

GETTING THE DEAL THROUGH

Acquisition Finance

in 20 jurisdictions worldwide

Contributing editors: Marisa Stavenas, Alexandra Kaplan and Ryan Bekkerus

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Getting the Deal Through is delighted to publish the fully revised and updated second edition of *Acquisition Finance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and clients.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 20 jurisdictions featured. New jurisdictions this year include Austria, France and Italy.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to 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

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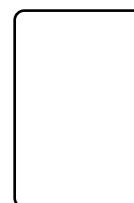
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United Arab Emirates

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General structuring of financing

- 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 shariah law, a body of religious, ethical and legal rules based on notions of justice and equity. In the event of a conflict, shariah law 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 an issue of fact and, if so proven, may nonetheless be ignored by the 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.

Also, 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 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 (the 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 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 the court for enforcement of a foreign judgment must comply with a number of other conditions which 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 that country;
- 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, the court will examine the merits of the case.

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

-
- 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. 8 of 1984, as amended (the 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, the enforceability of these agreements has yet to be 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 Companies Law nor the rules and regulations applicable in the UAE's exchanges (ie, the Abu Dhabi Stock Exchange, the Dubai Financial Market and NASDAQ Dubai) provide a separate set of rules governing the acquisition of public companies in the UAE. Accordingly, there is no express requirement that certain funds must be used in acquisitions.

In the Dubai International Finance 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 does not need to confirm that funds are in place for an acquisition, there are restrictions on the use of debt financing (see question 5).

- 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. Finally, 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 (SCA, also commonly referred to as ESCA) also has some oversight functions in certain specific areas, particularly in relation to listed securities, and ESCA's role with regard to fund regulation is expanding.

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 on 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, 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 above 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.

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;
- company limited by shares;
- limited liability partnership;
- protected cell company;
- investment company;

- branch of foreign company or partnership; or
- special purpose company.

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.

- 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 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, as it is prohibited under shariah law.

- 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 and DFSA licensing processes for administrative agents, trustees, and collateral agents are similar to those in place for entities intending to provide financing in the UAE and DIFC, 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.

The DFSA requires such agents and trustees to apply for a licence for custody, trust services, fund administration, or 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 generally only proceeds 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 effected 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?

No, there are no restrictions on guarantees from domestic and foreign-registered companies.

- 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?

No, there are no specific restrictions on a target company's ability to provide guarantees, collateral, or financial assistance in an acquisition of its shares. While there is no specific body of law governing acquisitions in the UAE, there are some applicable provisions in the Companies Law, Federal Law No. 2 of 1987 (the Civil Code), Central Bank circulars, ESCA regulations, and the listing rules for the UAE's three exchanges.

- 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.

- 17** What kinds of notification or other steps must be taken to perfect a security interest against collateral?

To perfect a security interest over intangible property, the debtor must deliver the instruments evidencing such property to the lender. The law over the creation of security interest over moveable property (other than vessels, vehicles and aircraft, which have registered ownership) is fairly rudimentary. As a general rule, to validly perfect a security interest over tangible moveable property, the lender must take actual possession of the underlying assets. However, 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 Lands Department of the emirate where such property is located.

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, receivables)).

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

As most liens do not require registration, there are generally no applicable renewal procedures in the UAE. 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 expiration of the security interest (eg, as provided in the assignment upon creation of the interest).

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.

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 expiration of such 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?

UAE law does not stipulate additional protections for creditors in respect of collateral.

22 Describe the fraudulent transfer laws in your jurisdiction.

Article 409 of the Civil Code provides 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 34).

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 financings generally employ full documentation, often on LMA lines.

The documentation used in an Islamic facility varies based on the structure used. However, many Islamic financings 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 therein. 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 financings), 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 accelerating payment by substituting part of a deferred debt or reducing the amount of a guarantee on a deferred debt.

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. 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. During and after an insolvency proceeding, a lender's ability to enforce against collateral is greatly limited (see questions 33, 34 and 35).

31 Discuss any preference periods in which secured claims could be voidable.

See question 34.

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

There is no express restriction against debtor-in-possession financing in the UAE; however, such financing may be restricted by the composition agreement that is approved by the creditors in respect of the restructuring. DIP financing would be dealt with and structured as a contractual matter, without any express statutory recognition.

Pursuant to Federal Law No. 18 of 1993 (the Commercial Code), in order to enforce a composition to prevent bankruptcy, the court must receive a composition proposal that is approved by the creditors and memorialised in an agreement. The composition agreement will contain conditions that must be met in order for the creditors to relinquish their claims (eg, the debt must be paid off within five years) and these conditions may include a restriction against debtor-in-possession financing. Also, in the event that such a restriction is not included in the composition, it is unclear whether the financing would be given priority over the remaining claims (see question 35).

33 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

Yes, bankruptcy courts in the UAE impose an automatic stay against creditors.

In accordance with the Commercial Code, the managing director, the liquidator, or any creditor of a company may apply to have the company declared bankrupt if it ceases to pay its debts when they fall due. If the application is approved, the bankruptcy court will generally specify a date for the suspension of payments by the debtor in the bankruptcy, which shall be no more than two years prior to the date of the bankruptcy judgment. If no date is specified, the date on which the judgment was pronounced is deemed to be the provisional date for the suspension of payments.

As soon as the bankruptcy judgment is pronounced, 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. Also, the judgment establishes a group of creditors consisting of persons and entities having valid claims against the debtor existing prior to such 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. 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. However, any interest on unsecured loans due to the group of creditors ceases when the bankruptcy judgment is pronounced, and interest may not be claimed on loans secured by a mortgage or lien, except in respect of sums arising from the sale of the assets on which the loans are secured.

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.

The automatic stay will be lifted in the event that either the debtor becomes capable of paying all debts before final execution of the bankruptcy judgment or the proceedings are halted owing to insufficiency of assets prior to ratification of a 'judicial composition' (ie, bankruptcy settlement) or establishment of a 'state of union' which is the union of creditors created by their rejection of a judicial composition.

Protection of existing lienholders

Yes, there is protection for existing lienholders under UAE law.

Under the Commercial 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.

It is worth noting that two additional factors will impact the effectiveness of this protection. First, a lien may be set aside if it was created after the date of suspension of payments (see question 34). Second, 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.

34 In the course of an insolvency, can previous payments to lenders be clawed back by a court or other authority? What are the rules for such clawbacks and what period is covered?

Yes, payments to lenders made by the debtor between the date of suspension of payments and date of the bankruptcy judgment can be clawed back by the bankruptcy court.

During such 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:

- the making of any donations, with the exception of small customary gifts;
- 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 such 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.

Update and trends

While newly enacted Central Bank regulations related to personal finance (eg, restricting property loans to expatriates) and ESCA regulations regarding the promotion of foreign funds have affected acquisition finance in the UAE, there are currently two proposals for new legislation that could have a much greater impact by reducing investment risk and stimulating acquisitions by foreign companies.

Draft Companies Law

The Federal National Council of the UAE is currently discussing the adoption of a new draft Companies Law, which would make a number of changes to the existing law. Two changes in particular would have a material impact on acquisition finance in the UAE.

First, the draft Companies Law would permit the UAE Cabinet of Ministers, upon the recommendation of the Ministry of Economy and in conjunction with the Department of Economic Development in the relevant emirate, to identify certain entity types and activities that would be exempt from the foreign ownership restriction. Accordingly, shareholding of foreign partners in UAE companies would be able to exceed 49 per cent and, in some cases, 100 per cent foreign ownership would be permitted. While the draft law does not provide any additional guidance on the possible exemptions, they are designed to stimulate foreign investment in the UAE.

Second, the draft Companies Law expressly permits a shareholder to pledge its shares in a limited liability company to another shareholder or a third party. The current Companies Law is unclear as to whether such a lien is enforceable; however, the new legislation clarifies this issue and establishes the requirements to effect the pledge, which include notarisation of the pledge agreement. This measure should improve enforceability of liens and promote lending in the UAE.

The UAE government has on numerous occasions over the past decade announced that significant amendments to the Companies Law were imminent. However, these are yet to be promulgated, and the Federal National Council's debate regarding the Companies Law

has been postponed indefinitely (reportedly owing to opposition to the provisions permitting majority foreign ownership).

Draft Insolvency Law

As noted above, the legal framework governing insolvency in the UAE is primarily set out in the Commercial Code, and it has remained essentially unchanged since this law was passed in 1993. The insolvency regime set out in the Commercial Code is still largely untested in practice, as debtors and creditors tend to avoid lengthy court proceedings and opt for commercially agreed solutions outside of the courts instead.

The UAE government has been developing an entirely new insolvency law for the UAE, which is likely to replace the existing legislation as and when it comes into force. The new legislation is expected to substantially overhaul the current regime and to create a specialised tribunal to hear and oversee insolvency proceedings. As of the time of writing, the UAE Ministry of Finance is commenting on the draft Insolvency Law, which has yet to be released publicly. Our expectation is that the draft legislation will not be finalised and put into effect for at least another one or two years (if not much longer).

Other trends

The UAE has also become a more attractive jurisdiction for both domestic and cross-border M&A deals in recent years and is the region's leader for such transactions. This can be attributed to the country's diversification from its oil wealth to its growing financial services sector and infrastructure. Furthermore, although lending in 2011 and 2012 were at roughly the same levels, there has been an increase in lending in 2013 (7.1 per cent) and the first quarter of 2014, which is largely due to the improved liquidity of the UAE banks. Banks in the UAE are focusing on expanding their retail loan portfolios, which are growing despite the Central Bank tightening lending criteria, and have been helped by the improved operating environment. Also, the majority of banks are reporting improved asset quality numbers.

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. However, in the event that a first mortgage is set aside, a creditor having a second mortgage is only entitled to receive that portion of the proceeds of the sale of the asset that the debtor would obtain on the assumption that the prior mortgage was enforceable. The remaining proceeds would be assigned for the benefit of the group of creditors.

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 amount in excess thereof.

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

Priority

Yes, creditors are ranked in an insolvency.

Although the Commercial Code does not set out an exact order of priority of payments, it does provide that certain payments are to be given preference, particularly those addressed by other UAE laws (eg, Federal Law No. 8 of 1980 on regulating labour relations), and specifically, preference is given to payments in the following order in bankruptcy proceedings:

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- wages and salaries due to workers and staff for the period of 30 days prior to the declaration of bankruptcy;
- amounts due to a trustee in bankruptcy or a third party where the trustee in bankruptcy or third party has paid a debt on behalf of the debtor from his or her own funds;
- payment of government taxes due from the debtor for the two years preceding the pronouncement of the bankruptcy judgment; and
- certain rent payments to the owner of premises leased to the debtor.

Unfortunately, the remaining priority rules are unclear. While the UAE regards secured creditors as ‘preferred creditors’ who have rights over the specific assets that are the subject of their security interests, there is no guidance as to whether a claim from a secured creditor will have priority over a claim from a preferred unsecured creditor from the list noted above or over another secured claim. The court will determine the priority of claims in a bankruptcy on an ad hoc basis.

Reorganisation plan

Article 767(1) of the Commercial Code provides that a composition or reorganisation plan must be approved by (i) a majority of the creditors by number and (ii) creditors holding at least two-thirds

of the debts that have been finally or provisionally accepted by the court. A creditor is unable to vote in respect of its own secured debt.

36 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 35).

37 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 instrument must make a claim to the trustee-in-bankruptcy, and the court will determine the priority of such claim.

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

See question 35.

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