

Distinguishing Features of Security and Collateral in the UAE

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I. Introduction

The UAE is a Civil Law jurisdiction and the law and practice has developed from several sources, including the Sharia'a, and the French and Egyptian legal codes. Banking and commerce in the UAE are predominantly governed by the Commercial Code (Federal Law No. 18 of 1993) and the Civil Code (Federal Law No. 5 of 1985, as amended).

The law and practice of creating security in the UAE is an area that has significant differences from the law and practice adopted by Common Law jurisdictions. Security such as floating charges or hypothecations, all monies guarantees and assignments of unidentified or future rights are not recognised in the UAE.

This article will set out some of the key differences when taking security in the UAE as compared to taking security in Common Law jurisdictions.

No Concept of a Floating Charge

Under UAE law, there is no concept of a floating charge. The law in the UAE does not allow for the creation of a security interest, whether by mortgage or pledge, over future assets that were not in existence at the time the security interest was created. A pledged item must be able to be sold and therefore (i) must exist at the time of the contract, (ii) must have a monetary value and (iii) must be capable of being delivered. Consequently, a security interest under UAE Law can only be created over assets that are ascertained and identifiable at the time of creating such interest and may not, subject to certain exceptions, be created over assets that change from time to time.

Therefore, future assets are not able to be captured, nor is a 'floating' pledge possible. This does make it difficult to take security over book debts and stock in trade. In the context of working capital facilities, as an alternative to taking a charge over current assets, bankers in the UAE may secure facilities by taking a pledge over machinery or a registered mortgage over immovable property.

No Requirement for Registration - Security over Plant, Machinery, Raw Materials

In some jurisdictions, a mortgage over movable property is achieved by a recording system within the Courts or authorized Governmental Departments (eg Registrar of Companies), which allows the filing of financing documents. The filing system protects the mortgagee against third parties or subsequent mortgages against the same movable property; however, there is no such recording system for pledges of movable property in the UAE. This is true in the context of plant, machinery and raw materials.

As a consequence, banks are unable to search public records in order to determine if the security provider has pledged the same assets to another bank.

However, where the security is being created in a Free Zone (eg the Jebel Ali Free Zone), the Free Zone Authority may require registration in its records.

No Equitable Mortgages or Mortgage by Deposit of Title Deeds

In order to create a mortgage over property in the UAE, the mortgage is required to be registered at the

Lands Department of the relevant Emirate. It is insufficient to merely deposit documents of title with the bank to create security over such property.

Requirement of Notification and Acceptance - Assignment of Receivables

In certain Common Law jurisdictions, the assignor and the assignee enter into an assignment agreement and the assignor's debtor is merely notified of the assignment in order to perfect the assignment. Under UAE law, especially in certain Emirates (eg Abu Dhabi), the Courts have held that the debtor's consent is required in order for the assignment to be created. This issue is developing in the courts and the approach taken by some bankers is to obtain express consent of the debtor.

All Monies Guarantees

Guarantees for 'all monies' may be unenforceable in the UAE, with Article 1061 of the Civil Code requiring that guarantees must be issued with respect to a specified debt or a thing certain in amount. While there have been judgments in the recent past where the UAE Courts have recognised and enforced all monies guarantees, the application of such judgments is limited (typically to current accounts).

The above is a brief note on some of the differences between UAE law and the practices that Common Law lawyers are accustomed to in the context of security creation. It is pertinent to note that the Dubai International Financial Centre (established in the Emirate of Dubai) has issued its laws and regulations that do permit the creation of security such as floating charges and also have a Security Registry. However, these regulations would be applicable to assets that are located within the Dubai International Financial Centre.