

Taking Security in the Sultanate of Oman – Part 2: Receivables, Shares and Bank Accounts

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This is the second in a series of articles providing an overview of the types of security available in Oman. This article focuses on security over receivables, shares in joint stock companies and bank accounts.

Oman law recognizes mortgages (both commercial and legal), pledges and liens. However, an assignment by way of security is not a valid form of security under the law and the assignee is not regarded as a secured creditor. Receivables nevertheless can generally be secured by way of assignment. There are two types of receivable; one type can be charged and the other can only be assigned. Oman law does not regard an assignment as true security and so the assignments do not need to be registered. In any event an assignment cannot be registered as it is a contractual right only, as opposed to a security interest capable of being enforced against third parties. Acknowledgement of, or consent to, or even receipt of a formal notice of the assignment perfects the assignment as a contractual arrangement (and not a security).

However, to the extent that the right to a receivable has crystallised, it is possible to create a commercial charge over that class of receivables.

Contractual Rights

Where performance of the contract has not been fulfilled, a right can be assigned i.e. an existing right to future or contingent receivables can be assigned. To the extent that the right to the debt has crystallised due to performance of the contract, it can be effectively charged.

Under Oman law an assignment is absolute, meaning that ownership transfers to the assignee on the effective date of assignment.

Conditional Assignments

Accordingly in Oman, a security assignment cannot be achieved by means of a purported conditional assignment as it would be construed as a commercial mortgage under Oman law. It will not be effective as security because, before the condition is fulfilled, any other creditor of the assignor could enforce against it. As it would purport to vest title to the secured asset in the lender before repayment of the debt had fallen due it is likely that it would be void.

Conditional assignments by way of a contractual undertaking will be respected (but this does not give the same rights of security against third parties in the event that the condition has not yet been fulfilled).

Under Oman law it is possible for the owner of shares in a joint stock company to pledge those shares by way of security. It is not possible to pledge the shares (or share participations) of an Oman law limited liability company, or partnership company.

Share pledges are registered at the Muscat Depository and Securities Registration Company ([MDSRC](#)) which is a

Muscat Securities Market company. The registration and redemption procedures of the MDSRC are not prescribed in legislation but are made by decision of the board of directors of the MDSRC. Therefore the requirements for registration and redemption of a share pledge and the applicable fee are subject to change. There is however a standard lien form in Arabic that both parties need to complete in order to complete the registration process. Additionally, the parties to the shares pledge should submit board minutes authorising the entry into the share pledge agreement, registration of the share pledge and appointment of a signatory of both the pledgor and pledgee, the share pledge agreement and relevant identification documents.

On enforcement of a share pledge, whilst a pledgee would normally only be entitled to receive the proceeds of the sale of the pledged shares, the court does have the discretion, if a pledgee so requests, to transfer the pledged shares in question to the pledgee direct in whole or partial satisfaction of the relevant debt. However, under Oman law there are limits on the percentage of shares in an Omani company that may be owned by a foreign entity or even in some events, to an Omani entity. The court will refuse to transfer the shares to the pledgee if this limit would be breached and the pledged shares will instead be sold, with satisfaction of the proceeds remitted to the pledgee in satisfaction of the debt.

Following Oman's accession to the World Trade Organization it committed under the General Agreement on Trade in Services (GATS) to allow 100% foreign ownership of shares in companies in a number of sectors including in banking services. However, although 100% foreign ownership appears to be permitted, there are provisions that state that no more than 35% of the voting shares may be held by certain related parties. Our view is that it would be possible for new entrants into the market to be 100% foreign owned but it would not be possible for a foreign entity to acquire all the shares of an existing Omani entity or bank. Additionally, it would be necessary for an acquirer of 10% or more of the voting shares of a licensed bank to obtain the prior approval of the Central Bank of Oman. Once a foreign entity does own the shares in a bank or other entity, it will have the same rights of enforcement as Oman entities. However, note that in practice such a foreign entity will need to appoint a local person or entity as its attorney or representative to take enforcement action on its behalf unless it has or establishes a presence in Oman.

As it is not possible to charge moveable assets by way of pledge - moveable assets are instead charged by Commercial Mortgage, see our previous article in this series Taking Security in Oman – Part 1: Commercial Mortgage.

There are no special statutory provisions dealing with a pledge over a bank account. It is necessary to consider the general provisions in relation to a pledge of moveable assets, which provide that a pledgee must be able to demonstrate “possession”. Under the Law of Commerce, a pledge must either be registered or there must be possession of the security asset. There is no general register for such security instruments.

The application of the general principles of pledges to bank accounts is not straightforward. Possession would seem to be achieved by the mere fact that the bank holds the funds, but it is also important to consider the need to be able to demonstrate to third parties that the bank account and the funds in it are pledged. There is no agreed procedure in this area.

We note that in practice it is common to enter into a pledge agreement covering the existing cash deposits and also any other deposits which will come into existence during the security period, after the date of the agreement. The pledge agreement usually includes a clause where the pledgor acknowledges moneys in the account at any time in the future, including at the time of enforcement.

Although this is common practice we are not aware of any court decision testing it and we cannot guarantee that a pledge would be enforceable as a security against third party creditors.

It is nevertheless prudent to include set-off provisions in a pledge agreement to enhance the enforcement procedures for pledges over movables, and allow the bank or pledgee set off the debt and the sums in the account if repayment is

not made on the due date.

Article 607 of the Law of Commerce specifically permits set off on insolvency provided the entitlements owed to or from the insolvent party are connected and arise out of the same cause or are comprised in the same current account.

In relation to current accounts and fixed deposit accounts, a charge cannot be taken over a current account or a fixed deposit account as there is no concept of a floating charge in Oman, nor are these assets considered as assets that the chargor can take possession of. Under Oman law it is also not possible to take a charge over a deposit account that has been "blocked". However, the parties would be able to assign the "blocked" account but the assignment, unless actually implemented, will not be enforceable against any secured creditor.

A court order is required to enforce any type of security interest. A chargee or pledgee may therefore be required to prove that the debt obligation owed to it has become due and payable and remains outstanding prior to taking any enforcement action.

The value of secured assets may only be realized by sale in a public auction administered by the court. The chargee or pledgee would then receive the proceeds of sale up to the amount of the debt depending upon the type of the assets in question. In relation to pledged shares the chargee or pledgee has a right to the proceeds of the sale of the shares but not necessarily to the pledged shares themselves.

Enforcement can be a lengthy process and may take up to two years. Note that unless the chargor or pledgor is co-operative, as far as we are aware it is not possible to circumvent the court process.

Enforcement Issues on Insolvency

In our view contractual subordination would not be effective in an insolvency scenario. The enforceability of the terms of any contractual subordination (such as any intercreditor arrangement) would be influenced by the potential presence of other creditors (in particular either governmental entities, employees or other secured creditors that are not party to such an arrangement).

Set off is generally recognised and enforced, including in insolvency scenarios, so long as the entitlements owed to or from the insolvent party are connected and arise out of the same cause or are comprised in the same current account. If this connection does not exist, set off on insolvency will not be permitted. There are three types of set off, namely, contractual set off, legal set off and judicial set off.

Regarding further enforcement issues on insolvency, we refer you to the provisions outlined in relation to Commercial Mortgages, which apply here, in Taking Security in Oman – Part 1.

Self Help Remedies

There are no self help remedies on enforcement of security, and it is not possible for an enforcing creditor to simply take possession of secured assets and dispose of them.

On enforcement of share pledges, a pledgee may not take possession of the pledged shares or exercise a power of sale over them without the prior intervention of the courts, unless the pledgee holds a valid power of attorney in relation to the pledged shares.

Powers of Attorney

We refer you to the provisions outlined in relation to Commercial Mortgages, which apply here, in Taking Security in Oman – Part 1.

The courts in Oman will recognize the validity of a security interest governed by a foreign governing law assuming it is

valid under the law of such security document and does not contradict public order or a mandatory provision of Oman law in which case the courts would apply the relevant provision of Oman law.

If a provision of a foreign law chosen by parties is found to be contradictory to public order in Oman then it will be unlikely that the foreign law would be applied and enforced. Instead, Oman law will apply.

Where provisions of a foreign law differ from Oman law, and are sought to be relied upon, they would be required to be specifically pleaded and proved as evidence of fact before the Oman courts.

A provision in a contract that a non-Oman court has exclusive jurisdiction will not prevent the courts in Oman from assuming jurisdiction.

Given the issues highlighted, most lenders to Oman entities have sought to rely on commercial mitigants (such as careful choice of counterparties and extensive due diligence). Anecdotal evidence suggests that, to date, secured creditors have been willing to restructure debt and payment terms rather than taking the trouble of enforcing Oman security interests.

Proceedings in the courts in Oman are conducted exclusively in Arabic. Should any security instrument be produced before the courts in Oman, only an Arabic translation will be admitted in evidence. In such event there is the possibility that the Arabic text will prevail over the English text.

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Please note that this article is based on the modern, written, secular legislation of the Sultanate of Oman as promulgated by decree or decision of HM the Sultan or other competent source of regulatory utterance including, but not limited to, Ministerial Decisions and/or fatwas having the force of law as at 30 September 2011.

It should be borne in mind that the Basic Law states, in Article 2, that "Islam is the religion of the State and the Islamic Shari'ah is the basis of legislation" and, in Article 77, that existing laws and regulations remain in force "provided that they do not conflict with any of the provisions of the Basic Law". The Basic Law also provides for the establishment of a court with jurisdiction to determine whether legislation complies with the provisions of the Basic Law. Whilst it is our expectation that it is not the government of Oman's intention to introduce a means of challenging the validity and enforceability of legislation relating to commercial matters generally on the basis that it is contrary to Islamic Shari'ah and, therefore, conflicts with Article 2 of the Basic Law, it is not possible for us to state that this is or will be the case. The only area which the Basic Law expressly states will be governed by Islamic Shari'ah is the law related to family affairs and inheritance (Article 11).

All laws, regulations, decisions and decrees are in Arabic with no official translation into any other language. All references to or extracts from the same in this analysis are based upon unofficial translations. Please also note that the decisions of the courts in Oman are not published nor is there any doctrine of binding precedent as in common law jurisdictions. Consequently, it is difficult to predict with any certainty what decision on interpretation a court would take on any given issue in the future.

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