

# Acquisition Finance

*Contributing editors*

Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas



2018

GETTING THE  
DEAL THROUGH 

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Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas  
Simpson Thacher & Bartlett LLP

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# Preface

## Acquisition Finance 2018

Sixth edition

**Getting the Deal Through** is delighted to publish the sixth edition of *Acquisition Finance*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Argentina, India and Nigeria.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

GETTING THE   
DEAL THROUGH

London  
April 2018

# United Arab Emirates

Bashir Ahmed and Abdus Samad

Afridi & Angell

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## General structuring of financing

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### 1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

#### Governing law

The transaction documents in a conventional acquisition financing in the United Arab Emirates (UAE) are typically governed by the laws of the UAE, as applied in the emirate where the funds are made available.

The transaction documents in an acquisition funded through Islamic finance are typically governed by the laws of the UAE, to the extent that such laws do not conflict with the principles of the Islamic Sharia'ah, a body of religious, ethical and legal rules based on notions of justice and equity. In the event of a conflict, such principles would prevail.

#### Choice of foreign law

UAE law recognises the principle of freedom of contract. Therefore, in theory, an express foreign choice of law clause in a contract should be recognised by the UAE courts. However, the courts are normally reluctant to apply foreign laws on public policy grounds (a principle that has been broadly construed).

If a UAE court decides to apply foreign law in a particular case, the foreign law must be proven to the court as a question of fact and, if so proven, may be ignored by a UAE court as a matter of practice. Furthermore, if a foreign law is applied, there is no guarantee that a court will interpret it in a manner that is consistent with its application in the jurisdiction of origin.

There are certain areas of commercial dealing in which UAE courts do not uphold a foreign choice of law, including:

- commercial agencies and distributorships;
- real property;
- employment;
- government contracts;
- certain sea transport claims; and
- certain types of insurance contracts.

Although acquisition finance agreements would likely not fall into any of these categories, some elements of the transaction (eg, satisfaction of closing conditions) may be affected, and the caveats noted above will apply to any choice of law provision.

#### Enforceability of foreign judgments

The UAE has treaties with various countries for judicial cooperation and recognition of judgments and arbitration awards. The UAE is also a signatory to the 1983 Convention on Judicial Co-operation between States of the Arab League (Riyadh Convention), to which several Arab countries have acceded, and which has provisions relating to, among other things, the recognition and enforcement of judgments rendered in member states.

In relation to a judgment from a Riyadh Convention member state or a state with which the UAE has a treaty, the jurisdiction of the court of origin is generally not reviewed (subject to particular exceptions that may be provided in the relevant treaty), and the foreign judgment will likely be enforced.

The provisions of the UAE Civil Procedure Code must be satisfied in order for a UAE court to enforce a judgment from a country with which the UAE does not have a bilateral treaty. The primary test for enforcement in the UAE (where no treaty is in place) is whether reciprocal arrangements for the enforcement of judgments exist between the UAE and the country in which the judgment is given. An application to a UAE court for enforcement of a foreign judgment must comply with a number of other conditions that include the following:

- the UAE courts must not have jurisdiction over the substantive dispute in relation to which the foreign judgment was obtained;
- the judgment must have been issued by a competent court under the law of the jurisdiction from which it emanates;
- the defendant must have been summoned and represented in the foreign proceedings;
- the judgment must be final and binding under the law of the country in which the judgment was given; and
- the judgment must not be inconsistent with a judgment or order already issued by a court in the UAE and cannot be contrary to UAE principles of morality and public order.

The requirement that the UAE courts must not have jurisdiction over the substantive dispute may cause difficulties when enforcing a judgment against a defendant resident or domiciled in the UAE, as the UAE courts have jurisdiction in relation to such a defendant. If the requirements of the Civil Procedure Code discussed above cannot be satisfied, a civil claim must be filed in the relevant UAE court where the foreign judgment may be filed in evidence. However, in such cases, a UAE court will examine the claim on its merits.

Arbitration is becoming an increasingly popular way to resolve disputes in the UAE. The UAE acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) in 2006, and UAE courts have since started enforcing foreign arbitral awards.

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### 2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

#### Acquisitions by foreign entities

Yes. There are significant restrictions on acquisitions by foreign entities in the UAE. UAE Federal Law No. 2 of 2015, as amended (Companies Law), requires companies located in the UAE (and not in one of the country's free zones) to be at least 51 per cent owned by one or more UAE nationals, citizens of a Gulf Cooperation Council (GCC) country or companies wholly owned by UAE or GCC nationals. Certain entities (eg, banks) are required to allocate an even greater portion of their shares to UAE and GCC persons and entities.

Foreign investors often contribute the entire capital and, in such circumstances, commonly enter into side agreements with the majority nominal shareholder in order to reflect the de facto beneficial ownership of the company and to strengthen their management rights. However, while certain aspects of such agreements have been upheld, their enforceability has yet to be fully tested in the UAE courts.

There is no restriction on acquisition of companies located in any of the UAE free zones, where 100 per cent foreign ownership is permitted.

**Restrictions on cross-border lending**

There are no restrictions on cross-border lending.

**3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?**

Acquisition financing in the UAE is typically structured as a senior term loan, which the borrower generally secures with personal or corporate guarantees. In addition to the primary facility documentation, the borrower will likely sign a promissory note, a subordination agreement for its remaining debt and an assignment of certain identified (ie, current) assets based on the nature of the acquisition.

Although most acquisitions are funded through conventional finance, there are a number of Islamic finance structures that are used as well, particularly the *murabahah*, *musharakah*, *mudarabah* and *ijarah* structures. However, the financial covenants of the Islamic finance instruments are often more onerous than those found in conventional facilities.

**4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?**

Neither the UAE Companies Law (being Law No. 2 of 2015) nor the rules and regulations applicable in the UAE's exchanges (ie, the Abu Dhabi Securities 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.

In the Dubai International Financial Centre (DIFC), a financial free zone in the emirate of Dubai, acquisitions are governed by the Takeover Rules Module of the Dubai Financial Services Authority (DFSA) Rulebook, which also does not prescribe the use of certain funds. Although an offeror need not confirm that funds are in place for an acquisition, there are restrictions on the use of debt financing (see question 5).

The recently established Abu Dhabi Global Market (ADGM) has its own set of rules regulating the acquisition of public companies with a presence within the ADGM (which can be found in the Takeover Regulations (Takeover Code) Rules 2015 and the Takeover Regulations 2015). These rules do contain provisions on certainty of financing.

**5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?**

Yes. Central Bank Circular 25/2005 (as amended by Circular 2418/2006) restricts the amount of debt financing that may be used to acquire shares in a target company. In particular, it provides that, in an initial public offering, any debt financing provided to the subscribers cannot exceed 10 per cent of the nominal value of the shares to be acquired, unless either the company or the bank receiving the subscription funds agrees to refund excess subscription funds to the lending bank (in which case, the lending limit would be 50 per cent of the nominal value of the shares). Also, loans extended against the pledge of allotted shares in a public subscription of a newly established company may not exceed 70 per cent of the book value of the shares. Moreover, borrowers may utilise debt financing to acquire up to 50 per cent of founder shares in a private company and 80 per cent of the shares in a company that has been operating for at least five years.

**6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?**

**Licensing requirements in the UAE**

The principal financial services regulator in the UAE is the Central Bank. The Securities and Commodities Authority (ESCA) also has some oversight functions in certain specific areas, particularly in relation to listed securities and funds.

Federal Law No. 10 of 1980 (the Banking Law) is the primary legislation giving the Central Bank the authority to regulate financial services in the UAE. The Banking Law provides that the Central Bank has the power to license and regulate a wide variety of financial institutions,

including those seeking to provide financing in the UAE. In particular, those institutions are as follows:

- commercial banks, which include institutions that customarily receive funds from the public for granting loans and which issue and collect cheques, place bonds, trade in foreign exchange and precious metals, and carry out other operations allowed by law or by customary banking practice;
- investment banks, which include institutions conducting similar activities to commercial banks, with the notable exception that they do not accept deposits with a maturity of less than two years;
- investment companies, which manage portfolios on behalf of individuals or companies, subscribe to equity and debt instruments, prepare feasibility studies for projects, market shares and debt instruments, and establish and manage funds;
- finance companies, which provide corporate and consumer credit facilities, but may not accept deposits from individuals;
- Islamic banks, which undertake all the activities of a commercial bank and additionally can own assets financed by them;
- Islamic finance companies, which may provide personal and consumer property, vehicle and trade financing, issue guarantees, enter into foreign exchange contracts with corporate entities, subscribe to shares, bonds and certificates of deposits, accept deposits from corporate entities, and manage investment vehicles; and
- real estate finance companies, which are finance companies that specialise in funding real estate projects on a conventional or shariah-compliant basis.

Each of the entity structures listed, if incorporated in the UAE, requires a UAE national to hold at least 51 per cent of its shares; however, for finance companies, commercial banks, and investment banks, the minimum UAE national shareholding is 60 per cent. Branches of foreign banks are licensed as commercial banks and routinely provide financing to local entities.

Any application for a Central Bank licence requires the submission of a letter of application, various constitutional documents of the applicant and a business plan. The Central Bank does not prescribe the exact documents required; rather, the normal practice is for the Central Bank to notify the applicant of such additional documents as it might require on an ad-hoc basis. Currently, the Central Bank has imposed a moratorium on accepting applications from foreign banks to operate a commercial bank in the UAE.

ESCA has released a number of new regulations regarding the registration, licensing and promotion of local and foreign funds. In particular, licensed fund sponsors must adhere to ESCA Board of Directors' Chairman Decision No. 9/RM of 2016 (Mutual Fund Regulations) and the new regulations issued in relation to it (as applicable), including fund-specific rules (such as those related to real estate investment trusts, cash investment funds, venture capital funds and exchange traded funds). The Mutual Fund Regulations require fund sponsors to submit an application form, along with a long-form offering document and short-form key investment information document.

**Licensing requirements in the DIFC**

To provide any financial service from within the DIFC, an individual or entity must be authorised by the DFSA. In particular, a lender must seek a licence for arranging credit in order to offer financing from the free zone and must be structured as any one of the following entities:

- limited liability company (note, it is anticipated that this legal form will soon be removed by way of an amendment to the DIFC companies law);
- company limited by shares;
- limited liability partnership; or
- branch of foreign company or partnership.

Unlike the rest of the UAE, the DIFC imposes no requirement for majority ownership by a UAE national, and 100 per cent foreign ownership is permitted. However, as with the entities incorporated in the UAE, a regulated lender in the DIFC must appoint directors and make periodic filings regarding, among other things, its capital adequacy.

**Licensing requirements in the ADGM**

Similar to the DIFC, the ADGM imposes no requirement for majority ownership by a UAE national, and 100 per cent foreign ownership is

permitted. An entity seeking to offer financial services in, or from, the ADGM must obtain permission from the Financial Services Regulatory Authority. However, as with the entities incorporated in the UAE, a regulated lender in the ADGM must appoint directors and make periodic filings regarding, among other things, its capital adequacy.

**7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?**

No. There is no withholding tax currently levied in the UAE.

**8 Are there usury laws or other rules limiting the amount of interest that can be charged?**

Central Bank Circular 2149/2003 requires banks operating in the UAE to publish tables on a monthly basis that include, among other things, the applicable interest rates for such period. For variable rate lending, the margin charged must be constant relative to either an inter-bank rate or the cost of funds. Although no limit is set for the maximum interest that may be charged, a bank may not lend at a rate that exceeds its maximum published interest rate. There are similar rules governing penalty interest.

Interest cannot be charged in Islamic finance, because it is prohibited under the principles of the Islamic Sharia'ah.

**9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?**

In both conventional and Islamic financing, the borrower typically indemnifies the lender for all costs resulting from any breach of the transaction documents or an event of default.

**10 Can interests in debt be freely assigned among lenders?**

Yes. A lender may assign an interest in debt to another lender in the UAE.

**11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?**

Yes. The Central Bank, ESCA, DFSA and FSRA licensing processes for administrative agents, trustees and collateral agents are similar to those in place for entities intending to provide financing in the UAE, DIFC and ADGM, respectively (see question 6).

In this case, the Central Bank application will need to stipulate that the entity intends to act as an administrative agent, trustee or collateral agent.

Both the DFSA and FSRA require those agents and trustees to apply for a licence for custody, trust services, fund administration or for acting as the trustee of a fund (as applicable).

**12 May a borrower or financial sponsor conduct a debt buy-back?**

There is no express restriction against conducting a debt buy-back in the UAE. In practice, a borrower may be permitted to buy back the outstanding debt in conventional financing. In Islamic facilities, debt prepayment is generally only possible with the consent of the lenders.

**13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?**

There is no express restriction against soliciting a majority of lenders to amend a debt agreement under UAE law. In practice, amendments are generally undertaken by a vote of the majority of lenders in both conventional and Islamic syndicated lending.

**Guarantees and collateral**

**14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?**

While there are no explicit restrictions on UAE entities providing related company guarantees or benefiting from guarantees from foreign-registered entities, the Companies Law includes provisions that may nonetheless limit such guarantees.

In particular, a joint-stock company may not provide any loan (or guarantee or collateral in connection with any loan) to a member of its board or any relative of such person (up to the second degree). The limitation on providing loans (but not guarantees and collateral) extends to companies where the board member or any such relative holds more than 20 per cent of the capital. Furthermore, the Companies Law requires any transaction (including providing or benefiting from a guarantee) with a related party to be approved by the shareholders and, if the value of such transaction is greater than 5 per cent of the company's capital, ESCA. For the purposes of this restriction, a 'related party' refers to any director or senior executive of the company, any company in which a director or executive holds at least 30 per cent of the share capital and any subsidiary or affiliate of that company.

**15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?**

The Companies Law prohibits companies and their subsidiaries from providing financial aid to any shareholder to enable the shareholder to acquire shares, bonds or Islamic bonds of the company. Such financial assistance includes providing loans, gifts, donations, security or guarantees.

Also, while there is no specific body of law governing acquisitions in the UAE, there are some applicable provisions in Federal Law No. 2 of 1987 (Civil Code), Central Bank circulars, ESCA regulations and the listing rules for the UAE's three exchanges. The legislation in the DIFC and ADGM has separate rules in each case concerning financial assistance in acquisitions. These should be considered separately where relevant.

**16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?**

It is permissible to create a fixed charge over a specific asset or a blanket lien over all assets that are in existence at the time the funds are made available. Security is generally taken in the form of an assignment from the debtor to the lender or, in the case of assets that are specifically addressed by statute (eg, land), a mortgage or pledge.

However, granting a lien over future-acquired assets, including by way of floating charges, is not possible under UAE law. The asset must be identifiable at the time that the security interest is created, it must have some monetary value and it must be capable of being delivered. A valid security interest cannot be created over assets that change from time to time. In practice, the lender and borrower have entered into a commercial mortgage (which is notarised and registered) or chattel mortgage (which is simply notarised) over all of the assets of the borrower. The assets in existence when the mortgage is created will be enumerated in an attached schedule, and that schedule may be updated periodically by the parties. However, the UAE recently enacted Federal Law No. 20 of 2016 (Pledge Law), which creates a register of mortgages for certain movable assets as security for debts. Under the Pledge Law, a lender may secure a pledge over tangible and intangible assets of a commercial business as security for any funding provided to acquire that business. The resulting pledge will have priority over the rights of any purchaser, lessee or lien holder, provided that it is registered before the creation of any other rights on the relevant assets. It is not clear to what extent this would replace the current use of commercial mortgages, which also secure an interest over such assets. The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

**17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?**

Execution of security interests over property in the UAE is governed by the Civil Code, Federal Law No. 18 of 1993 (Commercial Code), the Pledge Law, legislation passed in the individual emirates and the Companies Law. To validly perfect a security interest over tangible movable property (other than vessels, vehicles and aircraft, which have registered ownership), the parties must conclude a pledge contract,

including details of the pledged asset, declaration from the pledgor confirming its right to pledge the pledged asset and the nature of the secured debt and notify the holder of the pledged asset (if not held by the pledgor). The pledge shall be registered by filing the necessary registration form with the registrar, and all persons that should be notified of the pledge registration under the provisions of the Pledge Law (eg, third-party holders of the pledged asset) must be notified of the pledge registration at the time of the application. For such assets, there is no requirement for the lender to take actual possession of the assets (as was the case under the previous rules). However, to validly perfect a security interest over vessels, vehicles, aircraft and certain other assets, the lender must take actual possession of the underlying assets, and security interests over certain property must be registered in accordance with applicable law (eg, charges over vessels, vehicles and aircraft). In the case of a security interest over real property, the lender must register the mortgage at the land department of the emirate where such property is located. Also, a pledge over shares will only be effective once it is registered in the commercial register of the company that is maintained with the relevant economic department (though the mechanism for registering such pledges has yet to be established).

The DIFC and ADGM each have separate rules that should be considered separately, where applicable. In the DIFC, a security interest is validly perfected if the lender has given value in respect of the collateral (which the debtor must have the power to transfer), the parties have entered into a security agreement (or, in the case of certain financial instruments, the lender has control over the collateral) and the lender files a financing statement (unless a grace period applies or the collateral is exempt from filing (eg, promissory note or receivables)).

#### **18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?**

Most liens in the UAE do not require registration, therefore, there are generally no applicable renewal procedures. In fact, article 1502 of the Civil Code provides that a security interest lapses only upon the satisfaction of the entire secured debt, the assignment of the security interest, the unification of title to the security interest and the property, the destruction of the property or the expiry of the security interest (eg, as provided in the assignment upon creation of the interest). Furthermore, pledges that are registered under the Pledge Law do not automatically lapse; accordingly, such law does not prescribe renewal procedures. Specifically, the Pledge Law provides that a registered pledge may be terminated if the pledgee and pledgor or obligor (as applicable) agree to strike off the registration, the obligor discharges the obligations that are secured by the registered pledge, the registration relates to assets that cannot be pledged under the Pledge Law, the pledgee fails to discharge its obligations following the registration of the pledge contract or a court order is issued to strike off the pledge registration.

On the other hand, commercial mortgages are valid for five years and must be renewed before the end of such period in order to maintain priority. Also, security interests in real property are valid upon registration with the land department of the relevant emirate, but may require renewal, depending on the emirate involved.

The DIFC and ADGM each have separate rules that should be considered separately, where applicable. In the DIFC, a duly filed financing statement is generally effective for a period of five years after the date of filing, and a continuation statement may be filed within six months before the expiry of this five-year period.

#### **19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?**

No. There are no works council or similar consents required to approve a guarantee or security issued by a company. The company must simply issue a valid board resolution or shareholder resolution authorising the guarantee or security.

#### **20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?**

Security may be granted to an agent for the benefit of all lenders. The use of security agents is common practice, especially in syndicated loans.

#### **21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?**

Collateral can only be released with the prior written consent of the lienholder, and UAE law does not stipulate additional protections for creditors in respect of collateral unless the debtor is subject to bankruptcy proceedings (see question 32).

#### **22 Describe the fraudulent transfer laws in your jurisdiction.**

Article 409 of the Civil Code and article 206 of Federal Decree No. 9 of 2016 (Bankruptcy Code) provide that a debtor shall be liable for fraud if he or she files for bankruptcy to deliberately cause loss to any party, conceals property or fabricates false debts with the intention of causing loss to any creditor or fraudulently changes his or her place of residence.

Also, any fraudulent conveyance would be void in any insolvency proceeding (see question 33). The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

#### **Debt commitment letters and acquisition agreements**

#### **23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?**

In conventional acquisition financing, the typical documentation that is used includes an offer letter, facility agreement, assignment agreement and promissory note. Short form commitment letters are used for smaller transactions, whereas larger financing generally employ full documentation, often along Loan Market Association lines.

The documentation used in an Islamic facility varies based on the structure used. However, many Islamic financing rely on a sale-and-purchase agreement, a form of agency agreement and a sale undertaking. Depending on the structure, the parties may also enter into a lease agreement and promise to buy or sell.

#### **24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?**

In a conventional financing, a typical offer letter represents a full commitment to fund, subject to the borrower's satisfaction of the conditions and covenants contained in it. If a memorandum of understanding or term sheet is agreed upon for an Islamic facility, the parties will utilise their best efforts to complete the transaction. If such a document is not used (and in the case of acquisition agreements for both types of financing), the transaction documents represent a full commitment from the parties.

#### **25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?**

As noted in question 3, funding is typically conditioned upon the borrower providing the lender with any or all of the following:

- issuance of personal and corporate guarantees;
- an express subordination of debt;
- an assignment or pledge of assets (eg, insurance proceeds); and
- execution of a promissory note.

#### **26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?**

Yes. Flex provisions are sometimes used in the UAE; in particular, some commitment letters permit lenders to modify the amount and tenor of a loan.

#### **27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.**

No. Securities demands are not a key feature in acquisition financing in the UAE. Although not expressly prohibited under UAE law, there are a number of provisions that indicate that securities demands would not be upheld by the UAE courts. Most notably, article 733 of the UAE Civil Code provides that it is impermissible for parties to resolve a dispute in

which the settlement would include the creation of a new debt in order to annul an existing debt or to accelerate payment by substituting part of a deferred debt or reducing the amount of a guarantee on a deferred debt. The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

**28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?**

A lender will be interested in any provision of the acquisition agreement that affects its exposure under the loan, the ability of the borrower to repay and the prospects of the underlying business. In particular, a lender will be concerned with provisions limiting the borrower's liability, the scope of the borrower's representations, any indemnities provided and performance clauses that may impact the purchase price. These provisions are particularly important when the loan is intended to finance the acquisition of a business on a going-concern basis.

Most of the protections available to a lender will be secured in the relevant loan documentation and no funds will be released until all conditions are met. However, certain lender protections are sometimes found in the acquisition agreement and, specifically, some agreements will provide for information rights for the lender, a requirement for direct agreements of third parties with the lender, an escrow arrangement whereby any security documentation (eg, a title deed or share certificates) will pass automatically to the lender or ongoing covenants regarding the state of the business (particularly if the purchase price is subject to performance clauses).

**29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?**

No. Commitment letters and acquisition agreements do not need to be filed in the UAE and do not become public.

**Enforcement of claims and insolvency**

**30 What restrictions are there on the ability of lenders to enforce against collateral?**

Prior to an insolvency proceeding, a lender is generally able to enforce against collateral, provided that it has validly created a security interest over such collateral and has provided the debtor with notice of the same and there are no grounds to set aside any payment of proceeds during the preference period (see question 33). During and after an insolvency proceeding, a lender's ability to enforce against collateral is greatly limited (see questions 32, 33 and 34). The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

**31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?**

The Bankruptcy Code contemplates two types of proceedings (preventive composition and restructuring) that will permit a debtor to continue managing its business and, if approved, obtain DIP financing:

- preventive composition affords the debtor the opportunity to reach an agreement with its creditors for the repayment of sums owed (article 5), while under court protection from individual creditor claims (rather than having to proceed to bankruptcy proceedings). This option will be available to the debtor only if it has not been in default for more than 30 consecutive business days and is not insolvent (article 6(2)); and
- the court may grant restructuring in a bankruptcy proceeding under the following circumstances, provided that the restructuring will not prejudice the creditors (in which case the proceeding shall be structured as a liquidation of the debtor's assets):
- any qualifying debtor (ie, a company governed by the Companies Law, a business established in the free zones (except for the DIFC and ADGM), a licensed civil company conducting professional activities, a public sector company whose constitutional documents provide that it is subject to the Bankruptcy Code or an individual trader) may request a reorganisation, provided that the debtor has been in default for more than 30 business days or is insolvent;
- the court may order a reorganisation or convert a preventive composition into a restructuring proceeding if the debtor has been in

default for more than 30 business days or is insolvent, or it becomes impossible to apply the preventive composition (if applicable) and ending such an arrangement would result in payment default for more than 30 consecutive business days or result in the debtor's insolvency. The Bankruptcy Code does not include guidance as to what would constitute 'impossible';

- creditors holding at least 100,000 UAE dirhams (or such lesser amount approved by the Minister of Finance) in outstanding debt may initiate bankruptcy proceedings against a debtor, provided that those creditors have adequately notified the debtor of such debt, and the debtor has still failed to repay it within 30 consecutive business days of notification (article 69(1)). It is unclear from the regulations how the court will evaluate disputed amounts; or
- any bankruptcy court or public prosecutor may also initiate bankruptcy proceedings.

Article 181 of the Bankruptcy Code provides that the court may, at the request of the debtor or the trustee in a preventive composition or restructuring, permit the debtor to obtain DIP with or without guarantee as follows:

- the new financing has priority over any ordinary outstanding debt owed by the debtor on the date of initiating such proceedings;
- a guarantee may be provided for the new financing by pledging any non-pledged assets of the debtor; and
- a guarantee may be provided for the new financing by pledging pledged assets of the debtor to the extent that such assets are appraised at a value more than the value of the debt guaranteed by the previous pledge (in which case, the new pledge shall rank lower than the existing pledge on the same properties unless the secured creditors for such assets agree that the new pledge ranks equally to or higher than the outstanding pledge).

It is unclear whether DIP financing would be available in the event of a preventive composition in which such arrangement includes conditions restricting or prohibiting such financing.

The DIFC and the ADGM each have separate rules that should be considered separately, where applicable.

**32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?**

**Automatic stay**

Bankruptcy courts in the UAE impose an automatic stay against creditors.

In accordance with the Bankruptcy Code, a qualifying debtor or creditor, a bankruptcy court or a public prosecutor may apply to have the debtor declared bankrupt as noted in question 31. The debtor must suspend payments to creditors if the court elects to initiate bankruptcy proceedings, and any such payments shall be subject to unlawful preference rules (see question 33).

As soon as the bankruptcy judgment is issued, the court (with certain limited exceptions) removes the power to administer and dispose of the debtor's assets from the debtor and provides it to a trustee-in-bankruptcy, who will also manage all creditor claims. However, in the event of a preventive composition or restructuring, the debtor must continue to perform its obligations under any contract, provided that the court has not issued a stay of execution owing to the debtor's failure to perform its obligations in respect of the insolvency proceedings.

Also, the judgment identifies a group of creditors consisting of persons and entities having valid claims against the debtor existing prior to that judgment. The pronouncement of the bankruptcy judgment results in the suspension of individual proceedings and actions brought against the debtor by ordinary creditors and preferred creditors (including criminal proceedings for bounced cheques, which may be voided if the debtor satisfies the bankruptcy judgment). At that point, all monetary debts owed by the debtor become payable, regardless of whether such debts are unsecured or secured by a general or particular lien, in accordance with the judgment (which will approve a payment plan having a duration of no more than five years which may be extended in certain limited circumstances). Secured creditors shall be paid out of the proceeds of the sale of properties subject to their liens (and in accordance with applicable priority rules).

There are limited circumstances under which a creditor may bring an enforcement action against the debtor after the pronouncement of the bankruptcy judgment. They are as follows:

- actions connected with assets, rights and disposals that are not covered by the general prohibition preventing the debtor from administration or disposal (eg, assets of third parties and rights connected to the debtor's marital status);
- actions that the law permits the debtor to bring in connection with the bankruptcy proceedings;
- actions under criminal law; and
- actions preparatory to a judgment to close proceedings.

#### Protection of existing lienholders

There is protection for existing lienholders under UAE law.

Under the Bankruptcy Code, mortgage creditors and preferred creditors that have not been paid some or all of their debts out of the proceeds of the sale of real property have the right to share in any distribution to unsecured creditors, provided that such debts have been verified by the court.

Note that two additional factors will impact the effectiveness of this protection:

- a lien may be set aside if it was created after the date of suspension of payments (see question 33); and
- an additional secured creditor holding a specific charge may, if approved by the court, make a claim against the trustee-in-bankruptcy in respect of the assets over which the charge exists after the date of the bankruptcy judgment.

The DIFC and ADGM each have separate rules which should be considered separately, where applicable.

#### 33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

Payments to lenders made by the debtor within two years prior to the date of the initiation of bankruptcy proceedings can be clawed back by the bankruptcy court.

During this period, the following payments by the debtor must be clawed back and added to the assets made available to the group of creditors established on the date of the bankruptcy judgment (unless otherwise approved by the court):

- the making of any donations, with the exception of small customary gifts;
- entering into any transaction in which the liabilities of the debtor remarkably exceed the liabilities of the counterparty;
- the payment of any term debt, by whatever means, prior to the due date;
- the payment of immediate debts, other than in an agreed form; and
- entering into any mortgage or other charge that is secured by the debtor's assets for the purpose of guaranteeing a prior debt.

Furthermore, the creditors may bring an action for restitution regarding any other payments made, and the court may set aside any other disposal made by the debtor between the date of suspension of payments and date of the bankruptcy judgment (ie, in addition to those listed above) if that disposal is harmful to the creditors and if the party to whom the disposal was made was aware that the debtor was insolvent at the time of the disposal.

Also, mortgages and liens secured on the assets of the debtor may be held unenforceable in respect of the group of creditors if they are registered after the date of suspension of payments.

If the court sets aside any payment, the party to whom it was made must return the funds to the debtor's estate (or, failing that, the value of the asset at the time it was received) and repay any yield received from the date of receipt and any consideration for the asset's use (unless such consideration is in the bankruptcy estate). A third party that is compelled to return the consideration paid for an asset by the court may seek a refund of the benefit obtained from such payment from the group of creditors and may share in the debtor's estate as an unsecured creditor for any excess amount.

The DIFC and ADGM each have separate rules which should be considered separately, where applicable.

#### 34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Yes. Creditors are ranked in an insolvency.

The Bankruptcy Code sets out the following priority of payments (in the order listed):

- any judicial fees or charges, including those of trustees and experts, and any expense disbursed for the benefit of the creditors to maintain and liquidate the properties of the debtor;
- unpaid end-of-service gratuity, wages and salaries of the employees of the debtor (other than allowances and bonuses), which shall not exceed the relevant wages that are payable for a period of three months and provided that any payments made from the proceeds from the sale of assets in the debtor's possession do not exceed 30 days of the relevant wages;
- any maintenance payments that are subject to a judgment from a competent court;
- any amount payable to government bodies; and
- any fees, costs or expenses incurred after the date that insolvency proceedings have been initiated to procure commodities and services for the debtor or to continue the performance of any other contract required to continue the business of the debtor.

As noted in question 32, secured creditors are entitled to payment out of the proceeds of the sale of the underlying property subject to their liens and have the right to share in any distribution to unsecured creditors insofar as such proceeds are insufficient to satisfy their claims. The court will determine the priority of remaining claims in a bankruptcy on an ad-hoc basis.

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The Bankruptcy Code provides that a composition or reorganisation plan must be approved by a majority of the creditors by number and by creditors holding at least two-thirds of the debts that have been finally or provisionally accepted by the court.

The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

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**35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?**

Yes. Contractual agreements regarding lien subordination are enforceable in the UAE, provided that such agreements do not violate UAE laws regarding priority (see question 34).

The DIFC and ADGM each have separate rules (and independent course) that should be considered separately, where applicable.

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**36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?**

There is no special provision directly addressing discounted debt instruments under UAE law. The creditor holding such an instrument must make a claim to the trustee-in-bankruptcy, and the court will determine the priority of such claim.

The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

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**37 Discuss potential liabilities for a secured creditor that enforces against collateral.**

See question 34. Also, note that articles 33 and 34 of the Bankruptcy Code provide that a debtor initiating a preventive composition shall not cause its debts to come due or any contract to terminate. While it is unclear whether these provisions are intended to abrogate lenders' rights, they may have an impact on acceleration and termination clauses in loan agreements. The DIFC and ADGM each have separate rules that should be considered separately, where applicable.

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