

Lending and taking security in the United Arab Emirates: overview

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OVERVIEW OF THE LENDING MARKET

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

While the lending market in the United Arab Emirates (UAE) saw some marginal gains in 2018, banks and other market participants continue to predict a challenging 2019 due to the:

- Slowdown in population growth and economic activity (resulting in businesses being reluctant to commit to any long-term borrowing).
- Volatile geo-political environment (including the continuing severance of ties with Qatar and possible escalation of disputes between Iran and the US).

There are some ongoing concerns regarding:

- Government and public sector deposits. The government deposits in UAE banks (even those with a large government stake) have continued to drop, as the government continues to draw on these deposits to meet shortfalls in spending budgets (partly due to high social welfare spending and the low oil price).
- Oil prices. Volatility in oil price has continued with the price of Brent crude oil reaching USD86 per barrel in October 2018, only to fall to USD50 per barrel in the following month.
- Central Bank FX reserves.
- Loan to deposit ratios (LTD).

Banks continue to be more cautious in lending to the private sector, particularly retail, hospitality, education, construction and real estate. Lenders have become far more discerning when it comes to credit approvals, with some lenders favouring, or only financing, companies with assets located in the UAE. With large amounts of unallocated liquidity, which ultimately needs to be deployed somewhere, we have seen a number of UAE banks and financial institutions increase their lending to overseas companies. We expect this trend to continue, if not accelerate, in the coming years.

We have also observed an increase in funding for Public Private Partnership (PPP) projects, particularly infrastructure development (including roads, refuse recycling plants and renewable energy projects) in the northern Emirates, which tended to be under developed in comparison to Dubai and Abu Dhabi. This generally involves funding a (usually on a non-recourse basis) project company (usually a special purpose vehicle (SPV) established in the UAE by the overseas consortium, which will develop the project) to part-finance the implementation and operation of the project.

Lenders have also reported a significant increase in debt restructurings, partly due to borrowers struggling in the tough economic environment (particularly in the construction and real estate sectors) and some borrowers wanting to renegotiate their

long-term funding while interest rates are still favourable. It should be noted that the cost of funding increased in 2018, principally due to an increase in EIBOR and the UAE Central Bank raising its benchmark rates by 25 basis points, in line with the US Federal Reserve.

The creating 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 (Civil Code).
- UAE Federal Law No. 18 of 1993 relating to the law of Commercial Transactions (Commercial Code).
- Federal Law No. 20 of 2016 on Mortgaging Movable Property as Surety for Debts, Cabinet Resolution No. 6 of 2018 on creating a register for registering the rights on moveable property, Cabinet Resolution No. 5 of 2018 on the executive regulations of the Moveables Security Framework Law, and all regulations and policies issued under or pursuant to such law or resolutions (Mortgage Law).

There are several free zones in the UAE and each free zone has its own regulations for creating security interests by entities licensed within that zone and/or over property located within it. However, aside from the creation and enforcement of security interests in the UAE, this chapter is restricted to security in the Jebel Ali Free Zone Authority, the first free zone in the UAE, around which the laws and procedures of most other free zones are modelled. For security interests created in the Dubai International Financial Centre (DIFC), see *Question 2, Security in the DIFC*.

The most significant development in terms of taking security interests is the introduction of the Mortgage Law. This law:

- Introduces a new regime for registering a security interest over movable assets (different from a pledge, which requires a deed of possession and other existing forms of mortgages).
- Significantly enhances a bank's ability to take a registered security interest over movable assets in the UAE.
- Addresses limitations under the existing UAE laws, including the:
 - limitations on the types of movable assets that can be given as security;
 - requirement to have a UAE-licensed bank act as security agent in connection with a mortgage over the assets of a company; and
 - requirement to take possession (actual or constructive) of the secured assets to perfect the security.
- Introduces new categories of movable assets that can now be provided as security, including future assets (in effect creating a floating charge). The inability to establish effective floating charges (which are common in most overseas jurisdictions) had previously been particularly problematic for lenders.

The Mortgage Law defines movable assets broadly and provides a non-exhaustive list of tangible and intangible property over which mortgages can be created under the Mortgage Law, including:

- Receivables (that is, debts that are due now or in the future to the mortgagor resulting from carrying out its business), effectively creating a floating charge.
- Deposit and current accounts.
- Written instruments, including written bonds and documents, title to which is transferable through delivery or endorsement that entitle the bearer to an amount, or ownership of goods (including commercial papers, certificates of deposit, bills of lading and warehouse bonds).
- Work tools and equipment.
- Tangible and intangible elements of a commercial store.
- Prepared goods, raw material and goods under manufacture or transit.
- Agricultural crops and animals and their products.
- Fixtures to real property, if they can be detached from the real property without causing damage.
- Other movable assets which the laws of a particular emirate provide can be pledged under the Mortgage Law. Another key feature of the New Law is the proposal to make certain information relating to the registered mortgage available to the public.

The Mortgage Law also provided some guidance on assets that cannot be mortgaged under the Mortgage Law, including:

- Possessory pledges to which the provisions of the applicable laws will continue to apply (that is, the Civil Code and the Commercial Code).
- Movable property in relation to which dispositions are registered in a "special register" under the laws in force. However, there is no guidance on what is a "special register". We believe that this refers to existing mortgage registers relating to movable assets (such as vehicles, aircraft, vessels and shares of a UAE limited liability company).
- Subject to some exceptions, certain types of personal and public assets, including:
 - personal property or property allocated for home purposes;
 - entitlements of an insured or beneficiary under an insurance contract;
 - labour and vocational expenses; and
 - "public assets", endowment assets, assets of foreign diplomatic and consular corps and assets of government international organisations.
- Future rights arising from inheritance or a will.

Once the mortgage is registered in the register in accordance with the Mortgage Law, the mortgage becomes effective against third parties and no subsequent security interest can be created over the relevant mortgaged asset.

FORMS OF SECURITY OVER ASSETS

Real estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

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 are:

- Freehold land.
- Buildings and construction on freehold land.
- Leasehold interests in land.
- Buildings and construction on leasehold land.
- Usufruct (that is, the right to use (including 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 freehold/leasehold interest relating to property located within that free zone.

Common forms of security

Depending on the type of financing and the nature of the borrower or obligors, common forms of security include:

- Guarantees (personal and corporate).
- Assignment (over income, receivables, insurances (for example, personal or project), contracts and project guarantees).
- Chattel mortgage also known as a commercial pledge (over movable assets of a company).
- Real estate mortgage (over freehold interest, leasehold interest or building constructed over leased land).
- Business or commercial mortgage (includes tangible and intangible assets of a company).
- Pledges (over shares, accounts (including DSRA, collection accounts or project accounts)).

There are three types of mortgage over real estate in the UAE, that is, a mortgage over:

- Land and buildings.
- A leasehold interest in real property.
- 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. To have effect, a mortgage must be registered. 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 that the mortgagor 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 (*Law No. 7 of 2006 on Registration of Real Property in the Emirate of Dubai and its implementing regulations*):

- Freehold.
- Long-term lease (99 years).
- 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 (*Law No. 13 of 2008 regulating Initial Property Registration in the Emirate of Dubai*). The disposition of a completed property must be registered in the Real Property Register, also maintained by the Dubai Land Department. It is however, unclear, which party is responsible for registration. Both parties must attend the Dubai Land Department to complete registration. A disposition that is not registered in the Interim Register or the Real Property Register is invalid.

Each unit owner (defined as a person who is registered with the Dubai Land Department as the owner, including the tenant under a long term lease, of a flat, villa, house or other real estate) can create a mortgage over that unit in favour of a bank or financial institution (*Law No. 27 of 2007 concerning the Ownership of Joint Properties (Condominiums) in the Emirate of Dubai*).

Security interests relating to real estate in demarcated zones in the Emirate of Abu Dhabi can also be registered. The following are permitted (*Law No. 19 of 2005 concerning Property Ownership in the Emirate of Abu Dhabi*):

- For UAE nationals: to own freehold title to land anywhere in Abu Dhabi.
- For nationals of the GCC: to own freehold title to land in certain demarcated areas.

Law No. 19 of 2005 was amended in February 2007 to permit non-UAE nationals to:

- Own buildings in certain demarcated areas (but not the underlying land).
- Enter into a long-term lease agreement (up to 99 years) for real property in those demarcated areas under agreements.
- Enjoy usufruct rights over real property under agreements of up to 50 years. Holders of usufruct rights in excess of ten years can sell or mortgage their interests without seeking the permission of the land owner.

In the Jebel Ali Free Zone (JAFZ), a mortgage can be created over a building constructed on leased land.

Formalities

Mortgages over real property must be both:

- In writing.
- 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 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 (using prescribed forms) with the JAFZA.

Security in the DIFC

The Dubai International Financial Centre (DIFC) is unique among the free zones as it has an entirely separate body of laws and regulations. The relevant security laws include the:

- Law of Security (*DIFC Law 8 of 2005, as amended*), which, subject to certain exclusions, applies to all transactions, regardless of their form, that create a security interest in personal or real property by contract.
- Real Property Law (*DIFC Law 4 of 2007*), which specifically covers mortgages over land.
- DIFC Security Regulations (Security Regulations).

To perfect a security interest in the DIFC, it must be filed in the Security Registry. If the security holder is a natural person, he must submit the following information to the registrar:

- His identity.
- His residence and domicile.
- Any other information required under the Security Regulations, for example, a financing statement.

The Security Regulations also govern attachment, perfection and enforcement of a security interest in financial property.

Account holders can pledge eligible securities held in the Central Securities Depository (CSD) of the Dubai International Financial Exchange (DIFX) by submitting a pledge instruction to the CSD in favour of a pledgee. The CSD designates pledged eligible securities as being held to the order of and controlled by the pledgee. The DIFX will not accept any instructions from the account holder unless otherwise instructed by the pledgee.

Tangible movable property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible movable property

Tangible movable property includes:

- Machinery.
- Trading stock (inventory).
- Vehicles, aircraft and vessels.

Under the Commercial Code, all property not classified as immovable is considered movable property. Tangible property includes goods, inventory, stores and machinery. As with the Commercial Code, we expect that moveable assets under the Mortgage Law would cover most types of immovable assets located onshore in the UAE (subject to the provisions of the Mortgage Law) (*see Question 1*).

Common forms of security

Registered asset pledge/mortgage. The Mortgage Law intended to provide a fully online registration process where the lenders can establish an online account with the "Register" (as defined Cabinet Resolution No. 5 of 2018 on the executive regulations of the Moveables Security Framework Law) (Security Register). In light of the significant benefits of registering a security interest under the Mortgage Law (*see Question 1*), the registered pledge/mortgage has effectively replaced the use of business/commercial mortgages in the UAE.

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 definition of a business mortgage/commercial includes (*Commercial Code*):

- All of a company's tangible movable property comprising:
 - goods;
 - stores;
 - machinery; and
 - tools.
- All of a company's intangible movable property, such as:
 - contract rights;
 - goodwill;
 - trade name;
 - intellectual property; and
 - licence rights.

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*):

- Trade name.
- Contract rights.
- Goodwill.

Real estate owned by the business is not covered by a business mortgage. However, the landlord of the premises has a lien over the mortgaged assets in the leased premises for unpaid rent (subject to a maximum of two years' rent) in priority to the mortgagee's rights (*Commercial Code*).

Chattel mortgage. Unlike the business/commercial mortgage, the chattel mortgage, also known as a commercial pledge cannot either:

- Be perfected through registration.
- Mortgage intangible assets of a company.

A chattel mortgage is a pledge over movable property. A chattel mortgage can be created over:

- Stock in trade or inventory.
- Movable plant and machinery.
- Receivables.
- Negotiable instruments.

Other mortgages. Mortgages can also be granted and registered over:

- Vehicles. There may be cases where the scope of the mortgage is unclear. For example, a detachable trailer attached to a vehicle, may fall outside the scope of the mortgage, depending on how the mortgage was registered.
- Vessels.
- Aircraft.
- Shares of a UAE limited liability company (see *Question 4*).

The UAE is a signatory to the (*Federal Decree No. 32 of 2006*):

- Convention on International Interests in Mobile Equipment (Cape Town, 2001) (Convention).
- Protocol to the Convention on Matters Specific to Mobile Equipment (Cape Town, 2001) (Protocol).

Security over movables in the Jebel Ali Free Zone (JAFZ). A business/commercial mortgage can be created by a JAFZ Authority

(JAFZA)-licensed entity over its business and/or specific assets can be registered with the JAFZA.

DIFC. See *Question 2, Security in the DIFC*.

Formalities

Registered asset pledge/mortgage. To register a security interest in the Security Register, the parties must enter into a written agreement (Mortgage Contract), which complies with the requirements of the Mortgage Law and includes:

- A description of the pledged asset (including quantity, type, category of item and so on) to effectively identify the pledged asset.
- Clear language indicating both:
 - the existence of the pledge over the entire pledged asset; and
 - the fact that it applies to current and future moveable quantities of the pledged assets.

The process of registering a security interest created under a Mortgage Contract in the Security Register requires the submission of an application form, which must include:

- Information on the parties (including the security provider and beneficiary of the security interest).
- General information on the security type (for example, the security right, operating lease and so on).
- Confirmation on whether the full Mortgage Contract can be disclosed to the public.
- Description of the pledged assets.
- Details of other interested parties (such as third parties with possession of the pledged assets).
- Statistical information. This could include, for example, the:
 - number of employees;
 - annual turnover of the parties and related sectors;
 - currency of the obligation;
 - type of security; and
 - duration of security period).
- Statistical information will not be made public and will be used by the security registrar for administrative purposes.

The Mortgage Contract and the application form must be submitted (via the lender's online account) to the Security Registrar, along with payment of the relevant registration fees (which currently ranges from AED200 to AED300).

Business/commercial mortgage. To be valid and effective, a business mortgage must be:

- In writing (with specific details of assets covered).
- Executed before a public notary.
- Registered in the Commercial Register maintained at the relevant Emirate's Department of Economic Development (only the Department of Economic Development in the Emirates of Dubai and Abu Dhabi currently register business mortgages in the commercial register). Once registered, the mortgage is valid for five years.

Notice of the mortgage must be published in an Arabic daily newspaper two weeks before registration.

Chattel mortgage. To create a chattel mortgage, possession of the pledged asset must be transferred to the pledgee or a third party (that is, the bailee), who must retain possession until either:

- The debt is satisfied.
- The asset is placed in common possession to prevent the pledgor from disposing of the pledged asset without the pledgee's consent.

The transfer of possession can be actual or constructive.

Other mortgages. A vehicle mortgage is registered with the local traffic police, the road or transport authority and a notation is made in the title deed of the vehicle. The borrowing party still retains the legal ownership of the vehicle, subject to the mortgage.

A mortgage over a vessel can be created by a notarised instrument that must be registered in the register of ships (in the jurisdiction where the vessel is registered). Vessel mortgage in the UAE are created under the Commercial Maritime Law No. 26 of 2981 (as amended by law No. 11 of 1988) (Maritime Law). The Maritime Law permits the mortgage of a vessel if its total tonnage exceeds ten tonnes. A vessel being mortgaged in the UAE must be registered with the National Transport Authority (NTA) (that is, the vessel should maintain a UAE flag). A UAE vessel mortgage must be created once both:

- A notarised vessel mortgage agreement is registered with the NTA.
- The NTA has issued a new vessel registration certificate noting the mortgage registered in favour of the mortgagee.

A mortgage over an aircraft, registered in the UAE can be created by submitting a copy of the executed aircraft mortgage agreement to the UAE General Civil Aviation Authority (GCAA). However, the UAE Federal Act No. 20 of 1991, promulgating the Civil Aviation Law (Civil Aviation Law), does not specify the formalities for the creation and registration of mortgages over the UAE-registered aircraft. However, in practice, the GCAA notes a mortgagee's interest over a UAE-registered aircraft. Once the mortgage is perfected, the GCAA issues a certificate of registration confirming the details of the owner, the operator and the financing bank as mortgagee.

In addition to the registration of the mortgage with the GCAA, banks and financial institutions also require the registration of an additional security over the aircraft (airframe and engines) at the International Registry pursuant to the Cape Town Convention on International Interests in Mobile Equipment 2001, as adopted under UAE law. Such registration is effected through the GCAA, which acts as an Authorised Entry Point in relation to the International Registry for the UAE.

Security over movables in the JAFZ. The business or commercial mortgage is registered by completing the JAFZA's standard mortgage registration forms.

DIFC. See *Question 2, Security in the DIFC*.

Financial instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial instruments

Shares (in private or public companies) are the most common financial instruments that may be pledged as security.

Common forms of security

Commercial pledge. A commercial pledge can be granted over both (*Commercial Code*):

- Negotiable instruments.
- Nominative instruments (that is, documents with specified obligees).

Security over shares under the Companies Law. UAE Federal Law No. 2 of 2015, on commercial companies (as supplemented by UAE Ministry of Economy has now issued Ministerial Resolution No. 272 of 2016 on the Implementation of Certain Provisions of the Public Joint Stock Companies to Limited Liability Companies (Companies Law), which came into effect at the end of June 2015) regulates the creation of mortgages and pledges over shares of public shareholding and private shareholding companies.

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

Under the Companies Law the shares of a limited liability company can be pledged and perfected through registration.

Pledge over shares in the Jebel Ali Free Zone (JAFZ). Under the laws and regulations of the JAFZ Authority (JAFZA) the shares of a JAFZ company can be pledged and perfected through registration with the JAFZA.

Formalities

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.

A valid pledge over shares of a Free Zone establishment or company requires:

- Execution of certain forms, prescribed by the JAFZA, by the pledgor, pledgee and the company whose shares are being pledged.
- Filing executed documents with the JAFZA to register the pledge.

Under UAE law, shares are treated as movable assets. Therefore, a share pledge requires possession of the certificates for the pledged shares. This is not always possible, given that most free zone companies do not issue share certificates.

In certain free zones it is possible to perfect a share pledge by registration (over the shares of a free zone company in that free zone) with the free zone. This will prevent the free zone company from transferring the pledge shares or otherwise dealing with the pledged shares, until such pledge is released by the pledgee.

In the case of a share pledge over shares registered on stock exchanges, it will be necessary to comply with the specific requirements of the particular exchange and the relevant regulatory bodies in the UAE.

A valid pledge over the shares of a limited liability company requires:

- Filing the executed share pledge agreement along with other documents (as required by the relevant Emirate department of economic development companies regulator). The mortgagor must be a local bank.
- Payment of the relevant notary and registration fee (for example, a fee at the rate of 0.5% of the secured amount, capped at AED15,000 is payable at the notary public at the time of executing the share pledge agreement).

The pledging of the shares on a limited liability company must be in accordance with the terms of its constitutional documents. It is unclear whether this requirement requires express provisions permitting the pledging of shares in the limited liability company or whether the absence of a prohibition on pledging the shares will suffice.

DIFC. For the Dubai International Financial Centre (DIFC), see *Question 2, Security in the DIFC*.

Claims and receivables

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- 5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?**
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Claims and receivables

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

Common forms of security

Common forms of security include assignments of receivables, income and insurances.

Formalities

It is now possible to perfect the security created under an assignment of income and receivables under the Mortgage Law. It is also possible to register the security interest created under an assignment of insurances provided the insured asset(s) has also been pledged as security for the same financing (see *Question 3*).

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

Cash deposits

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- 6. What are the most common forms of security over cash deposits? How are they created and perfected?**
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Common forms of security

The most common form of security over cash deposits is an accounts pledge.

Formalities

It is now possible to perfect the security created under an accounts pledge under the Mortgage Law (see *Question 3*).

The UAE does not recognise the concept of a floating charge. Therefore, if a pledge cannot be mortgaged under the Mortgage Law, such pledge over an account in the UAE 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

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- 7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?**
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Intellectual property

It is not common to grant security over intellectual property (IP) in the UAE.

Common forms of security

See above, *Intellectual property*.

Formalities

IP rights are generally only pledged by a commercial mortgage. There is also the possibility of registering a mortgage over tangible and intangible assets of a commercial store under the Mortgage Law (see *Question 3*).

Problem assets

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- 8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?**
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Future assets

The concept of security over future assets exists under the provisions of the Mortgage Law. In relation to assets that cannot be mortgaged under the Mortgage Law, such assets must be in existence at the time of the creation of the pledge over the assets (see *Question 3, Formalities*).

Fungible assets

Under the Mortgage Law, it is possible to create a mortgage over raw material stock in a warehouse that will be used to manufacture end products (for example, plastic pellets used in the manufacture of plastic products) (see *Question 1*). If the raw material or manufactured products cannot be mortgaged under the Mortgage Law, the bank requires an assignment over income generated from the sale of the end products and may ask for any pledge over such assets to be amended on a periodic basis or at the request of the bank, so as to cover any changes in the quantity of the pledged assets. This will result in a new fixed charge over the revised quantity of the pledged assets.

RELEASE OF SECURITY OVER ASSETS

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- 9. How are common forms of security released? Are any formalities required?**
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Most unregistered securities can be released with a release and discharge letter from the secured party. For registered securities (such as a land mortgage, share pledge (relating to the shares of a UAE limited liability company) 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.

SPECIAL PURPOSE VEHICLES (SPVS) IN SECURED LENDING

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- 10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?**
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Other than in the case of non-recourse project financing or aircraft/vessel financing, it is not common to take security over the shares of a special purpose vehicle (SPV) set up to hold certain of the borrower's assets.

QUASI-SECURITY

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

In the UAE, a significant number of recent financings have been structured according to Islamic Sharia law. Islamic financing structures rely heavily on the quasi-securities listed below.

Sale and leaseback

Ijarah financings are similar to conventional sale and leasebacks. The sale forms the basis of the Ijarah transaction although, for certain assets (typically land) the sale is often not registered to avoid the transfer charges.

Factoring

Factoring is used in the UAE. The UAE courts respect the parties' decision regarding the form of the transaction. Therefore, the risk of such structures being recharacterised as a security interest is low.

Hire purchase

Hire purchase is used for under construction asset financing (for example, in relation to the construction of hospitals) in the UAE, such as under an Istisna'h (procurement contract) arrangement. The UAE courts will respect the parties' decision regarding the form of the transaction. Therefore, the risk of such structures being recharacterised as a security interest is low.

Retention of title

Retention of title is used in the UAE. The UAE courts will respect the parties' decision regarding the form of the transaction. Therefore, the risk of such structures being recharacterised as a security interest is low.

Other structures

Set off. Set-off arrangements can be enforced under Federal Decree Law No. 9 of 2016 (Bankruptcy Law), provided the conditions requirements for set-off are satisfied before initiating procedures under the Bankruptcy Law.

Netting arrangements. Under UAE issued Federal Decree-Law 10 of 2018 on Netting (Netting Law), netting arrangements (including close-out netting) may be enforced even after the initiation of bankruptcy proceedings, provided they relate to a qualifying netting agreement (as identified under the Netting Law). This is particularly for close-out netting arrangements under various derivative transactions.

GUARANTEES

12. Are guarantees commonly used in your jurisdiction? How are they created?

Personal and corporate guarantees are commonly used in the UAE. Guarantees must be in writing and specify the amount secured by the guarantee.

RISK AREAS FOR LENDERS

13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

Financial assistance

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) that will 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).

Within the Dubai International Financial Centre (DIFC) a company cannot provide financial assistance for a person to acquire shares in the company or a holding company of that company, unless the financial assistance falls within certain exemptions provided for in the DIFC companies law.

Corporate benefit

A parent company can guarantee, or grant a security in respect of, a loan given to a related company (that is, 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.
- Necessary corporate approvals (that is, board resolution and, where necessary, shareholders' resolution) are obtained.
- A subsidiary can also guarantee, or grant a security in respect of, a loan to its parent, subject to the conditions above.

Loans to directors

The Companies Law prohibits:

- A company from making a loan of any kind to a company director and from guaranteeing the payment to a director of a loan made by any person to that director (including his spouse, children or relatives up to the second degree).
- A company from making a loan to another company, if a director of the lending company holds (including any shares held by his spouse, children or relatives up to the second degree) over 20% of the share capital of the borrowing company.

Usury

According to Article 76 of the Commercial Code, a creditor is entitled to receive interest on a commercial loan at the rate of interest stipulated in the contract. If this rate is not stated in the contract, it is calculated according to the rate of interest current in the market at the time of dealing, provided it does not exceed 12% per annum.

The limitations for banks are that interest in excess of 12% per annum, compound interest, and interest in excess of principal are not enforced. However, these limitations are not usually followed by the Dubai courts, unlike other Emirates.

14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

A lender who holds or enforces security over a vessel may be liable for environmental damage caused by that vessel.

STRUCTURING THE PRIORITY OF DEBTS

15. What methods of subordination are there?

Contractual subordination

Subordination of debt is possible under UAE law and common in project financings (where the shareholders of the project SPV will generally subordinate their debts to the project SPV). This is usually achieved by a subordination agreement between the senior and junior creditors, in which they agree that any enforcement proceeds will be used to settle the payments due to the senior creditor and any residue will be applied towards payments to the junior creditor.

Structural subordination

Structural subordination of loans is not common. However, banks regularly require shareholders to enter into agreements to subordinate their loans to the banks' loans to their corporate entities.

Inter-creditor arrangements

Inter-creditor arrangements are common for syndicated financing. The parties to the inter-creditor agreement include the:

- Borrower.
- Lenders.
- Facility agent.
- Security agent.
- Lead arranger (if applicable).
- Obligors.

DEBT TRADING AND TRANSFER MECHANISMS

16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

Secured debt can be transferred through participation agreements. Under a participation agreement, a pledgee or registered mortgagee continues as the pledgee or registered mortgagee but transfers all or part of the loan, on a funded or unfunded basis. Participation may be disclosed or undisclosed, depending on the terms of the participation agreement.

Under the Mortgage Law, mortgage rights can expressly be assigned by the mortgagee without the consent of the mortgagor. The mortgagee can register the assignment as an amendment to the previous registration, but the non-registration of the assignment will not affect the validity of the mortgage right against third parties.

AGENT AND TRUST CONCEPTS

17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

The concept of agency is recognised in the UAE. Agency arrangements are generally recognised by the UAE courts.

The concepts of facility and security agent are recognised in the UAE. The facility agent will generally act on the instructions of (and on behalf of) the lenders and/or the instructions of the majority lenders (as per the standard Loan Market Association (LMA)). The security agent can enforce the security in the courts of the UAE, as agent of the lenders.

However, in certain circumstances an overseas lender may need to appoint a local security agent (usually a UAE bank), particularly where the registration and/or enforcement of a security interest can only be undertaken by local entities or entities that have specific licences (for example, to enforce a share pledge over the shares of a company licensed by the education authority in an Emirate, the pledgee may also be required to hold a licence from the education authority). Such requirements may be the result of:

- Legislation (either at Federal or Emirate level).
- Specific practices at particular free zones or financial institutions.
- The UAE notary (although UAE law and JAFZA's rules and regulations do not specifically require pledging over the shares of a JAFZA company, in order to be registered in favour of a UAE

Central Bank licensed entity, this is the internal practice at the UAE notary).

Other examples may include (this is not an exhaustive list):

- A real estate mortgage, which must be registered in favour of a UAE entity.
- A commercial mortgage, which may only be registered in favour of a UAE Bank or financial institution.

18. Is the trust concept recognised in your jurisdiction?

The common law concept of trust is not recognised under UAE law. An instrument purporting to create a "trust" might be construed by the UAE courts as giving rise to an agency, bailment or other relationship.

The concept of a local security agent, holding security for the benefit of third parties, is recognised. A trustee under a trust arrangement in another jurisdiction would be recognised as the equivalent of a security agent. Therefore, a security trustee could enforce its rights in the UAE courts.

ENFORCEMENT OF SECURITY INTERESTS AND BORROWER INSOLVENCY

19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

Generally, a secured creditor can enforce its security only after both:

- An event of default has occurred.
- A UAE court has granted an enforcement order. Only a pledge of cash can be enforced without a court order.

However, there are two alternative enforcement options under Chapter 8 of the Mortgage Law:

- The sale of the mortgaged asset by agreement of the parties.
- Summary execution through the courts.

(See Question 20.)

Bank accounts and bonds are treated differently from other assets.

Methods of enforcement

20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

All security interests, with the exception of pledges over cash, can only be enforced through a court. The concept of self-help (or extra-judicial enforcement) is not recognised. The security must be enforced by a sale of the secured asset in a public auction.

Enforcement of a mortgage over real property is time-consuming. As a matter of policy, mortgages over property, owned and occupied by a UAE national as his personal residence, generally cannot be enforced. Further, in the Emirate of Abu Dhabi, enforcement of a mortgage over real estate requires governmental approval and approval has not been given in over two decades. However, this is expected to change in view of the Abu Dhabi and Dubai governments' support for the ownership of freehold and leasehold property by foreign nationals.

The Mortgage Law provides the following enforcement options:

- **Sale of mortgage asset (except bank accounts and bonds).** If a mortgagor (or the underlying obligor) fails to perform its obligations under the mortgage contract (or if the contract is not implemented for any other reason), the mortgagee can separate the asset from the other property of the mortgagor (after giving notice to the mortgagor) and request the sale of the mortgaged asset at least its "market value" within 10 working days. To exercise this enforcement option, the parties must agree in advance that the execution will not require resorting to the courts. Notice of the enforcement must be given to the person holding the mortgaged asset and (if applicable) the owner of the real property. For bank accounts and written documents that transfer ownership through delivery or endorsement, the right of sale of a mortgaged asset without recourse to the courts requires that the mortgagor does not perform its obligations under the contract. In practice, the contents of a mortgaged account may be set off by the mortgagee against any debts (if it is the bank where the mortgaged account is held). Alternatively, the amount in the mortgaged account can be claimed from the account bank. Bonds or written documents that transfer ownership through delivery or endorsement must be delivered or endorsed (if their value is not more than the mortgage).
- **The mortgagee can apply to the UAE courts for a summary judgement to seize the mortgaged asset so that it can exercise its rights over the mortgaged asset.** This may involve placing the mortgaged asset with a third party to effect its sale. The summary proceedings judge must notify all relevant parties of the application, who can lodge an objection to the court. If the court permits the summary judgement application, it will permit the mortgagee to either:
 - take possession of the mortgaged asset and sell at market value; or
 - attach additional conditions for the sale of the mortgaged asset.

The mortgagee must take adequate care to achieve a sale price of at least the market value. The mortgagee must pay the sale proceeds into court (following the sale procedure to be specified under the Mortgage Law).

The sale proceeds must be distributed in accordance with the directions of the court, taking into account the rights of any other parties over the mortgaged asset. However, sale proceeds are generally distributed in the following order of priority:

- Any expenses relating to repairing, the sale, licensing or maintenance of the mortgaged asset.
- Charges and fees relating to the enforcement of the mortgage (including court fees).
- To the mortgagees (following the priority determined by the court).
- Any surplus is distributed in accordance with the laws of the relevant emirate.

If the sale proceeds exceed the amount due under the mortgage, the surplus must be distributed to the mortgagor. If the sale proceeds are insufficient to discharge the debt secured by the mortgage, the mortgagor remains liable for the remaining unpaid debt. Enforcement and sale of the mortgaged asset will not be possible if the mortgagor is subject to any preventative composition, bankruptcy or equivalent procedures under the Bankruptcy Law.

Rescue, reorganisation and insolvency

21. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee or security?

No company rescue or reorganisation procedures are available in the UAE outside the insolvency regime under the Bankruptcy Law. The new insolvency regime under the Bankruptcy Law provides for preventative composition procedure (PCP), restructuring scheme (RS) and bankruptcy. The Bankruptcy Law provides for a two-step insolvency procedure of:

- A PCP, which can only be initiated by a debtor in financial distress.
- If it becomes clear that the PCP will not be successful, the next step is bankruptcy, which can be initiated by:
 - a debtor;
 - a creditor;
 - the debtor's regulatory body;
 - the court; or
 - the public prosecutor.

Once a bankruptcy application is made, the court will determine (based on its expert's report) whether to proceed to bankruptcy or RS.

If the court decides to proceed with a PCP or RS, the trustee must submit a draft PCP or RS scheme to the court (as applicable). The draft scheme should contain details regarding (among other things):

- The possibility of the debtor's business to generate profits.
- The terms and conditions relating to any settlement of the debtor's liabilities.

Once the draft scheme is approved by the court, it must be submitted to the creditors. At least two thirds of the unsecured creditors must approve the scheme. If approved, the scheme will then be resubmitted to the court for final approval. If the scheme is a:

- PCP scheme: it should be implemented within three years of receiving the final approval from the court.
- RS scheme: it should be implemented within five years of receiving the final approval from the court.

22. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?

If the court accepts an application for PCP or RS, a moratorium on creditor actions (including enforcement of security or attachment orders by creditors) is implemented. While the moratorium binds both secured and unsecured creditors, a secured creditor can still enforce its security interest against the debtor with the approval of the court. During the implementation of the PCP or RS, all agreements (including loans) remain valid and binding, including payments under loan agreements and the enforcement of any security in the event of a breach (subject to the approval of the court). In bankruptcy, all debts become due and payable when the bankruptcy judgment is given. The courts will then order the sale of secured assets, and the sale proceeds will be applied towards the repayment of the relevant secured debt(s). If the proceeds from the sale of the secured assets are insufficient to repay the debt, the bank is treated as an unsecured creditor for the outstanding debt.

After the court has accepted an application for a PCP or RS, it will appoint a trustee to administer the PCP or RS (as applicable). The trustee must publish a notice of the court's approval in two local newspapers (one English and one Arabic) giving the creditors 15 business days to submit their claims with supporting documentation. Creditors who fail to submit their claims within this time period cannot participate in any distribution (unless they make an application to the court requesting their inclusion to the list of creditors). The trustee reviews the claims and provides a list of the creditors to the court, together with its recommendation on which claims should be accepted or rejected (in part or in their entirety). A final list of creditors and their respective claims is then prepared by the court. A disgruntled creditor can appeal the court decision, but such appeals will not stop the implementation of the PCP or RS. As the Bankruptcy Law is relatively new, it still remains to be seen how this law (particularly the tight timeframes) will be applied in practice.

23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

Once the PCP or RS scheme has been approved by the court, it is sent for creditors' approval (majority approval is required). Only unsecured creditors can vote on whether to adopt a PCP scheme or an RS. If the PCP scheme or RS is approved, the trustee can (at any stage of the PCP or RS scheme) recommend that the court terminates any agreement between the debtor and a third party (including loan agreements) and/or substitute an existing security interest (including any security for a loan) with an alternative security interest of equal value (as determined by the court).

In the event of a declaration of bankruptcy, the trustee must sell the secured asset within one month of the date of the bankruptcy declaration, unless the trustee believes that the costs related to the enforcement of a security interest will exceed the enforcement proceeds from the sale of the secured asset.

24. In what order are creditors paid on the borrower's insolvency?

Under the Bankruptcy Law, upon the UAE court declaring the bankruptcy of a company, the order of priorities ranks as follows:

- Secured creditors to the extent of their security. All reasonable fees and expenses incurred by the trustee in selling the secured asset are deducted before distribution to the secured creditor.
- Preferential creditors. The following classes have priority:
 - any court fees or charges (such as trustee and expert fees, and expenses paid for the benefit of all creditors to maintain or liquidate the debtor's properties);
 - wages and salaries due to employees for the 30-day period before bankruptcy is declared;
 - maintenance paid to the spouse and children (whether before or after a divorce) paid by the debtor under a judgment delivered by a competent court;
 - any amounts payable to governmental bodies;
 - any fees, costs or expenses that are incurred either after the decision to initiating 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 to continue the course of the business of the debtor after the date of initiating procedures.

- Unsecured creditors. While the Bankruptcy Law does not specify the priority given to unsecured creditors, we assume that they will rank below secured and preferential debts. In relation to subordinated creditors, their ranking will depend on the terms of the relevant subordination agreement.

The creditors in each class of debts listed above are ranked equally, unless the debtor has insufficient assets to satisfy each creditor ranking equally. If assets are insufficient, creditors recover a percentage of their debts.

If two or more creditors have a security interest over the same asset, the first step is to see if one of the parties has perfected their security interest through registration (in the security Register or otherwise), in which case the UAE court will generally determine (particularly in the case of a registration under the Mortgage Law) that the registered security interest has priority.

It is also important to note that registering a security interest is not always a legal requirement under UAE law. For example, it is possible to have a legally binding accounts pledge agreement (which will be enforced by the UAE courts) without having to register this under the Mortgage Law. Therefore, creditors with unregistered security interests may still be considered secured creditors in relation to the relevant secured asset. However, this does not apply to assets that require registration with a legal, regulatory and/or free zone authority (such as mortgages over real estate, shares, vehicles, ships and so on). This issue would need to be considered on a case-by-case basis.

CROSS-BORDER ISSUES ON LOANS

25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, or taking guarantees from foreign subsidiaries of the borrower?

Security over immovable property cannot be granted to foreign banks unless they have a commercial banking licence in the particular emirate where the immovable property is located, with the exception of the Dubai International Financial Centre (DIFC) (see *below*). In practice, however, foreign banks lending to UAE borrowers normally appoint a local security agent to hold the UAE-located security on their behalf.

Security over movable property can be granted to non-resident foreign banks by registration in the Security Register (provided the relevant security can be registered under the Mortgage Law) or a chattel mortgage. However, a commercial/business mortgage (whether under the Commercial Code or in relation to assets in the Jebel Ali Free Zone) can only be granted to banks or financial institutions with a commercial banking licence.

In practice, foreign non-resident banks normally appoint an onshore security agent to hold the security on their behalf.

Foreign lenders can hold security in the DIFC. Foreign lenders can be mortgagees on vessel mortgages.

26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

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. AED is pegged to the US dollar.

BREXIT

27. If UK financial institutions no longer have "passporting" rights in the EU after Brexit, what regulatory requirements would a UK lender have to comply with to make a loan to, or purchase a loan made to, a borrower in your jurisdiction?

Non-applicable.

28. Will a UK financial institution require a licence to lend after Brexit? Will a UK lender be able to take security from a borrower in your jurisdiction?

Non-applicable.

TAXES AND FEES ON LOANS, GUARANTEES AND SECURITY INTERESTS

29. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?

Documentary taxes

There are no applicable documentary taxes.

Registration fees

Fees are payable to the local Emirate authority to register the security. Fees vary, depending on the authority, and form a percentage of the secured amount (generally 0.25% for a mortgage over land and 0.2% for a mortgage over shares). These fees can be costly. In contrast, the mortgage registration fees under the Mortgage Law currently range between AED200 to AED300 per registration (depending on the type of secured asset). See *Question 1*.

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

Notaries' fees

Notarial fees for documents required to be notarised are 0.25% of the secured amount, up to a maximum of AED16,000.

30. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

There are no strategies available to minimise costs.

REFORM

31. Are there any proposals for reform?

No major reforms are anticipated in the area of security.

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