditor's objection within five business days (the Bankruptcy Law is silent on when such a timescale begins), but without any pleadings being heard from the creditor or trustee; such decision shall be final.

Upon request by the trustee, the court can order the rescission of any contract to which the debtor is a party, provided that such rescission is necessary to enable the debtor to transact his

business or if it would fulfil the interests of all of the creditors and not significantly prejudice the other contracting party's interests.

8. PROJECT FINANCE

8.1 Introduction to Project Finance

Project finance is generally defined as the development of a capital-intensive infrastructure project, which is typically structured on a limited recourse financing basis. In a limited recourse financing structure, the borrower is the project company (a special purpose vehicle, or SPV, created for the project), repayment is done through the project's cash flows and debt is guaranteed principally by the project assets.

The parties involved in a standard project finance deal include:

- the project company, which acts as the borrower, holds equity interests and implements the project;
- the project developer or main sponsor, which leads the project development;
- the other sponsors who hold equity interest in the project;
- the lenders who finance the project; and
- the contractors that execute the project.

Most infrastructure projects in the UAE are implemented wholly or partially by government-owned entities and to that extent are typically self-financed. This is the case with almost all public works projects, oil and gas projects and power projects. Consequently, there is limited scope for pure "project finance" within the local market, with certain exceptions, such as some power, water and infrastructure facilities structured through public-private partnerships (PPP – see **8.2 Overview of Public-Private Partnership Transactions**). Most real estate and tour-

ism projects are funded on a corporate or full recourse basis (not discussed in this section).

The UAE is highly regulated, and the legal framework regulates the activities of each stakeholder in a project finance deal. The regulations differ depending on the nature of the project and its sponsors. Where the project developer is a government-owned entity, it must comply with their relevant enacting legislation. In the case of a private entity, the project must comply with local licensing requirements. Furthermore, commercial project lending must comply with standard banking and financial regulations. Regardless of the public or private nature of the project, contractors are also subject to local licensing and operating requirements.

This section will focus on the relevant legal framework applicable to project developers, sponsors and lenders in privately funded and PPP-style projects, and to contractors in both government and private projects, with an emphasis on the special considerations that foreign entities need to consider when operating in the region.

8.2 Overview of Public-Private Partnership Transactions

PPPs and independent power projects (IPPs) are common structures in the UAE and, while there is no applicable federal legislation, there are emirate-level laws in Abu Dhabi and Dubai. In 2017, the UAE Cabinet issued a procedures manual for partnerships between federal entities and the private sector. Amongst other matters, the manual provides a general framework for the project life cycle of partnerships with private sector entities.

In Abu Dhabi, the law regulating PPPs was enacted in 2019 (Abu Dhabi Law No 2 of 2019).

Dubai's Law No 6 of 2011 regulating Participation of Private Sector in Electricity and Water

Production in Dubai (the Dubai Electricity Privatisation Law) was enacted in 2011 to allow the private sector to participate in energy generation. The law authorises the Dubai Electricity and Water Authority (DEWA) to establish project companies, by itself or with third parties, to generate electricity.

Dubai also passed a law pertaining to PPPs (the Dubai PPP Law) in November 2015, to regulate partnerships between government agencies and private entities to develop projects in Dubai. This law does not apply to water and electricity-related projects, which come within the purview of the Dubai Electricity Privatisation Law. The Dubai PPP Law permits various structures, such as concession agreements, build-operate-transfer, build-transfer-operate, build-own-operate-transfer and operating agreements. The authority granting approval for the projects varies depending upon the project cost. Interested private entities can either bid for projects individually or as a consortium, and the selected private partner must establish a project company in the form of a limited liability company to implement the partnership contract. The Dubai PPP Law also contains provisions pertaining to the bidding process, the general and specific conditions of contracts, the obligations of the project company, etc.

8.3 Government Approvals, Taxes, Fees or Other Charges

Part of the legal framework for a project finance transaction in the UAE involves obtaining government approvals for the project, complying with the registering and filing requirements for the transaction documents, and for foreign sponsors to meet foreign ownership requirements.

As the UAE is a federal structure with powers divided between the federal government and the governments of each emirate, government

approvals may be required at both federal and emirate levels.

Contractors must also take local licensing requirements into account. In addition to the basic corporate structuring requirements discussed later, both local and international contractors must be licensed to carry out their activities in the relevant emirate. The procedure to obtain construction-related licences is more cumbersome, and each emirate has different requirements. This applies to contractors, sub-contractors, architects, civil engineers, project managers and engineering consultants.

The licensing process begins with an application that includes, among other things, proof of experience (past projects, length of experience) and demonstration of minimum capital requirements and corporate documentation. Approvals will then be required from the relevant authorities regulating the particular activity. Additional requirements will apply if there is an environmental impact (see **8.8 Environmental, Health and Safety (EHS) Laws**). After the entire procedure is complete, the licence will be issued; the types of licences cover the standard types of construction activities, including building contracting, road contracting, marine contracting, electrical power station contracting and others. In some cases, however, licences will not be issued to foreign contractors. In such circumstances, arrangements can be made with existing local contractors to work together on a partnership basis.

8.4 The Responsible Government Body

As previously discussed, project finance deals are subject to the regulatory oversight of the relevant government bodies. The UAE is a federal system composed of seven emirates, with division of power between the federal and emirate governments enumerated in the Constitution. To

that end, federal authorities and emirate authorities both have roles in any given project.

By way of example, the generation, transmission and distribution of electricity in the UAE is regulated and requires specific licences from the relevant government authorities. In Abu Dhabi, the Department of Energy is the relevant emirate level authority that issues licences to conduct regulated activities in the energy sector.

8.5 The Main Issues when Structuring Deals

Privately funded projects with foreign sponsors (other than PPPs whose structure will be as per the relevant government policy) require a structure that complies with local majority ownership requirements.

In accordance with the Companies Law, foreigners are permitted to own up to a maximum of 49% of a UAE company (other than in the free zones), and the majority of 51% is required to be owned by UAE nationals. Although this restriction is a deterrent to foreign investment, it is not an insurmountable hurdle, as informal arrangements exist to enable foreign investors to transfer 100% beneficial interest in local companies to themselves. It is common for foreign investors to enter into side agreements with the local majority-owning partners by virtue of which the foreign shareholders assume management powers and at the same time transfer to themselves the economic interest in the shares held by the local partners. The local shareholder is usually paid a fixed fee as part of this arrangement for acting as a local sponsor. The authorities in the UAE have so far tolerated this practice and the arrangement works to the benefit of all shareholders, as long as there is no dispute between the parties. The enforceability of these side agreements is questionable and untested in the local courts. Although the local partner could, in theory, take over the business by revoking the

side agreements, the arrangement works well in the vast majority of cases and offers a practical way forward for foreign investors wishing to do business in the UAE.

Federal Law No 19 of 2018 on Foreign Direct Investment (the FDI Law) was promulgated to allow 100% foreign ownership of companies in certain sectors in the UAE subject to approval of the UAE Cabinet, but it also sets out a “negative list” of 13 sectors where existing laws and restrictions will continue to apply and majority foreign ownership will not be permitted. These include insurance, water and electricity, land and airport services and retail infrastructure.

Foreign sponsors have different options for structuring their investment in a project, such as becoming a direct shareholder in the project company or creating a holding company to serve as the shareholder in the project company. The latter is advantageous in that the holding company can be incorporated in a foreign jurisdiction such as the British Virgin Islands, where certain shareholder rights (such as drag and tag) can be enforced as a matter of right, unlike in the UAE.

Foreign contractors can partner with local contractors, either by setting up an offshore holding company to hold their interests in a UAE company that will be licensed to carry out the construction work or by entering into contractual arrangements outside of the UAE company. The former is advantageous in that it allows the foreign contractor to have a direct interest in the local company. Smaller projects can also be carried out by a single established local entity, where a foreign contractor is the sole shareholder.

8.6 Typical Financing Sources and Structures for Project Financings

Typically, project financings in the UAE are in the form of long-term loans granted by large inter-

national and domestic banks, with tenure of 20 to 25 years being common. Banks finance up to 75% of the project cost, and the remaining funds are contributed by the sponsors of the project, by way of either equity contributions or shareholder loans. Sponsors may also be required to provide undertakings, sometimes supplemented by collateral security such as letters of credit, towards funding any cost overruns that the project may encounter and to ensure completion of the project.

The usual security package taken by lenders in the UAE is similar to other jurisdictions and includes the following:

- an asset pledge over plant, machinery and other company assets;
- a legal mortgage over the land or site, which may take the form of a mortgage over sub-usufruct, which is the right to use, enjoy and occupy land or property belonging to another entity for a fixed term;
- a pledge over the shares of the project company; and
- an account pledge over the bank accounts of the project company.

8.7 The Acquisition and Export of Natural Resources

According to the Constitution, the acquisition and export of natural resources in the UAE is governed at an emirate level, not a federal level. Therefore, individual emirates have the authority to determine how to exploit their natural resources.

Oil and gas affairs are governed by the Supreme Petroleum Council in Abu Dhabi, and by the individual Ruler's Office in each of the other six emirates. Oil production in the UAE today is a public sector activity engaged in by government-owned entities and holders of government concessions, which include the traditional oil majors (BP, ExxonMobil, ConocoPhillips, etc).

The regulation of oil in the UAE is largely addressed by the individual concession agreements and other agreements with the major oil companies, not by general laws and regulations. Some of these agreements date back to the 1930s.

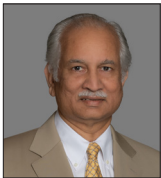
8.8 Environmental, Health and Safety (EHS) Laws

As with other laws and regulations in the UAE, health, safety and environmental laws exist at a federal and emirate level. Federal laws are meant to prevail over emirate laws in the event of conflict, but this is not always observed in practice. Most health and safety laws are found in the UAE Labour Law and some are also contained as criminal offences under the UAE Penal Code. Local authorities in the UAE also have their own rules and regulations, such as the Dubai Municipality, Trakhees (part of the Dubai Department of Planning and Development) the Abu Dhabi Department of Urban Planning and Municipalities, and the Environment Agency – Abu Dhabi.

Afridi & Angell has a banking and finance team that advises on a range of matters, including structured finance, capital markets, investment products, acquisition finance, Islamic financing, regulatory banking (including the Dubai Financial Services Authority), litigation, insurance, reinsurance, asset finance, corporate structuring and restructuring, consumer products, and treasury products. The firm's lawyers regularly advise banks on dual tranche transactions involving both conventional and Islamic financ-

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