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Banking & Security Law in the UAE



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The Firm generally acts in the all areas of business law, and provides specialized legal services in the fields of shipping, construction, property, commercial and Islamic banking, project finance, intellectual property, information technology, media law, arbitration and local and foreign litigation matters.

The Al Tamimi & Company team is comprised of qualified and experienced lawyers from the UK, North America, Europe, South Africa, the UAE, Iraq and other Arab countries.

Our clients depend on our proficiency in local and regional laws. Within the UAE we enjoy long established contacts within the public sector, and regularly confer with government departments and ministries, with respect to new legislation and regulations. Such local contacts and regional knowledge greatly assist our private sector clients and the international corporations that represent the majority of our client base.

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PART I

REGULATING BANKS & FINANCIAL INSTITUTIONS IN THE UAE

1. INTRODUCTION

The banking sector in the United Arab Emirates has enjoyed substantial growth since the creation of the U.A.E. There are now 19 national banks and 27 foreign banks carrying out various banking activities in the U.A.E. serving a population of approximately 2 million people.

The United Arab Emirates Central Bank was formed in 1980 and replaced the Currency Board which was set up in 1973. The establishment of the Central Bank was to bring about control and discipline to the banking sector in the U.A.E. and to provide greater control of national and foreign banks operating within the State in addition to regulating various financial institutions.

1.1 Laws Governing Banks and Financial Institutions and their Operation in the U.A.E.

The most relevant Laws, Decrees, Resolutions and Decisions in the field of Banking, Finance and related areas in the U.A.E. are the following:

1. Federal Law No.(10) of 1980 concerning the Central Bank, The Monetary System and Organization of Banking.
2. Federal Law No.(8) of 1984 concerning Commercial Companies.
3. Federal Law No-(6) of 1985 concerning Islamic Banks and Financial Institutions.
4. Federal Law No.(5) of the 1985 concerning Civil Transactions.
5. Federal Law No. (18) of 1993 concerning Commercial Transactions.
6. Central Bank Resolution No.123/7/92 regarding Regulation of Money Changing Business in the U.A.E.
7. Central Bank Resolution No.164/8/94 regarding Regulation of Financial Investment Companies and Banks, Financial and Investment Consultancy Institutions and Companies.
8. Central Bank Resolution No.126/5/95 Regarding Financial and Monetary Brokers.
9. Central Bank Resolution No.57/3/96 Regarding Representative Offices.
10. Central Bank Resolution No.58/3/96 Regarding Finance Companies.

1.2 The Role of the Central Bank

Article 5 of Law No. (10) of 1980 ("1980 Law") provides that the Central Bank shall direct monetary, credit and banking policy and supervise its implementation in accordance with the State's general policy and in such ways as to help support the national economy and the stability of the currency. In order to attain those objectives, the Central Bank is required to:

1. exercise the privilege of currency issue in accordance with the provisions of the 1980 Law;
2. endeavour to support the currency, maintain its stability internally and externally, and ensure its free convertibility into foreign currencies;
3. direct credit policy in such ways as to help achieve a steady growth of the national economy;
4. organize and promote banking and supervise the effectiveness of the banking system according to the provisions of the 1980 Law;
5. undertake the functions of the bank of the U.A.E Government within the limits prescribed by the 1980 Law;
6. advise the U.A.E Government on financial and monetary issues;
7. maintain the U.A.E. Government's reserves of gold and foreign currencies; and
8. act as the bank for banks operating in the State.

The Central Bank has been granted substantial powers to enable it to carry out the above objectives particularly the organization, promotion and supervision of the banking and financial system in the State.

2. ORGANIZATION OF BANKING AND FINANCE

2.1 Commercial Banks

Article 78(1) of the 1980 Federal Law concerning the Central Bank defines a commercial bank as “any institution which, customarily, receives funds from the public in the form of demand, under notice or time deposits, or which carries on the placement of debt instruments or deposit certificates to be used, in whole or in part, for its account and its risk and for the granting of loans and advances”.

Paragraph (1) of Article 78 further provides that “Commercial banks also carry on operations relating to the issue and collection of cheques, the placing of public or private bonds, trade in foreign exchange and precious metals, or any other operations allowed for commercial banks either by law or by customary banking practice”.

This legislation requests all institutions that engage in commercial banking to be in the form of joint-stock companies chartered by law or decree for this purpose.

However, branches of foreign banks operating in the United Arab Emirates are by virtue of Article 79 of the 1980 Law, exempt from this requirement.

The paid up capital of any commercial bank shall not be less than U.A.E. Dirhams 40 million. Branches of any foreign bank must produce evidence that the equivalent of U.A.E. Dhs.40 million has been allocated as capital funds for their operation in the United Arab Emirates.

Article 83 of the 1980 Law stipulates that commercial banks may not commence operations until they have been licensed by the Central Bank and their names are entered in the Register of banks maintained by the Central Bank for this purpose.

Moreover, all registered commercial banks shall seek the Central Bank’s approval for any contemplated amendments to their Articles or Memoranda of Association.

2.1.1 Prohibitions

Commercial banks may not engage in non-banking activities. In particular no bank shall:

- a) carry on its own commercial or industrial activities or acquire, own or trade in goods, unless the acquisition of such goods is for settlement of debts due from others, in which case the goods must be disposed of within the period defined by the Governor of the Central Bank;
- b) acquire immovable property for its own account, except in the following cases:
 - (i) immovable property required for the conduct of the bank’s business or for housing or amenities for its staff;
 - (ii) immovable property acquired in settlement of debts, in which case, however, the property must be sold within 3 years. (Incidentally, this period may, by a decision of the Governor of the Central Bank, be extended).
- c) hold or deal in the bank’s own shares unless they are acquired in settlement of a debt in which case they must be sold within two years from the date of their acquisition;
- d) purchase shares of, or bonds issued by, commercial companies in an amount which would result in raising the bank’s holding thereof above 25% of the bank’s own funds, unless acquired in settlement of a debt, in which case the excess must be sold -within two years from the date of acquisition. (This prohibition does not apply to the acquisition or holding of bonds issued or guaranteed by the U.A.E. Government or other public sector institutions).

A further list of prohibitions is contained in Articles 91 and 92 of the 1980 Law namely;

- Commercial banks may not grant loans or advance funds on current account to members of their Board of Directors, to managers of departments or to similar staff.
- Members, except by prior licence of the Central Bank, such licence being subject to annual renewal. However, this prohibition shall not include the discounting of commercial paper, the issuance of bank guarantees or the opening of documentary letters of credit.
- No bank may offer its customers credit facilities against their shares in the bank.

- No bank may grant loans or advances, for the purpose of constructing commercial or residential buildings, exceeding in total 20% of its total deposits. However, this prohibition would not apply to banks specialized in granting real estate loans and authorised to do so by the Central Bank; and
- No commercial bank may issue travellers' cheques without prior authorization by the Central Bank.

2.1.2 Supervision

Articles 94 - 100 of the 1980 Law inclusive give the Central Bank extensive powers in relation to supervising commercial banks, particularly relating to a banks credit policies (Article 94), ratio requirements (Article 95), maximum lending (Article 96), in addition to the establishment of a department within the Central Bank to supervise commercial and other banks (Article 99) and investigate the financial position of a particular bank (Article 100).

2.2 Investment Banks

For the purposes of implementing the 1980 Law, investment banks are defined as "those banks which are usually called merchant, investment, development, medium term, or long term banks, or any such expression or name distinguishing them from commercial banks as defined in Article 78 principally in that they do not accept deposits for less than two years". (Article 113) Investment Banks (as defined above) may borrow from their main offices, from local or foreign banks and from the financial markets. Paragraph 3 of Article 113 of the 1980 Law empowers the Board of Directors to determine the extent and conditions of operations of this type of banks to which the provisions of the 1980 Law shall also apply unless specifically- exempted by the Board of Directors of the Central Bank from some of the provisions and regulations therein.

2.3 Financial Institutions

The term "Financial Institution" refers to those institutions whose principal functions are to extend credit, to carry out financial transactions, to take part in the financing of existing or planned projects, to invest in moveable properties, and such other functions as may be specified by the Central Bank.

Pursuant to Article 114 of the 1980 Law financial institutions "may not accept funds in the form of deposits but may borrow from their head offices, from local and foreign banks or from financial markets".

A financial institution may not, according to Article 115, commence operations in the United Arab Emirates or open branches abroad unless so licensed by the Central Bank.

2.4 Financial and Monetary Intermediaries

The term "Financial and Monetary Intermediaries" refers to any physical or juridical person, other than Financial Institutions, who:

- a) practices the profession of foreign exchange dealing based on the purchase and sale of currencies, currency notes, coins of all kinds and travellers' cheques; or
- b) acts as a stock-broker or agent who sells and purchases domestic as well as foreign stocks and bonds, in a local capacity or as agent of a foreign institution.

The 1980 Law empowers the Central Bank with the discretion to subject the professions referred to above to prior licensing in respect to operations in the United Arab Emirates and further to establish rules to govern the licensing requirement, professional obligations, supervision by the Central Bank and the circumstances under which licenses may be revoked.

2.5 Representative Offices

These are offices which represent foreign banks and financial institutions in the United Arab Emirates.

Such representative offices may not commence operations in the United Arab Emirates without being first licensed by the Central Bank.

2.6 Islamic Banks, Financial Institutions and Investment Companies

Federal Law No. (6) 1985 concerning Islamic Banks, Financial Institutions and Investment Companies defines in Article 1 Islamic banks, financial institutions and investment companies as "those companies whose Articles and Memorandum of Association include an obligation to apply the Islamic Shariá Law and that their operations would be conducted pursuant to Islamic Shariá Law".

Article 2 of the Law No.(6) of 1985 provides that such institutions are subject to the provisions of the 1980 Law in addition to Law No. (8) of 1984 relating to Commercial Companies.

Such banks and institutions are required to adopt the form of a public joint-stock company and must prior to commencing their operations, obtain a licence from the Central Bank.

An Islamic bank is entitled to commence all or any of the banking, commercial, financial or investment operations. In addition, it is also entitled to carry out any of the services and/or operations referred to in the 1980 Law. It may also establish companies or finance projects provided that such projects are undertaken pursuant to Shariá principles.

An Islamic Financial or Investment Company is entitled to grant loans, provide credit facilities or finance projects. It may also invest in movable property in addition to its ability to accept deposits from the public to invest such monies in accordance with Islamic Shariá principles.

Such Islamic banks and financial institutions (including licensed branches and offices of foreign Islamic banks and financial institutions and investment companies) are exempt by virtue of Article 4 of Law 6 of 1985, from certain of the prohibitions imposed on commercial banks relating (i) to carrying on for its own account commercial or industrial activities or acquire, own or trade in goods; (ii) acquire immovable property for its own account; (iii) having interest rates to be paid by banks on deposits and the rate of interest and commission to be collected from customers.

The Articles and Memorandum of Association of such companies must provide for the establishment of a Shariá committee of not less than 3 persons who will ensure the adherence by such companies to Shariá principles in their operation, and contracts. The appointment of the relevant Shariá committee within each of these companies is subject to the approval of a Supervisory Shariá committee within the Ministry of Islamic Affairs.

3. RECENT DEVELOPMENTS: DUBAI INTERNATIONAL FINANCIAL CENTRE

In an attempt to ascertain itself as a business hub, Dubai has recently initiated the launch of a world-class onshore financial center; the Dubai International Financial Centre (“DIFC”), which is estimated to involve a multi billion dollar investment on approximately 4 million square feet.

The proposal to establish the DIFC first came about in the year 2002, as an effort to bridge the gap between the worlds major financial centres located in Europe, the Far East and North America, by availing a region estimated to hold a third of the worlds population, and comprising of the Middle East, North and East Africa, the Caspian states and Indian Subcontinent.

On 13 July 2003 the federal cabinet of the United Arab Emirates realised this end by approving a decree allowing for the full establishment of the DIFC as a Financial Free Zone, with a substantial degree of sovereignty. Since its inception, the DIFC has an estimated 100 financial institutions that have expressed an interest in establishing themselves within its boundaries.

The DIFC is governed by its own legal and regulatory framework, which, at the date of publication, is being drafted by the DIFC regulatory and supervisory body: the Dubai Financial Services Authority (“DFSA”). Through its independent legal framework, the DIFC will enjoy greater leverage through independence from national restrictions and impositions made by Central Banks.

The DFSA regulations have been modelled on international best practice, using principles followed in financial centres such as London and New York, and operates to standards that meet or exceed those in the worlds major financial centres. Additionally, in the DIFC legal independence is further upheld through the establishment of DIFC courts, autonomous of national judicial systems.

In tandem with the aforementioned benefit of regulatory independence, establishing under the DIFC, allows for complete foreign ownership, with no municipal or local authority, personal or corporate taxes being levied for an initial period of 50 years, as well as the ability to repatriate profits and capital without any limitations.

Upon its initial inception, DIFC will focus on five areas of activity in the financial industry, those are: Asset Management & Fund Registration, Islamic Finance, Insurance & Reinsurance, Back-office Operations and the establishment of a Regional Financial Exchange.



PART II

REGULATIONS AND LICENSING

This part of the booklet will deal with the legal structure of the various types of banks, finance companies, financial institutions and representative offices that may exist in the U.A.E.

1. COMMERCIAL, ISLAMIC AND INVESTMENT BANKS, ISLAMIC FINANCIAL INSTITUTIONS AND ISLAMIC INVESTMENT COMPANIES.

The above banks, companies and financial institution (as we have mentioned) are required by virtue of the 1980 Law and by Law No.(6) of 1985, to adopt the form of public joint-stock companies.

The procedure for setting up a public joint stock company is contained in Federal Law No. (8) of 1984 (Articles 64-214) and various Ministerial Decisions including Decision No. 64 of 1989.

Although the organization and setting up of public joint-stock companies is outside the scope of this booklet, it will be sufficient for our purposes to give our readers the main characteristics of these types of companies which are:

- a) share capital is represented by negotiable shares subscribed for by the public, with provisions for rights issues;
- b) minimum capital requirement of U.A.E. Dirhams 10,000,000 (bearing in mind any other requirements contained in any particular legislation) and a minimum of ten founding members who are required to subscribe to a minimum of 20% and a maximum of 45% of the share capital of the company;
- c) management rests in a Board of Directors and the Chairman must be a U.A.E. national; and
- d) free transferability of shares provided always, that 51% of the shares are held by U.A.E. nationals.

Such banks and financial institutions must naturally satisfy the requirements laid down by the 1980 Law and Law No. (6) of 1985 in relation to the requirement of obtaining a licence from the Central Bank prior to commencing their operations in the State.

2. MONEY CHANGING BUSINESS

The setting up regulations applicable to this type of business depends to a large extent on the form that the promoters, wish this business to adopt. If the promoters wish the business to adopt the form of a company, then, in addition to adhering to the provisions of the 1980 Law, such business must also adhere to the provisions of Federal Law No.(8) of 1984 relating to commercial companies. Additionally, the rules and regulations applicable to the setting up of individual establishments in each of the relevant emirates must also be adhered to.

In addition to the above requirements, the Central Bank's Resolution No.123/7/92 was issued to regulate the Money Changing Business in the U.A.E.

Pursuant to Article 1 (c) of Resolution No.123/7/92 a Money Changing Business is defined as "the purchase and sale of foreign currencies in the form of bank notes and coins, the purchase and sale of travellers' cheques, the handling of remittance business in both local and foreign currencies and other matters approved by the Central Bank".

It is not permissible for any person according to Article 2 of the above Resolution to carry out any money changing business unless that person is licensed by the Central Bank or is an exempted person e.g. a commercial bank as defined in the 1980 Law.

2.1 Application

The Application for a Money Changing Business license may be submitted by a natural or juridical person on the Central Bank's prescribed form and shall be accompanied by the following documents:

- a) a statement setting out the nature and scale of money changing business which the applicant intends to carry on together with a description of the proposed management structure of the business;
- b) name and address of the applicant and a copy of his/her passport and a copy of his/her U.A.E. identity card if the applicant is a U.A.E. national;

- c) an undertaking to provide the Central Bank, if the application is approved, with a bank guarantee equal to 50% of the capital of the applicant;
- d) an undertaking to comply with the provisions of Federal Law No.10 of 1980 and other Directives, Communications or Resolutions issued by the Central Bank; and
- e) any other documents that may from time to time be requested by the Central Bank in relation to this type of application.

2.2 Conditions For Granting the Licence

The Central Bank may after considering the application grant, or refuse to grant a Money Changing Business Licence.

Article 4.2 of Resolution No.123/7/92 provides that "A licence shall not be granted unless the following criteria are fulfilled with respect to the applicant:

- a) Paid-up capital of the applicant is not less than Dhs.1,000,000 if the application is in respect of the purchase and sale of foreign currencies in the form of banknotes and coins and the purchase and sale of travellers cheques and not less than Dhs.2,000,000 if the application includes conduct of money changing business as defined in this Resolution; the opening of each additional branch would require an increase in the paid-up capital by 10%
- b) The applicant is a U.A.E national-of not less than 21 years of age, and in case of application made by companies the share of the U.A.E. nationals in the capital shall not be less than 60% of the total paid up capital.
- c) The applicant or the founders are of good personal and professional standing.
- d) No commercial bank should manage the licensed person."

2.3 Scope of Licence

If a licence is granted by the Central Bank, such licence would be for a period of one year, renewable thereafter. (It is worth noting here that a licence granted pursuant to the said Resolution may contain such conditions and/or restrictions as the Central Bank may deem appropriate.)

The validity of such a licence would, if granted, depend on the validity of the relevant licence issued by the relevant local authorities, i.e. a licence granted by the Central bank may subsequently be revoked or withdrawn if the relevant local authorities withdraw any licence issued in favour of the licensed person.

The Central Bank has, in Resolution No.123/7/92, reserved for itself the right to revoke, withdraw, amend or suspend any licence granted by it to any Money Exchange Business.

3. FINANCIAL INVESTMENT COMPANIES AND BANKING, FINANCIAL AND INVESTMENT CONSULTANCY INSTITUTIONS AND COMPANIES.

In terms of the procedure for setting up, the above businesses are naturally subject to any Federal law applicable to them such as the Commercial Companies Act (Law No.8 of 1984) etc.

Such businesses would also need to adhere to the provisions of the 1980 Law and any Resolutions, Decisions or Regulations issued thereunder.

In the early 1990's it became apparent to the Central Bank that there was an urgent need to regulate such businesses due to the large number of licence applicants, to carry out these types of businesses in the U.A.E. The Board of Directors of the Central Bank decided in its meeting on 18.04.1995 to issue Resolution No.164/8/94 to regulate the said businesses.

3.1 Financial Investment Companies

A Financial Investment Company is defined in Article 1 of Resolution. 164/8/94, as "a juridical person who conducts financial investment business".

3.1.1. Activities

Article 2 of the same Resolution provides a list of the activities that may be conducted by a Financial Investment Company namely;

- (a) Opening of investment accounts and portfolio management on behalf of third parties (whether companies or individuals);
- (b) Preparing feasibility studies for projects and marketing of share public offerings;
- (c) Formation and/or management of Investment Trust Funds (as defined in the same Resolution);
- (d) Formation and/or management of other Investment Funds and acting as Trustee for funds entrusted to it by a Settler on behalf of a Beneficiary; and
- (e) Subscribing to companies' share capital and syndicated loans.

The Central Bank may extend the license granted to a Financial Investment Company thus enabling such companies to act as a broker in the purchase and sale of local and/or foreign securities, foreign exchange dealing and to provide banking financial and investment advice. Such extension is naturally subject to satisfying the licensing requirements for these additional activities by the relevant Financial Investment Company seeking such additional powers.

3.1.2. Financial Resources

The financial resources for a Financial Investment Company may be any one or all of following:

- (a) the company's own paid up-capital;
- (b) reserves available with the company; and/or
- (c) retained profits.

In addition to the above financial resources, a financial investment company may obtain funds from third parties for investing such funds on behalf of such third parties.

A financial investment company may also open investment accounts for third parties. It may also borrow from third parties.

A Financial Investment Company may not, however, accept funds in the form of deposits from the public in any form whatsoever.

One important source of funds is the ability to issue bonds, however, this ability is always subject to the prior approval of the Central Bank.

3.1.3 Licensing Requirements & Conditions

3.1.3.1 Application

Article 6 of Resolution No.164/8/94, contains a restriction forbidding any person from undertaking the activities of a financial investment company without obtaining the prior written approval of the Central Bank.

An application for a "Financial Investment Company" should, by definition, be submitted by a company. Such Application would be made on the Central Bank's prescribed form accompanied by the following documents:

- (a) a statement highlighting the nature and extent of the investment business, any future development plans in addition to details on the management of such business;
- (b) a notarised copy of the Articles and Memorandum of Association;
- (c) a statement detailing the management and staff structure;
- (d) an undertaking to adhere to the provisions of the 1980 Law and Law No.(8) of 1984 relating to Commercial Companies, Resolution No. 164/8/94 and any other instructions, circulars, directives or communications issued by the Central Bank in respect of financial investment businesses. And also an undertaking to open its records to inspection and auditing by the Central Bank; and
- (e) any other information or documents that the Central Bank may request.

3.1.3.2 Conditions

The following conditions must be satisfied prior to applying for a “Financial Investment Company’s” licence:

- (a) paid-up capital not less than U.A.E. Dhs.25,000,000 to conduct certain activities as specified in the Resolution. The Central Bank may require a higher capital if the Company requires to obtain licence for additional activities ;
- (b) national shareholding should not be less than 60% of the total paid-up capital, and the number of founders should be not less than (12);
- (c) the majority of the Company’s Board of Directors should be U.A.E. nationals including the chairman;
- (d) the Chairman of the Board of Directors of the company should be a U.A.E. national; and
- (e) the founders must all be of good standing personally and professionally.

3.1.4 Extent of the licence

If granted, a licence would be valid for 3 years and may contain various conditions as the Central Bank sees fit.

The Central Bank has reserved to itself in Article 11 of the above Resolution, the right to withdraw, revoke, amend or cancel any licence at any time if any of the events referred to in Article 11 occur which include: insolvency, reduction in the share capital and where the Central Bank is satisfied that the licensed person is unable to perform its continuing obligations which include:

- not to subscribe in more than 25% of its own funds in the same securities;
- not to alter the legal structure unless previously approved by the Central Bank;
- not to open a branch without obtaining the prior approval of the Central Bank; and
- not to act contrary to the provisions of Resolution No.164/8/94 and any replacement or amendments thereof at any time.

3.2 Investment Funds

Investment Funds are also subject to the provisions of Resolution No.164/8/94.

Investment Funds are defined as “the funds collected from investors interested in investing their money in foreign or international stocks and shares and/or capital markets, whether local or foreign. The investors contribute through the purchase of shares, units or certificates (of equal values), issued by such fund, provided always that the aggregate value of such certificates, shares or units is equal to the value of the share capital of that Investment Fund”.

Who Can Create an Investment Fund ?

Article 4 (1) of Resolution No.164/8/94 stipulates that “except for exempt investment funds under the 1980 Law, no investment funds may be established or announced without being licensed by the Central Bank”.

[Exempt funds under the 1980 Law are: (a) governmental development funds; and (b) private savings and pension funds).

An Investment Fund may, pursuant to Article 4 (2) of the above Resolution be created by either (i) a licensed financial investment company; or (ii) a licensed bank.

Such bank or financial investment company shall prepare a prospectus (similar to the Articles and Memorandum of Association of a company) in which all details relating to the fund must be included therein e.g. objectives, share capital, financial objectives, list of assets, management structureetc.

Each Investment Fund must have an administrative committee consisting of the fund manager and unit, share or certificate holders of the fund.

3.3 Banking, Financial & Investment Consultancy Institutions and Companies (“a Financial Consultant”).

A licensed person authorised by the Central Bank to carry out the activities of a Financial Consultant may carry out any of the following activities:

- (a) prepare feasibility studies relating to investments in banking and financial projects or relating to invest-

ments in the financial markets;

- (b) prepare business plans with a view to improving the performance of existing financial or banking project;
- (c) provide any person with an opinion relating to the value of any security or other financial instrument;
- (d) prepare recommendations to any person relating to banking or financial activities; and
- (e) prepare periodical or non-periodical reports relating to the banking system and structure and related services provided that such reports are distributed on a limited scale.

3.3.1 Application and Licence

Any person wishing to practise as a Financial Consultant must obtain the approval of the Central Bank prior to commencing such activities in the U.A.E.

Readers are kindly requested to refer to Section 3.1.2 above for the documents required for a licence. In addition, if the applicant for a Financial Consultant licence is a natural person (i.e. individual) then copies of the identity card (if a U.A.E. national) and passport must also be submitted.

3.3.2 Licensing Conditions

The following conditions must be satisfied before a "Financial Consultant" licence may be issued:

- (a) The paid-up capital shall not be less than Dhs.1,000,000;
- (b) Contribution or shareholding by a U.A.E. national shall not be less than 60% of the total paid-up capital;
- (c) The majority of the Board of Directors and Chairman should be U.A.E. nationals;
- (d) If the applicant is a natural person he or she must be a U.A.E. national; and
- (e) The applicant or applicants must be of good personal and professional standing.

A licence, when granted, will be valid for three years. However, it is always subject to amendment, withdrawal, revocation or cancellation by the Central Bank if the licensed person commits a breach of the applicable rules and regulations.

3.3.3 Can a Non-U.A.E National Apply for a Licence to Become a Financial Consultant?

Article 16 of Resolution No 164/8/94 provides that "the Central Bank may, if needed authorize a non-U.A.E. national to apply for and obtain a licence as a Financial Consultant Provided always that (i) the application is made by an individual (not a company); and (ii) the applicant satisfies the provisions of the Resolution.

3.3.4 Exempt Persons

The following are exempt from the requirement to obtain a licence from the Central Bank to carry out the activities of a "Financial Consultant":

- (a) Any Lawyer, Accountant, Engineer, Teacher whose financial consultancy and opinions are incidental to their profession;
- (b) Any broker or dealer who provides financial opinions as an incidental part of his profession;
- (c) Any publisher of financial newspapers or magazines; and
- (d) Any other person exempt by the Central Bank from time to time.

4. FINANCIAL AND MONETARY BROKERS

Article 1 of Resolution No.126/5/95 defines a broker as "every natural or juridical person, other than a financial institution, authorised to carry out the activities of a financial and monetary brokerage"

Article 2 of the same Resolution states that the activities of a broker shall be restricted to acting as an intermediary in the buying and selling of local and foreign shares and stocks, currencies, commodities, and as an intermediary in the monetary markets.

4.1 Application and Licence

An application for a financial and monetary brokerage licence may be submitted by either a natural or juridical person. Such application should be made on the prescribed form accompanied by the following:

- (a) a confirmation of the nature and extent of the proposed business and its management structure;
- (b) name and address of the applicant and passport copies of its promoters;
- (c) bank guarantee equal to 50% of the share capital of the applicant;
- (d) an undertaking to adhere to the laws and regulations of the Central Bank including the 1980 Law; and
- (e) any other documents as required by the Central Bank.

4.2 Pre-Licence Conditions

The following conditions must be satisfied before an application for a licence is submitted to the Central Bank.

- (a) Paid-up capital or the funds allocated for the proposed activities shall not be less than:
 - (i) Dhs.1,000,000 if the activities relate to local stocks and shares only;
 - (ii) Dhs.2,000,000 if the activities relate only to foreign stocks and shares;
 - (iii) Dhs.3,000,000 if the activities relate only to currencies and commodities and brokerage in the monetary market; or
 - (iv) Dhs.6,000,000 to carry out all the above three activities.

The share capital must be increased by 10% in the event that an application for a branch is submitted.

- (b) The applicant shall be a U.A.E. national (not less than 21 years of age) if the application is submitted by an individual.

If the applicant is a company, then the national shareholding shall not be less than 60% of the total paid-up capital.

- (c) The applicant must be of good personal and professional standing.
- (d) The proposed manager must have sufficient knowledge of the brokerage business.

A licence, if granted, would be valid for one year, renewable thereafter.

As with any other licence, the Central Bank has the power to amend, withdraw, revoke or cancel any licence granted under the provisions of Resolution No.126/5/95.

5. REPRESENTATIVE OFFICES

A "Representative Office" is defined in the Central Bank Resolution No.57/ 3/96 as "an office which represents a foreign bank or any other financial establishments in the United Arab Emirates" (Article 1).

5.1 Activities

Article 6 of Resolution No.57/3/96 provides an exclusive list of the permitted activities that a representative office may undertake. Such permitted activities are restricted to:

- (a) representing "the authorised institution" in the U.A.E. and promoting the activities of such authorised institutions in the local market. (The authorised institution for the purposes of this Resolution means a financial foreign bank or institution authorised to establish a representative office in the U.A.E.);
- (b) providing its head-office with information relating to economic developments in the U.A.E.;
- (c) providing the client of the authorised institution with information relating to the local market;

- (d) providing information to any local party who intends to develop its activities in the country where the head office of the representative office is situated; and
- (e) providing customers with banking, financial and investment opinions.

5.2 Prohibitions

A Representative Office may not carry out any of the following activities:

- (a) accept any deposits in any form whatsoever;
- (b) open accounts, of any type, for its customers;
- (c) advance any loans or credits to any person;
- (d) carry out any usual banking activities such as issuing Letters of Credit or Bank Guarantees etc., and
- (e) deal in foreign currencies, financial stocks or trade in gold.

5.3 Application for a Licence

Article Z of Resolution No.57/3/96 clearly provides that a representative office may not carry out any of the activities referred to in Article 6 of this Resolution (see above) without being properly licensed by the Central Bank.

The following conditions must be satisfied before an application for a representative office is submitted to the Central Bank:

- (a) the applicant, who must be a foreign bank or a foreign financial institution, must be licensed in its country of origin;
- (b) the applicant must have completed a minimum of 10 years of activity in its country of origin (the Central bank may reduce this period by a resolution of the Board of Directors);
- (c) if the applicant is a foreign bank, its share capital and reserves shall not be less than Dh.183,700,000 (US\$ 50 million approximately) (To date there is no indication as to the share capital requirement where the applicant is a foreign financial institution);
- (d) the applicant must provide the Central Bank with an approval issued by the relevant authorities in the country of origin of the applicant authorising the applicant to set-up a representative office in the U.A.E.;
- (e) the applicant must submit an undertaking that it will adhere to the applicable laws and regulations of the U.A.E.; and
- (f) the nominated person to undertake the management of the representative office must be of good standing personally and professionally with appropriate experience in banking and financial business.

5.3.1 Supporting Documentation

The following documents must be submitted in support of the application:-

- (a) notarised copy of the Memorandum and Articles of Association, and Certificate of Incorporation of the applicant;
- (b) names of the principal shareholders and the percentage of shareholding of each of them;
- (c) resolution of the board of directors authorizing the establishment of a representative office and appointing the manager;
- (d) formation of the board of directors of the applicant, number of directors, their names and nationalities;
- (e) a statement relating to the proposed activities of the representative office;
- (f) name and address of the relevant licensing authority in the country of origin;
- (g) copies of the audited financial reports for the last 3 years;
- (h) a list of the names of companies or establishments which the applicant owns or is a principal shareholder therein;
- (i) a power of attorney to the manager of the representative office setting out his powers and authorities;

- (j) a curriculum vitae of the appointed manager, and a letter detailing the professional qualifications and experiences in addition to a copy of his passport; and
- (k) any other documents as required by the Central Bank from time to time.

5.4 Extent of the Licence

If granted, a licence would be valid for two years renewable thereafter.

The Central Bank is empowered to cancel, amend revoke or withdraw any licence granted for a Representative Office.

Finally, a representative office is required to adhere to the other applicable laws relating to applying for and obtaining a trade licence from the relevant local authorities. In addition, adherence must also be made to the provisions of the Commercial Companies Act 1984 which contains provisions dealing with the establishment of branches and/or representative offices of foreign companies in the U.A.E.

6. FINANCE COMPANIES

A "Finance Company" is defined in the Central Bank's Resolution No.58/3/96 (as amended by Resolution No.81/4/96), as

"A Company which conducts one or more financial activities".

6.1 What is meant by "Financial Activities"?

Financial activities are defined in Article 2 of the same Resolution (as amended) as including one or more of the following:

- (a) advancing personal loans or credit for personal or consumer purposes;
- (b) providing businesses and trades with finance including issuance of Letters of Credit and Guarantees to customers;
- (c) subscribing to the share capital of projects and (or issuing stocks or certificate of deposits, provided always that the aggregate of the Finance Company's involvement in these activities shall not exceed 7% of its share capital; and
- (d) any other finance business authorised by the Central Bank.

6.2 Financing a "Finance Company"

Article 3 of Resolution No 58/3/96 provides a list of the financial resources available to Finance Companies, namely:

- (a) own paid-up capital;
- (b) reserves available with the company;
- (c) retained profits; and
- (d) debt instruments, bank loans, loans from financial institutions or companies in addition to deposits made by non-individuals.

6.3 Application and Licence

An application for a licence must be submitted on the prescribed form of the Central Bank accompanied by the following documents:

- (a) a statement describing the nature and extent of the proposed activities of the Finance Company;
- (b) a list of the names, addresses and nationalities of the founders, together with a notarised copy of the Memorandum and Articles of Association;
- (c) copies of the identity cards (for U.A.E. nationals) and passports of the founders;
- (d) a description of the management structure together with the curriculum vitae of the key personnel;

- (e) a certificate issued by one of the banks operating in the U.A.E confirming that a minimum of Dhs.15,000,000 has been deposited with the bank;
- (f) an undertaking that the remainder of the value of the authorised shares will be deposited with the bank upon obtaining the preliminary approval of the Central Bank;
- (g) an undertaking to adhere to the terms and provisions of the relevant applicable laws and regulations particularly, the 1980 Law, the Commercial Companies Law of 1984 and any other instructions, directives, circulars or communications issued by the Central Bank. In addition to an undertaking to open its records and documents for inspection and auditing by the Central Bank; and
- (h) any other information or documents that the Central Bank may from time to time require.

6.4 Pre-Licensing Conditions

The following conditions must be satisfied prior to a “Finance Company” licence being issued:

- (a) the paid-up capital shall not be less than Dhs.35,000,000 (US\$ 9.6 million approximately);
- (b) national shareholding shall not be less than 60% of the total paid up capital;
- (c) the majority of the Board of Directors must be U.A.E. nationals. The Chairman must also be a U A.E national; and
- (d) the founders are of good personal and professional standing. The Extent of the License if granted, such a licence would be valid for two years, renewable thereafter. This is subject always to the Central Bank’s right to revoke, amend, withdraw or cancel such a licence.

6.5 The Extent of the License

If granted, such a license would be valid for two years, renewable thereafter. This is subject always to the Central Bank’s right to revoke, amend, withdraw or cancel such a license.

6.6 Adherence to Other Laws

Naturally, obtaining a licence from the Central Bank is one of the requirements to set up such companies. Additionally, adherence to other applicable laws is also required, particularly the Commercial Companies Law of 1984 and any other Local laws applicable in the relevant Emirate of the U.A.E.



PART III

HIGHLIGHTS OF THE UAE BANKING LAW

1. INTRODUCTION

In the absence of one exclusive legislation that deals only with banking law, lawyers in the U.A.E have to consult various laws and court rulings before providing their clients with legal opinions or advice relating to banking law.

In this part of the booklet we aim to give the reader a brief description of the most relevant areas of U.A.E. banking law. The areas which we highlight in this part of the booklet include:

1. bank deposits;
2. current accounts;
3. bank loans;
4. bank guarantees;
5. documentary credits;
6. discounting; and
7. chattel or commercial mortgages.

2. BANK DEPOSITS

2.1 General

A bank deposit is defined in Article 371 of Law No.(18) of 1993 relating to Commercial transactions (“the Commercial Code”) as “a contract whereby one party delivers to a bank a sum of money, and the bank undertakes to return such sum upon demand in accordance with preagreed conditions”.

It is worth noting here that the bank, upon receipt of such funds from its customer becomes the owner of such sum, and may use the same for its own purposes provided always that the bank would be under an obligation to re-pay the same funds to the customer upon the latter’s request.

A deposit or part thereof made pursuant to Article 371, above, can be withdrawn by the depositor anytime, subject of course, to pre-agreed conditions such as a notice period or upon maturity.

A depositor must always bear in mind that his or her deposit is always subject to the bank’s right of set-off. This rule applies to all types of deposits but not to investment deposits. Set-off may also be made between current and deposit accounts.

Unless otherwise agreed, depositing further funds and/or withdrawal must be made through the same branch where the account is opened and if multiple accounts are opened by the same depositor with the same bank or the same branch, each of such deposits shall be treated separately.

The bank must dispatch a monthly statement of account to the depositor.

2.2 Joint Deposit Accounts

Article 379 of the Commercial Code deals with deposit accounts held by two or more persons. According to Article 379, the relevant bank must ensure the following:

- (a) all depositors must have equal value of the funds and must all sign the account opening forms;
- (b) if an attachment order (i.e. freezing) is obtained from a court against any of the depositor’s share in the joint account, and the bank is informed of such an order, the bank must immediately prevent any dealing in the joint account to the extent of the relevant depositor’s share. The bank should also notify all the depositors or their representatives of such actions within 5 days of enforcement of such an order by the bank;
- (c) the relevant bank may not carry out any set-off between the joint account and any of the other accounts held by any of the depositors individually without obtaining the prior written approval of the other depositors; and
- (d) in the event of death or loss of capacity of any of the depositors the relevant bank must, within 10 days, inform the other depositors, and the bank must also prevent any dealings in this joint account until a personal representative is appointed.

3. CURRENT ACCOUNTS

3.1 Definition

A current account is defined in Article 390 of the Commercial Code as a Contract between two persons whereby their rights and obligations towards each other are recorded in an account with the ultimate result being a debt due for payment”.

3.2 Main Features of a Current Account:

- (a) a bank may open a current account for a particular customer, if such customer requests the bank to provide credit facilities and/or issue credits on behalf of such customer;
- (b) a current account could involve an overdraft facility;
- (c) property in the money paid to the bank by a customer remains with the bank;
- (d) credit balances in a current account do not attract interest unless otherwise agreed between the parties, in which case the agreed rate would apply otherwise (i.e. if the rate is not agreed upon), market rate would apply provided it does not exceed 12%; and
- (e) a current account would be closed in the event of the customer’s death, loss of capacity or insolvency or in the event of cancellation of the banking licence by the Central Bank issued to the bank maintaining that current account.

4. BANK LOANS

A bank loan (pursuant to Article 409 of the Commercial Code) is:

“A contract whereby a bank advances a sum of money to a borrower in accordance with pre-agreed upon conditions”.

A bank loan may be made conditional upon the bank receiving sufficient securities to guarantee the loan provided to the borrower.

The borrower is under an obligation, pursuant to Article 409(3) of the Commercial Code to repay the loan, together with the agreed interest, on the relevant payment date or dates.

A bank loan is, by virtue of Article 410 of the Commercial Code, always a commercial transaction regardless of the identity of the borrower or the purpose of the loan.

5. BANK GUARANTEES

5.1 Definition

A bank guarantee is defined in Article 411 of the Commercial Code as:

“An undertaking by a bank to satisfy its customer’s debt vis-à-vis third parties in accordance with agreed upon provision and terms, during a limited or unlimited period of time”.

5.2 Main features of a Bank Guarantee

The main features of a bank guarantee may be summarised as follows.

- (a) a bank guarantee is always a commercial transaction;
- (b) a bank guarantee may be made in a separate contract or in a letter issued in favour of the customer’s creditor;
- (c) banks would normally request adequate security prior to issuing such an undertaking;

- (d) a bank guarantee may not be assigned without the prior written approval of the issuing bank;
- (e) a bank guarantee is independent from the underlying contract or transaction between its customer and his/her creditor;
- (f) a bank guarantee constitutes a primary obligation of the bank regardless of whether its customer satisfied its debt or not i.e. a bank guarantee creates a contract between the customer's creditor and the issuing bank;
- (g) if the issuing bank pays under the guarantee it shall be empowered to collect the same funds from its customer; and
- (h) a bank guarantee, if subject to a time limit, will expire automatically upon the expiration of such time limit.

6. DOCUMENTARY CREDITS

6.1 Definition

A documentary credit is defined in Article 428 of the Commercial Code as:

“An agreement whereby a bank, acting at the request of its customer (“the Applicant”), issues a credit in a specified sum to a third party (“the Beneficiary”) to be collected by such beneficiary within a certain time upon presenting documents representing shipped, or to be shipped, goods “.

6.2 Underlying Contract

A documentary credit is, by virtue of Article 428 of the Commercial Code, an independent arrangement from the contract for which the credit was issued i.e. the issuing bank is under an obligation to pay the Beneficiary, regardless of the terms of the contract between the Applicant and the Beneficiary. However, the issuing bank must ensure compliance of the terms of the documentary credit by the Beneficiary before it may advance such funds to the Beneficiary.

6.3 Validity Period

Each documentary credit arrangement must contain a maximum date within which the documents must be submitted by the Beneficiary i.e. it must contain an expiration date (Article 429 of the Commercial Code).

This provision has been adopted from Article 44 of the Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC publication No.500 ('UCP500').

6.4 Documents

According to Article 430 of the Commercial Code, documents required to be submitted by the Beneficiary, must be defined clearly and the issuing bank has an obligation to ensure that documents presented by the Beneficiary correspond exactly to the documents required under the documentary credit. (see Article 20 of UCP500).

6.5 Revocable and Irrevocable Credit

A documentary credit may, according to Article 431 of the Commercial Code, be: (a) Revocable; (b) Irrevocable.

And, in the absence of such indication, a documentary credit would be considered irrevocable. (see also Article 6 of UCP500).

Article 433 of the Commercial Code provides that a bank may not, in case of an irrevocable documentary credit, withdraw or cancel the credit. Moreover, such documentary credit may not be amended or withdrawn without the agreement of all the relevant parties. (see Article 9 UCP500).

However, a revocable documentary credit may be revoked at any time prior to the submission of the required documents by the Beneficiary (Article 432 of the Commercial Code and Article 8 of UCP500).

6.6 Confirmation of Credit

A documentary credit is usually used to finance international trade, therefore Article 434 of the Commercial Code provides for this practice.

Article 434 provides that “a documentary credit may be confirmed by a bank other than the issuing bank in which case the confirming bank would be fully liable vis-à-vis the Beneficiary”.

However, if the other bank’s duty is restricted to notifying the Beneficiary of the credit, in this case the notifying bank will not be liable towards the Beneficiary. (Similar provisions are contained in Article 7 and 10 of UCP500).

6.7 Examination of Documents

Banks are not required to examine any document other than the documents presented to them by the Beneficiary. Moreover, banks are not under any obligation to check whether such documents represent the goods in question or not i.e. the bank’s obligation is confined to ensuring that the presented documents are the exact documents required under the documentary credit. (see also Articles 13 and 15 UCP500).

6.8 Procedure following Acceptance of Documents

The accepting bank must forward the documents received from the Beneficiary to the Applicant as soon as possible (Article 437 of the Commercial Code and see also Article 14 of UCP500).

6.9 Transferability of Credit

A Beneficiary may not, by virtue of Article 438 of the Commercial Code, transfer or assign the credit or part thereof to any person, unless the Beneficiary is authorised to do so pursuant to the terms of the credit. (See Article 48 of UCP500).

7. DISCOUNTING

Discounting, as defined in Article 440 of the Commercial Code, is an arrangement whereby a bank buys commercial paper from a beneficiary at a discount, thus making an advance payment to that beneficiary.

In addition to the discounted price of that commercial paper, banks usually charge a commission and for lost interest on the purchase price.

PART IV

OVERVIEW OF SECURITY LAW IN THE UAE

Security law is predominantly governed by the UAE Commercial Code (Federal Law No. 18 of 1993 and the UAE Civil Code (Federal Law No. 5 of 1985, as amended), together with law and practice developed from several sources, including Islamic Law and the French/Egyptian legal models. Since the Commercial Code was adopted fairly recently, there is little case law in this area of the law. In many ways the UAE is still a developing jurisdiction and enforcement of rights and obligations arising from legal relationships under the commercial code is still being tested in the courts. The establishment, enforcement and other rights and obligations under various types of security interests are also addressed.

1. TYPES OF MORTGAGES/PLEDGES

Under the Commercial Code, mortgages or pledges are divided into six (6) categories based on the type of property to be mortgaged or pledged, and each is addressed separately thereunder. The Commercial Code clearly distinguishes movable property from immovable property based on the context of the manner in which a mortgage can be created over such property. The Civil Code defines immovable property as a thing, which has a permanent fixed nature and may not be removed without damaging or altering its structure (physical appearance or surroundings). Everything else is regarded as movable. Immovable property specifically refers to real property and any structural improvements thereon. Although fixtures, which cannot be removed without damaging the structure, fall within the legal description in the Civil Code, they are considered immovable property. Movable property is further subcategorised into tangible and intangible property. Tangible elements include goods, tools, machinery, equipment and cash. Intangible elements include trade name, goodwill, intellectual property rights, licenses, and the right to enter into contracts. Negotiable instruments, debts, if accompanied by documents evidencing the same, and shares are also considered tangible property.

The rights, obligations, registration and enforcement of pledges securing movables, immovables, commercial business, negotiable instruments, debts and shares issued by UAE registered companies will each be addressed separately.

2. MORTGAGE OVER IMMOVABLE PROPERTY

Pursuant to Article 1399 of the Civil Code, a mortgage over real property is defined as a contract whereby the mortgagee acquires a security interest over the real property mortgaged for the mortgagor's debt. The mortgagee is given a priority right above ordinary creditors and creditors subsequent in rank to that of the mortgagee. In addition, the mortgagee is entitled to have its debt satisfied out of the proceeds of the real property mortgaged. Any person or entity may grant a mortgage to a mortgagor.

A mortgage over immovable property in the UAE can be achieved by a simple application, which, in effect, becomes the mortgage deed. The mortgage must be registered at the Mortgage Registrar at the Land Department or Municipality in order to be recognized. Registration can be conducted on a specified form at the Land Department or Municipality detailing the land, amount secured, interest on the loan, period of the mortgage and the signature of both parties. The Land Department or Municipality records the information contained in the application and retains one copy of the mortgage deed on file. The mortgagor and mortgagee are also each given an original copy of the mortgage deed. The procedure and specimen of the application varies from one Emirate to another, though they are similar in form and substance. Special terms and conditions of the mortgage may be added to the forms in any of the Emirates.

Once the mortgage is registered and recorded at the Land Department or Municipality it will not be lifted unless the mortgagor makes a formal application to deregister the mortgage. Even if the mortgage expires or is satisfied prior to expiration, it will not be automatically deregistered until a formal application is made to the Mortgage Registrar to delete the mortgage from its register. A mortgage over real property only becomes effective against third parties from the date of registration.

If the mortgagor fails to satisfy the debt in the mortgage deed by the expiration of the instrument, the mortgagee may satisfy the debt owed out of the mortgaged immovable. This is accomplished by filing a civil action in the courts. The courts will order the sale of the mortgaged immovable property by way of public auction. The mortgagor may challenge this order of sale by obtaining a court order to stop or stay the sale. During this time period granted to the mortgagor under the stay, he has an opportunity to satisfy the debt to the mortgagee. If he fails to do so, the immovable is sold with the proceeds of the sale used to satisfy the debt owed to the mortgagee and

any balance thereon paid to the mortgagor. If the proceeds of the sale are insufficient to satisfy the debt, the mortgagee may have recourse for the balance against the Mortgagor (debtor's) other assets. In this case, however, the mortgagee will lose its priority as a creditor and be ranked as an ordinary creditor in relation to such balance. It should be noted that pursuant to the UAE Civil Procedures Code only UAE nationals may purchase property through a public auction.

Finally, it should also be noted that all lands in the Free Zones are leased land and thus mortgage over land in any Zone is not available as a security.

3. PLEDGE OVER MOVABLES

The general rule pursuant to Article 165 of the Commercial Code is that a pledge over movables may not be effective against the debtor and/or any third party except by transferring possession of the pledged property to the pledgee or to a third party appointed by both parties. Further, in order to be valid, the pledged property must remain in the hands of the pledgee or the appointed third party until the debt is satisfied. This rule does not apply to pledges over commercial business, which is discussed separately below. Further, the pledged property should be identified and listed in the Pledge Over Movables Agreement.

In some jurisdictions, mortgages over movable property is achieved by a recording system within the Courts or other Departments, which allows the filing of financing documents. The filing system protects the financier/mortgagee against third parties or subsequent mortgages against the same movable property. There is no such recording system for immovable pledges in the UAE. In this regard the area of the law regarding movables is in our opinion, underdeveloped.

A pledge for movable property may be established by a written or oral agreement of the parties. However, without a written instrument, evidence of the movable pledge is difficult. Once the parties enter into the agreement, the pledged property is transferred to the pledgee or appointed third party. During this time period, the pledgee or appointed third party is responsible and liable to the pledgor for any damage or theft thereof. Once the debt is satisfied, the pledgee must return the pledged property to the pledgor in its original condition. If the pledgor fails to re-pay his debt on the due date, the pledgee may after 7 days of requesting the debtor to pay the debt, apply to the court for permission to sell the pledged assets through a public auction.

4. PLEDGE OVER COMMERCIAL BUSINESS

Article 39 of the Commercial Code defines a commercial business or unit as "all kinds of tangible and intangible property allocated for commercial trading." Article 40 further identifies the tangible and intangible elements of a commercial business or unit. Tangible elements include goods, tools, machinery and equipment. Intangible elements include trade name, goodwill, intellectual property rights, and contracts with clients, the right to let and licenses. Real property is expressly excluded from the definition of a commercial business or unit. Further, if the pledge agreement does not specify the assets pledged, the pledge will not be effective except in relation to the trade name, right to let, client contracts and goodwill.

Although the pledge over commercial business involves the pledge of movable property, it is distinguishable in several ways from the general rule regarding movable property described in the preceding section.

The Commercial Code distinguishes pledges over commercial business from other types of pledges by providing in Article 49 that only banks and financial institutions may grant pledges to a commercial business.

Another distinguishing factor is that the pledgor may continue to maintain possession of the commercial business or unit even after pledging the commercial business or unit. The crucial question is whether goods are excluded. Under Egyptian Law, upon which much of the UAE law is based, goods are expressly excluded. Goods are meant to be sold, and the merchant cannot operate unless he is able to dispose of his goods in such a way as to give bona fide purchasers good title to the goods. However, the merchant will not be able to grant good title to the goods if they were pledged. Therefore, if the goods are not excluded from the materials elements that can be pledged, trading will be impossible, thus defeating the whole purpose of having a special type of pledge that does not require possession. Moreover, goods could be pledged under Articles 164 to 177 of the Commercial Code by actual delivery of possession of the goods.

Based on this, it can also be argued that a pledge on commercial business is somewhat different from the “floating charge” concept recognized in a number of jurisdictions, including the U.S. and U.K. Since the pledge over commercial property, by definition, relates to the concept of the “floating charge”, it is often the source of confusion by foreign attorneys familiar with the “floating charge.” Under the UAE Civil Law System the floating charge concept does not expressly exist. In the UK, such a charge was held to exist if it had three main characteristics: (1) it is a charge on a class of assets of a company present and future; (2) that class is one which in the ordinary course of the business of the company would be changing from time to time; and (3) it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets. Based on this definition of a “floating charge”, the commercial pledge can be distinguished from the “floating charge” since the material elements of a commercial business are not constantly changing, and the creditor has priority over all unsecured claims and secured creditors, if they rank junior to him.

The Commercial Code provides that a pledge over a commercial business “must be made in writing, notarised before a Notary Public and registered at the Commercial Registry.” Until now, only three established Commercial Registries exist in the UAE, in the Emirates of Dubai (including Jebel Ali Free Zone), Abu Dhabi and in Sharjah. Thus, the pledge of commercial business may only be effected in these three Emirates.

Registration in the Commercial Register provides protection for a period of five (5) years from the date of registration, bearing in mind that such registration will be automatically cancelled if not renewed prior to the expiry of the five (5) years. The registration of a pledge at the Commercial Registry may not be cancelled except by the consent of both parties or pursuant to a final court order.

In the event that the pledgor fails to re-pay his debts when due, the pledgee may 8 days after notifying the pledgor, apply to the court for permission for the assets included in the pledge agreement to be sold at a public auction.

5. MORTGAGES OVER IMMOVABLE PROPERTY ERECTED AT JEBEL ALI FREE ZONE

Dubai Government issued Law No. 1 of 2002 in relation to mortgages over immovable property at Jebel Ali Free Zone (“JAFZ”). Before the issue of this Law, banks tended to provide secured financing to establishments in JAFZ against a pledge over their movable assets and/or an assignment of the lease over the JAFZ land. Practically, many problems were encountered by banks: firstly, a pledge over the movable assets of an establishment in JAFZ cannot be registered at any registry in the UAE and hence the rights arising out of the pledge may not be protected against third parties; secondly, the assignment of the lease was in the form of an assignment in which the bank only had the right to request that the lease is assigned to its own name or the name of a third party, after the consent of the Jebel Ali Free Zone Authority (the “JAFZA”) had been obtained. In practice however, JAFZA promptly consented to such assignments.

Under this Law, only structures erected at JAFZ may be mortgaged and this does not include the land leased by JAFZA, which remains under the ownership of Dubai Government. Banks and other creditors may be the mortgagee under this Law and, therefore, the scope of application of this Law is wider than former security laws in the UAE. The mortgagor and the mortgagee have to provide their mutual consent to the mortgage over the immovable property before the Registrar at JAFZ. Once the Registrar has obtained receipt of an application to register the mortgage, he must ascertain the competence of the contracting parties to perform the mortgage and ensure that there is no previous attachment court order over the immovable property. In addition, the Registrar has to ensure that the immovable property is owned by the mortgagor after reviewing evidence submitted to him regarding the same, this may be in the form of different invoices, the lease and any bank accounts. Finally, the Registrar ensures that the amount of the mortgage debt is not higher than the value of the immovable property mortgaged.

Under this Law, a registered mortgage constitutes conclusive evidence vis-à-vis third parties and, therefore, registration is essential for the preservation of the security for the debt. Any alteration or cancellation will not be effective vis-à-vis third parties unless the same is made in the Registrar. Priority among registered mortgages is according to the date of the registration of such mortgages. Under Section 13 of this Law, a deed of mortgage

made pursuant to its provisions will be deemed an executable deed. Accordingly, if the mortgagor fails on repayment of the debt, the mortgagee may approach the Dubai Execution Court immediately without having to resort to filing a civil action before the courts.

Under Section 14 of this Law, it is provided that a mortgage shall expire at the end of the lease of the land on which the Immovable Property has been erected or by agreement of the contracting parties or by a final judgment of a competent court. In practice, the first circumstance may cause problems in the event that the lessee has defaulted on rent. JAFZA may then terminate the lease and - if one applies the section as is worded - the mortgage shall accordingly expire. In effect, the mortgagor may upon his own will, be able to free the Immovable Property of all mortgages by simply defaulting on the rent.

Under Section 17 of this Law, it is stipulated that the buyer of the mortgaged property may personally benefit from it or rent the land from JAFZA for the remaining period of the lease concluded between JAFZA and the lessee (mortgagor). Further, the fees for registration of a mortgage is 1.2% of the amount of the debt, and this is also applicable in the event of an amendment to the conditions of the mortgage.

In conclusion, we feel that the Dubai Government has by issuing this Law, eased the legal mechanism for credit financing in the JAFZ. The Law overcomes previous difficulties encountered by JAFZ entities when requesting credit financing from banks and other creditors. However, there are some ambiguous sections that may prove difficult to enforce in practice. It should be noted that JAFZA has stated that it shall refrain from registering a mortgage over Immovable Property when the lease of the related land has already been assigned, thereby removing one possible conflict in enforcing this Law.

6. PLEDGING CERTAIN INSTRUMENTS AND DEBTS

The Commercial Code provides for the pledging of the rights contained in certain instruments such as promissory notes and bills of exchange by delivering such instruments to the pledgee. If such instruments are bearer instruments, the pledge will be affected by a written document specifying that the delivery of such instruments is by way of security. Moreover, such documents must be registered with the entity that issued such instrument.

The pledging of debts due to the pledgor is also permissible under the Commercial Code provided that (1) an instrument representing the debt is delivered to the mortgagee; and (2) the pledgor's debtor has been notified of the pledge or has accepted the pledge. Such pledge will not be valid against any third party unless the pledgee maintains possession of the instrument representing the debt.

7. PLEDGES OVER QUOTED AND UNQUOTED SHARES ISSUED BY COMPANIES REGISTERED IN THE UAE

Three types of companies may issue shares in the UAE: private joint stock companies, public joint stock companies and partnerships limited by shares. This includes Free Zone companies.

Shares in joint stock companies, Free Zone companies and participating shareholders' shares in a partnership limited by shares are nominal and not in bearer form. Also, the shares are negotiable. Such shares, therefore, may be pledged by delivering them to the pledgee. In order to effect the pledge, the pledgor should undertake to request the company to register the pledge in the register of shares of the company to secure the full payment of the facility or loan. The pledgor should also deliver the share certificate to the pledgee. The pledgor shall have the right to receive the dividends and utilize the rights related to the shares unless otherwise agreed in the pledge agreement.

The pledgee's rights over the pledged shares can be protected by registering the pledge at company's register or JAFZA and by marking the share certificate. This will give the pledgee a priority right over other creditors of the pledgor in relation to the pledged shares.

Please note in this regard that in the event that any company's shares are listed on one of the Financial Markets, any pledge of shares in such companies must be registered with the relevant Financial Market.

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