

Project finance in the United Arab Emirates: overview

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MARKET OVERVIEW

1. What types of projects make use of project financing in your jurisdiction? What have been the most significant project finance deals in the past 12 months?

Types of projects

In the United Arab Emirates (UAE), project financing has been used mainly in the power and water sectors. There have been various project financings in these sectors stretching back to the 1990s and there are very well established precedents for these. In the last few years, the solar power sector has seen a great deal of activity, with a number of large solar financings being closed in Dubai and recently a major solar project being awarded in Abu Dhabi.

Outside the power and water sectors, there have been project financings in the heavy industrials sectors, including steel and petrochemicals.

There has also been one PPP in the education sector, the Abu Dhabi Sorbonne University PPP. It is anticipated that in the future, the PPP/project finance model may be rolled out to other sectors, including health and education. For example, Dubai has recently passed a PPP law indicating its openness to such structures. The federal government is also currently considering a PPP law/framework.

Significant deals

Significant recent deals include:

- In the power sector, the DEWA Mohammed bin Rashid Al Maktoum Solar Park Project. The PPA for the third phase of this project was signed at the end of 2016. At 800MW, it is one of the largest solar projects in the world with (at the time) the lowest cost tariff in the world. Masdar was the successful bidder.
- The Emirates Steel Industries refinancing. This US\$1.3 billion refinancing achieved financial close in 2014. It involved Islamic and conventional tranches of financing, with both regional and international banks participating.

This article does not provide information on the Dubai International Finance Centre.

REGULATORY FRAMEWORK

2. What regulatory framework governs project finance in your jurisdiction?

Regulatory framework

There are power and water sector-specific laws in Abu Dhabi and Dubai governing project financings in these sectors. Dubai also has a PPP law in place. Otherwise, project finance is subject to the

general legal framework in the UAE under the Commercial Code, as supplemented by various laws, depending on the particular sector.

Regulatory authorities

Power/water sector project financings are procured by the Abu Dhabi Water and Electricity Authority (ADWEA) in Abu Dhabi and Dubai Electricity and Water Authority (DEWA) in Dubai. ADWEA has also assisted the Emirate of Fujairah and other Emirates in their Independent Water & Power Projects (IWPPs). In addition, in Abu Dhabi the Regulatory and Supervisory Bureau (RSB) acts as a regulator for the electricity and water sector.

Material laws

The UAE Commercial Code applies to project financing (and all other commercial banking transactions). The Commercial Code is based on the Egyptian and French civil and commercial codes.

English law is often used as the governing law for financing documentation (other than security documentation, which is typically governed by local law). In some cases, the courts of the Dubai International Financial Centre (DIFC), which operate on English law based principles, are used as a dispute resolution forum.

International treaties

There are no international treaties specifically dealing with project financing transactions, although various treaties cover general areas that may be of relevance. In particular, the UAE is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which can be of relevance to project financing transactions as it allows the enforcement of international arbitral awards in the UAE.

REGULATORY CONSIDERATIONS

3. Are government approvals required before financing a project? Are fees typically paid for such approval?

Various governmental approvals are required for any significant project, including various building, planning and environmental permits.

In addition, in a water/electricity project financing context, the approval of the Regulatory and Supervisory Bureau (RSB) is required for any power or water project where security is to be granted to the project lenders.

Governmental approvals must be investigated on a case-by-case basis. In general, the governmental authorities are familiar with complex project financings. If the project is located in a particular industrial zone, then the main regulator is likely to be the authority that administers that zone. Specific rules for that industrial zone are likely to apply and must be considered in addition to the general laws.

4. Is there any requirement to file or register project documents with a regulatory authority or other government body?

In the water/electricity sector, it is likely that the finance documentation will need to be filed with the Regulatory and Supervisory Bureau (RSB) (for projects in Abu Dhabi) to obtain consent to create security in favour of lenders.

Otherwise, if general security is to be created over the project assets, then it is likely to require a commercial mortgage. This must be publicly advertised and the mortgage registered with the Department of Economic Development (or equivalent in the relevant Emirate) against the company's licence.

5. Do any specific laws exist in relation to state ownership or state repatriation of assets?

State ownership

It is the practice of the authorities in the UAE to own a majority shareholding in a project company that operates an infrastructure project such as an Independent Power Producer (IPP) or Independent Water & Power Project (IWPP). This is the model that has been followed on all previous projects.

In addition, there is a requirement that UAE nationals/companies own a majority (at least 51%) of all onshore companies (which applies regardless of sector).

State repatriation of assets

There are various grounds on which the state can expropriate or nationalise assets in extreme scenarios. The authorities in general retain a wide discretion to ensure that critical infrastructure services are maintained.

STRUCTURING THE FINANCING

Main parties

6. Who are the main parties in a project finance transaction?

The main parties in a project finance transaction are the:

- Sponsors.
- Public authority for the relevant sector (in an infrastructure project).
- Lenders.
- Construction contractor.

Equity bridge lenders, who provide junior debt to the project company in lieu of equity during the construction phase, guaranteed by sponsors and refinanced by sponsors' equity/shareholder loans, are also common in project financing transactions in the UAE.

Types of financing

7. How are projects financed? What sources of funding are typically available?

Long-term senior bank debt is the most common form of project financing, typically providing 70% to 80% of the cost of a project. Sponsor equity (shareholder loans or share capital) is used for the remaining portion of the project cost, sometimes supplemented by early revenues generated by the project before completion.

In addition, equity bridge lenders are very common during the construction phase, as they are considered to improve sponsor equity returns by delaying the time at which sponsors must inject their own cash.

Bond refinancings (typically refinancing bank debt once the project has been built) have been seen in recent years for certain projects in the power sector, although they are not yet common.

Long-term project financing with senior bank debt is the most common form of financing. The revenue stream for water/electricity infrastructure projects is paid on an availability basis through a water/power purchase agreement. In water/electricity sector projects, a government-owned entity typically retains 60% of the equity in the project company. The debt is typically very long term, and 20 to 25 years is common.

8. What are the advantages and disadvantages of using project financing to structure a construction or infrastructure project?

Advantages

Project financing has the following benefits:

- From a sponsors' perspective, it allows the project to be developed on a no or limited recourse basis, through a separate project company. The sponsors' balance sheet is not put at risk (or exposure can be managed). The use of long-term debt (typically much longer than can be procured for other types of financing) for the bulk of the project cost reduces the equity requirement and enhances project returns.
- The lenders have security over all of the project assets and direct agreements with the key project counterparties, so tend to see project finance as relatively low-risk. There have been no significant project financing defaults in the UAE, even during the global financial crisis.
- Host governments are attracted by project financing as it attracts long-term investment from foreign developers and, through long-term partnerships with the private sector and foreign developers, facilitates technology and skills transfer over a long period. It also allows the rapid development of infrastructure with limited immediate impact on government budgets and balance sheets (since the private sector takes responsibility for funding the project) although, in the longer run, the public sector typically pays for the project through the payments for the services/product delivered.

Disadvantages

Banks must set aside more regulatory capital for long-term project financing under Basel III, and this is therefore increasing the cost of such financing.

The deals can be more complex as they are structured financings, and all risks must be properly identified, negotiated and appropriately allocated, which can increase transaction lead times and costs.

Corporate vehicles

9. What corporate vehicles are typically used for financing projects? What are the considerations behind choosing these vehicles?

Special purpose vehicles are commonly used in the UAE, typically limited liability companies or private joint stock companies. If the project is to be carried out in a specific free zone area, it may be that the free zone has its own rules about the kind of entity that can be set up there.

Considerations can include:

- The number of shareholders likely to be involved.
- The need or desire to undertake an initial public offering (IPO) in the future.
- Whether or not the project is in a free zone.

Documentation

10. What are the typical documents in a project finance transaction?

There is no standard set of project documents and each project has its own set of documents specifically structured for that particular project. Some of the key documents found in many project financings include:

- **Shareholder/sponsor documents.** These include:
 - pre-development agreements;
 - shareholders' agreement/joint venture agreement;
 - sponsors shareholders support agreement.
- **Loan and security documentation.** This includes:
 - project loan agreement;
 - security documents.
- **Project documents.** These include:
 - concession agreements/licences;
 - construction contracts;
 - operating and maintenance agreement;
 - fuel supply agreements;
 - sales/offtake agreements.
- **Other project documents.** These include:
 - through-put agreements;
 - tolling agreements;
 - technology/operating;
 - licences;
 - consultancy contracts;
 - utility agreements;
 - refining agreements;
 - transportation contracts.

SECURITY

11. What forms of security are available to protect investments? How are they created and perfected?

Forms of security

The form of security used depends on the nature and type of the assets to be secured. The following are the main types of security that are available under UAE law:

- **Mortgages over real property.** Land owned by a project company can be secured by a real estate mortgage. Article 1399 of the UAE Civil Code defines a mortgage as a document in which the mortgagee acquires a security interest over real estate. It gives a priority right, and the mortgagee can use the mortgaged property to cover a debt. Mortgages over land in a

free zone are usually not possible as the interest is leasehold, although the Jebel Ali Free Zone has passed a law that allows a mortgage of a building but not land.

- **Commercial mortgages over a business.** A project company's plant and machinery can be secured through a commercial mortgage over the business. A commercial business for this purpose is defined to include all kinds of tangible and intangible property allocated for commercial trading. Article 40 of the Civil Code further defines the business' tangible and intangible elements. Real property is not included in the definition. It is necessary to specify the assets being mortgaged, otherwise all that will be mortgaged is the trade name, right to let, client contracts and goodwill.

Only UAE central bank-licensed banks and financial institutions can take commercial mortgages. The mortgagor can retain possession after the mortgages have been entered into.

Commercial mortgages do not cover "goods", meaning those things that are sold as part of business operations.

The mortgage must be notarised and registered at the relevant Commercial Registry. A registration is valid for five years.

If the owner of a commercial concern fails to pay the price or the outstanding balance to the seller, or to pay the debt on its date of maturity to the mortgagee, the seller or mortgagee creditor can, eight days after notification to the debtor, file a petition for all or some of the components of the commercial concern to be sold by public auction. The sale will take place at a venue, day and hour appointed by the judge and by the method which the judge specifies. The sale must be publicised at least ten days before it takes place (*Article 53, Commercial Code*).

- **Commercial pledges over movables.** A commercial pledge can cover movable items and is not effective in relation to an item that is immovable or affixed to land.

Article 165 of the Commercial Code provides that such a pledge is only effective if possession is delivered to the pledgee or to a third person appointed by both parties. The pledgee or the third party must retain possession while the pledge exists, which is often not a commercially feasible proposition. There is no system for the general registration of these types of pledges as there is in many other countries.

The Ministry of Finance and Industry has issued a decree (Ministerial Decree No 612 of 2000) that permits the registration of a pledge of plant and equipment with it. However, the Ministry has provided guidance that registration is only possible for those companies that have an industrial licence.

If a debtor fails to pay a debt guaranteed by a pledge on the due date, the creditor can apply to the court for leave to sell the pledged object after seven days have elapsed from the date of the notice. The application must be dealt with as a matter of urgency, and the method of sale is determined by the court. The chargee creditor can then recover his debt, including principal, interest and expenses incurred, from the proceeds of the sale (*Article 172, Commercial Code*).

There are often difficult issues over what exactly constitutes "possession" of the movable assets and what happens if new assets arise in the future that are supposed to be covered by the pledge.

The law on taking security over movable assets in the UAE has been revised by Federal Law No 20 for 2016 (New Mortgage Law). Key changes to the current regime (set out in the Commercial Transactions Law and the Civil Code) include that possession of the movable assets is not required to be transferred to a mortgagee. A new register is also to be established that will enable a creditor to register a pledge over movable property. If the register is publicly searchable, it will

also enable a creditor to establish whether movable assets have already been pledged and put third parties on notice that the assets are already subject to a pledge.

In Dubai, granted land can now be mortgaged as security for a debt obligation, following the enactment of Dubai Decree No 31 of 2016. The owner of land granted by the Ruler of Dubai can mortgage the land to a bank or financial institution licensed in the UAE, subject to conditions, including on investment in the development of the land of funds from the secured financing. Land granted to entities majority-owned by the Government of Dubai or to real estate developers can be mortgaged unconditionally. In the event of enforcement proceedings, mortgaged granted land can be sold at public auction (save in the case of granted residential land, the sale of which is subject to additional approvals).

- **Pledges over cash deposits.** There are no special statutory provisions dealing with a pledge over a bank account and it is therefore necessary to consider the general provisions in relation to a pledge of movable assets, which provide that the pledgee must be able to demonstrate possession.

A pledge over a bank account must be by reference to an identifiable asset. A fixed deposit is an identifiable asset but there is doubt as to the effectiveness of a pledge over an account that has a fluctuating balance.

The application of the general principles 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.

Some institutions take the view that as long as the account and the statements in the name of the pledgor have a notation that the account is pledged, this is sufficient. Another view is that the account name should be changed into that of the pledgee (assuming it is a bank) or opened with a third party and that there should be a notation that it is pledged money. This approach is based on a concern that if the pledgor has a judgment debt issued against it, the UAE Central Bank will then issue a circular to the banks instructing them to attach all accounts in the name of that person. The argument is that if the account is not in the name of the pledgor, the pledgee bank could respond that it had no such accounts and so would not have to attach the account. Such an approach holds significant risks for the pledgee bank because ultimately the funds in the account do belong to the customer regardless of any nomenclature that may be used and such a response to the UAE Central Bank could be untruthful.

Other approaches are to have the deposit slip or other instrument pledged.

As additional protection for lenders, account pledges usually include set-off provisions and provisions restricting the use of funds.

- **Pledges over certain instruments and debts.** The Commercial Code has provisions allowing for the pledge of rights in certain instruments, such as promissory notes and bills of exchange. It is also possible to pledge debts owed to the pledger, which requires notification to, and consent from, the debtor. The pledgee must retain possession of the document evidencing the pledged debt.
- **Pledges over UAE shares.** Shares in a special purpose vehicle can also be secured.

The form of the special purpose vehicle determines the means by which shares in the vehicle are secured.

Shares are issued by private and public joint stock companies and also by partnerships limited by shares. The shares can then

be pledged by delivery to the pledgee and with registration in the company's records. The share certificate must be retained by the pledgee.

For LLCs, which are a partnership of limited partners with interests in "parts" or "participations" in the LLC, there are no share certificates that can be delivered and pledged. Pledges are used for LLCs but there is some uncertainty about such pledges, as there can be no delivery into possession of any share certificates. In other civil code jurisdictions (such as France) it is possible to have pledges of the "participation rights" that exist in an LLC, but in these countries registration is possible.

- **Assignments.** The assignment of contractual rights under UAE contracts are normally assigned under a UAE-law governed assignment agreement. This can include a project company's rights under UAE-law governed contracts, such as:
 - local governed concession agreements or licences;
 - other project agreements (such as off-take, supply or transportation agreements); and
 - UAE-governed local project insurances.

Neither the Civil Code nor the Commercial Code contain express general rules governing the assignment of a right (as opposed to an obligation).

- **Other forms of security.** Other forms of non-UAE law governed security are also used in UAE project financings. These include English law-governed assignments of contractual rights with respect to non-UAE law governed contracts, such as hedging agreements or project agreements governed by English law.

Formalities

The relevant formal requirements are as follows:

- **Mortgages.** The mortgage must be notarised and registered at the relevant Commercial Registry in the relevant Emirate. A registration is valid for five years, at which point it must be renewed.
- **Commercial mortgages over a business.** The pledge must be notarised and registered at the Commercial Registry. A registration is valid for five years, at which point it must be renewed.
- **Commercial pledge over movables.** There have been recent developments in the law on commercial pledges over movables. There are a number of aspects of the New Mortgage Law which remain unclear and are not likely to be clarified until the Implementing Regulations for the New Mortgage Law are issued.

A public register is among the issues which have been put forward in the New Mortgage Law. However, details have not yet been provided. Details of this register (including when it will actually be established, which authority will administer it, procedural requirements, what information must be registered and will be publicly searchable, taxes, fees, and so on) are not yet available and are expected to be set out in a further decision of the UAE Council of Ministers. No specific timeframe has been given for this.

- **Pledges over cash deposits.** Under the civil code system in the UAE, a pledge must either be registered or there must be possession of the security asset. However, in the UAE there is no general register for such security instruments, although there are special registers for land, aircraft and vessels, motor vehicles and commercial pledges over a business.
- **Pledges over certain instruments and debts.** It is possible to pledge debts owed to the pledger, which requires notification to, and consent from, the debtor. The pledgee must retain possession of the document evidencing the pledged debt.

- **Assignments.** The consent of the assignor, the assignee and the obligor is required for there to be an effective and valid transfer of an obligation. Neither the Civil Code nor the Commercial Code contain express general rules governing the assignment of a right (as opposed to an obligation) but there are Federal Supreme Court and Court of Cassation judgments holding that, in commercial matters, consent to the assignment of a right is not necessary, although evidence is required that the other party has been put on notice of the assignment.
- **Documentary taxes.** There are no applicable documentary taxes.
- **Notaries' fees.** Notarial fees apply where documents must be notarised. Notary fees for security are typically a percentage of the amount secured.
- **Registration fees.** Fees are payable to the local Emirate authority to register the security. Fees vary, depending on the authority, and usually form a percentage of the secured amount. These fees can be costly.

Notary fees and registration fees cannot be avoided and must be paid to notarise and register a security document. Fees can be reduced by reducing the amount secured by the relevant security document.

12. What mechanisms are available to protect security interests against competing interests?

A lender that perfects its security has priority over other creditors in an insolvency of the security grantor. Perfection in the UAE occurs through registration (for security that is capable of being registered).

13. How is priority established?

Priority can be established by:

- **Contractual subordination.** On a contractual subordination, loans are made to the same company but the senior creditor and junior creditor agree priority of payment between them by contract. Contractual subordination can be provided for by senior and junior creditors entering into a subordination agreement.
- **Structural subordination.** Usually a lender to a company will not have access to the assets of the company's subsidiary until after all of the subsidiary's creditors have been paid and the remaining assets have been distributed up to the company as an equity holder. Lenders may require shareholders to enter into agreements making shareholder loans to the company subordinate to the lender's loans.
- **Inter-creditor arrangements.** Inter-creditor arrangements are common for syndicated financing. The parties to the inter-creditor agreement include the borrower, lenders, facility agent and security agent.

14. Can an agent or trustee hold security on behalf of a group of lenders?

UAE law does not recognise the concept of a commercial trust and, to the extent that such trust arrangements are contemplated by finance documents, there is no certainty that they would be enforced. However, the concept of agency is understood and provided for in UAE law. Agents can therefore hold security on behalf of a group of lenders.

15. How can security interests be enforced? What steps can a lender take to enforce security?

The exercise by a lender of enforcement powers given to it by security documents is subject to mandatory legal provisions. Provisions in finance documents or project documents purporting to permit a party to take possession, sell or enforce against any property are generally not enforceable unless a court order is first obtained permitting that enforcement.

The process for undertaking court proceedings and obtaining a court order can be lengthy and drawn out.

16. Can a lender foreclose or appropriate against an asset?

Generally, the concept of self-help (or extra-judicial enforcement) is not recognised. All foreclosures or appropriations against an asset must be through a court order.

17. How does the start of bankruptcy/insolvency proceedings affect a lender's ability to enforce its security?

The New UAE Bankruptcy Law was published on 29 September 2016 and entered into force on 29 December 2016.

Under the New UAE Bankruptcy Law, the enforcement of security depends on the type of proceeding which has been initiated. In the case of a protective composition procedure (PCP) (a pre-bankruptcy rescue procedure) and a restructuring within bankruptcy, where entry into a PCP or restructuring has been accepted by the court, there is a moratorium on enforcement of security by creditors. However, secured creditors can still bring enforcement actions with the permission of the court.

CONTRACTUAL PROTECTIONS

18. What other forms of contractual protections are available to lenders to protect their investment?

There are various additional forms of creditor protection mechanisms that are commonly used by lenders in project financing. These include:

- **Assignments.** Assignments can include assignments by way of security over the project revenue stream.
- **Warranties.** Lenders typically require the project company to provide a suite of representations and warranties in relation to itself, its business, its assets and various other matters.
- **Covenants.** Lenders require the project company to give various covenants, including financial covenants such as a debt service cover ratio.

INSURANCE

19. What insurance arrangements are typical for projects in your jurisdiction? How do lenders protect their interests as regards project insurance?

Lenders look to the following to protect their interests with respect to insurances:

- **Insurance advisers.** In most large projects lenders appoint a firm of internationally recognised insurance brokers to act for

them in providing speciality advice on scope and level of insurance for the project.

- **Security assignment.** It is common for lenders to obtain an assignment by way of security of all the rights, title and interests in the insurances and reinsurances.
- **Loss payee arrangements.** A loss payee clause is ordinarily included in each of the policies. Any claim proceeds above a certain threshold are paid to the lenders or to the order of the lenders.
- **Co-insurance.** Lenders often require that they be listed as a co-insured in the policy (see *Question 20*). This is usually supplemented by express insurance endorsement language under which the insurer confirms that non-disclosure or misrepresentation by one party does not affect the other.
- **Broker undertakings.** Primary insurance and reinsurance brokers provide certain undertakings to the lenders relating to the insurances, such as undertakings to arrange endorsements placed on the insurances and certain information undertakings.

20. Are lenders named as co-insured or joint insured?

Lenders may prefer to be co-insured on the basis that a policy would not be tainted due to a misrepresentation or non-disclosure by the project company with respect to a policy. This is an attempt to avoid joint insurance, which can create issues where one of the joint insured is subject to a claim by the other insured party.

21. Are non-vitiation provisions common?

Non-vitiation provisions are commonly used in addition to named insured and loss payee protections. Such provisions ensure the policy remains operative even if a borrower contravenes a condition of their insurance policy.

22. How are insurance proceeds treated and applied?

The treatment and application of insurance proceeds is set out in the facility agreement. This is typically reinstatement of the asset or prepayment of the loans.

23. Are there any restrictions on insurance over projects provided by foreign companies?

Under local UAE insurance law, the insured must take out insurance for UAE-based risks from a local insurance company.

There is no restriction on proceeds of insurance claims being paid to foreign lenders.

24. Is reinsurance a feature of project financing in your jurisdiction? Are there any other aspects of project insurance that are particular to the jurisdiction?

Under UAE insurance law, the insured must take out insurance for UAE-based risks from a local insurance company. All reinsurers can reinsure UAE-based risks. Therefore, primary insurances are procured from local insurers and reinsurances are obtained from international reinsurers. Lenders therefore ordinarily look to reinsurers for comfort in relation to project insurances.

PROJECT RISKS

25. What risks are typical in your jurisdiction and how are these mitigated or allocated?

Market price and volume risk are key risks and are typically hedged for infrastructure projects by long-term availability-based off-take contracts. Terrorism and political risks are typically accepted by the government, and often supplemented by sabotage and terrorism (S&T) insurance.

Interest rate hedging is common.

Tax issues are limited, as corporation tax is not currently charged. However, VAT is to be introduced into the UAE and rest of the Gulf Cooperation Council in the near future, so developers must look closely at the changes in the law and any tax gross-up provisions in the financing and project documents, to ensure that their returns are not reduced because of this imminent change.

PUBLIC PRIVATE PARTNERSHIPS (PPPS)/PRIVATE FINANCE INITIATIVES (PFIs)

26. Has your jurisdiction enacted any specific legislation for enabling the use of PPPs or similar funding models such as PFIs?

The Emirate of Dubai has enacted its own PPP law, the Dubai Law No 22 of 2015 Regulating Partnerships between the Public and Private Sectors (Dubai PPP Law). This law became effective on 19 November 2015.

The new law does not apply to:

- Electricity and water projects (which are governed by the Electricity & Water Sector Law (*No 6 of 2011*)).
- Simple works contracts or supply contracts (which are governed by the Procurement Law (*No 6 of 1997*)).

In addition, the Dubai Supreme Committee for Financial Policy also has full discretion to exclude other types of contract from the operation of this law.

A Federal PPP law is currently under consideration by the federal government and is expected to be published imminently.

27. Are there any limitations on the use of PPP or PFI transactions?

There are no general limitations on the use of PPP transactions. PPP transactions must be undertaken within the bounds of UAE law generally (including the Dubai PPP Law, for projects in Dubai).

28. How are projects involving PPPs or PFIs typically financed? How does this differ to other projects?

PPPs are typically financed using the project finance technique. This is where the majority of the project's financing is provided by way of bank debt and is repaid principally out of the assets being financed and their revenues. The overriding aim of project financing is to make it clear that the repayment of the loan in question is limited to the assets of the project being financed.

Key differences between project finance and other types of financing include:

- Sponsors being able to insulate themselves from both the project debt and the risk of any failure of the project through the use of a special purpose vehicle.
- Sponsors being able to avoid consolidating the project's debt onto their own balance sheets.

29. Can security be given to lenders by a concessionaire over interests in PPP or PFI projects? Does this require consents?

Security can be given by a concessionaire over interests in PPP projects.

Direct agreements are common.

Typical types of direct agreements include:

- Concession agreement direct agreements.
- Construction contract direct agreements.
- Operation and maintenance agreement direct agreements.
- Supply contract direct agreements.
- Off-take agreement direct agreements.

SOCIAL, ETHICAL AND ENVIRONMENTAL ISSUES

30. What social and ethical issues are relevant to project financing in your jurisdiction?

The Equator Principles are commonly applied by international banks operating in the region and also increasingly by regional banks. Bribery and corruption are not prevalent by international standards (Transparency International ranks the UAE as the least corrupt country in the Middle East), and the UAE has a well-developed public procurement regime in place.

The UAE has well-developed money laundering regulations and the sanctions regime is generally in line with the UN. The fact that the UAE operates as a hub for so many international banks, developers and multinational companies in the Middle East region means that social and ethical issues, sanctions compliance, and so on receive a great deal of attention.

31. What environmental risks might be encountered? How is potential environmental liability assessed and how is liability allocated?

The environmental risks associated with projects are similar to those anywhere else and risk allocation is in line with international practice. The project company and its contractors must manage these risks, and procure insurances for them.

The UAE has a legal regime in place to regulate environmental liability.

NATURAL RESOURCES AND MINERALS

32. Who has title to minerals or other natural resources? Can foreign companies acquire rights to such assets?

Article 23 of the UAE Federal Constitution provides that the natural resources and wealth in each Emirate is the public property of that Emirate. Each individual Emirate has its own regulatory structure that covers exploration and extraction rights and all other rights in relation to that Emirate's natural resources.

Foreign companies can acquire rights to the assets of an Emirate, under that Emirate's regulations. The main restriction for foreign companies is that they can only hold a minority interest in the rights granted (or in the special purpose vehicle granted those rights). The typical arrangement is for the foreign company to have a minority shareholding interest in a special purpose vehicle, with the relevant state-owned entity having the majority shareholding.

33. What royalties and/or taxes are payable on the extraction of minerals or other natural resources? How is the charge calculated?

The government charges royalties based on gross revenue, under the relevant concession agreement.

A corporate tax applies to oil and natural gas activities in accordance with the Abu Dhabi Income Tax Decree of 1965 (as amended). The tax rate ranges between 55% and 85% depending on the product generating the taxable income and the specific concession agreement.

34. Are there restrictions, fees or taxes on the export of minerals or natural resources?

Export duties on minerals or natural resources are not levied in the UAE.

FOREIGN INVESTMENT

35. Are there any incentives to encourage foreign investment in projects?

The UAE does not levy corporation tax on any foreign or domestic investments in any sector. There is no specific incentive scheme for foreign investment. Typically, there is an open tendering process for government-promoted projects. However, in certain priority sectors, terms can be offered on a case-by-case basis.

36. Are there investment treaties that protect foreign investment in projects?

The UAE is party to several bilateral investment treaties. However, the political risk in the UAE is generally perceived to be low so this is not typically a major concern for foreign investors.

37. What fees or taxes are payable on foreign investment in a local project company? Are payments of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions subject to fees or taxes?

Taxes such as corporation/withholding tax are not levied in the UAE. However, VAT will be introduced in the near future.

Fees are payable for registrations, permits, and so on.

38. Can project companies establish and maintain foreign currency accounts, both locally and in other jurisdictions?

There is no prohibition against foreign currency accounts, either held in the UAE or offshore.

39. Are there any restrictions on the payment of dividend/repayment of shareholders' loans to a foreign parent?

There are no restrictions on the payment of dividends (subject to the typical conditions such as distributable reserves being available, and so on) or shareholder loan repayments to foreign parent companies.

40. Are there restrictions on the importation of equipment from abroad for use in a project?

In general, the import regime is relatively liberal and so there are limited or no restrictions in relation to most plant/machinery required for projects. However, this must be considered and confirmed on a case-by-case basis.

CHOICE OF LAW AND JURISDICTION

41. Will local courts recognise a choice of foreign law or jurisdiction in a project contract or financing agreement? Are there any mandatory rules that apply despite a choice of foreign law or jurisdiction?

Foreign law

Article 19 of the Civil Code permits contracting parties to choose the governing law of an agreement. If the parties are not domiciled in the same state, then the governing law is that of the state in which their contract was made, unless they agree otherwise or the circumstances indicate a different law is intended to apply.

Under Article 27 of the Civil Code, it is not possible to apply the provisions of a governing law determined in accordance with the preceding articles (including Article 19) if those provisions are contrary to sharia law, public order or morals in the UAE.

Under Article 28 of the Civil Code, the law of the UAE must be applied if it is impossible to prove the existence of a foreign applicable law or to determine its meaning.

While on the basis of the above it is possible for contracting parties to choose a governing law other than the UAE, the courts routinely do not adopt a choice of foreign law due to their interpretation of the evidentiary requirements under Article 28 of the Civil Code.

Jurisdiction

The following applies to the extent that the documents provide for the submission of relevant disputes to the jurisdiction of courts other than the UAE courts.

Article 20 of the UAE Civil Procedures Code provides that, except in relation to real property abroad, the UAE courts have jurisdiction to hear cases against a UAE national and actions brought against a foreigner who is domiciled or has a place of residence in the UAE. In addition, under Article 21 of the Civil Procedures Code, the courts have jurisdiction to hear actions against a foreign national who has no domicile or a place of residence in the UAE if:

- He has a domicile of choice in the UAE.
- The action relates to assets in the UAE, or an inheritance devolving on a UAE national, or a deceased's estate opened in the UAE.
- The action relates to:
 - an obligation entered into or performed, or stipulated to be performed in the UAE;

- a contract intended to be attested in the UAE;
- an event that occurred in the UAE; or
- a bankruptcy declared by a court in the UAE.

- The action relates to a matter of personal status and the plaintiff is a UAE national or foreign national with domicile in the UAE, where the defendant has no known domicile abroad, or UAE law is the applicable law in the action.
- Any one of the defendants had a domicile or a place of residence in the UAE.

Article 24 of the Civil Procedures Code states that any agreement made in violation of the articles contained in Chapter 1 (which includes Articles 20 and 21) are null and void.

Despite a contractual provision providing for exclusive jurisdiction elsewhere, the courts may accept jurisdiction in relation to any dispute relating to any finance document or project document.

42. Are waivers of immunity enforceable?

There are no laws in the UAE specifically addressing the issue of waiver of sovereign immunity. The UAE courts may consider a variety of factors, including public policy issues, before accepting jurisdiction in a case involving a foreign sovereign government or government entity. The Civil Procedures Law contains a prohibition on the seizure of public property belonging to the UAE federal government or the governments of any of the individual Emirates to satisfy a judgment debt.

Some Emirates may also require the written consent and approval of the respective Emirate's Ruler's court or legal department before filing of a claim against an Emirate's Ruler, government, or government entity. For example, in the Emirate of Dubai, the Dubai Government Lawsuits Law (*Dubai Law No 3 of 1996, as amended*) requires the prior approval of the Ruler of Dubai before filing a lawsuit against the Ruler or a Dubai government entity. Failing the approval, the claim will not be accepted at the court. The requests for such approvals must be made to the Dubai Government's legal department.

43. Will the courts recognise a foreign arbitral award or court judgment?

The UAE is a member of the New York Convention. A foreign arbitration award rendered in a Convention member state can be enforced in Dubai under the Convention. The only grounds for non-enforcement would be the restrictive grounds found in the Convention, although the implementation of the provisions of the New York Convention is as yet untested.

While dealing with an award rendered in a country that is not a signatory to the New York Convention, a potential route of enforcement could be via a bilateral treaty or a multilateral treaty between the UAE and that particular state.

In the absence of a treaty or convention, a foreign judgment is not enforced in the UAE if the local courts have jurisdiction over the subject matter of that judgment, regardless of whether the agreement contractually provides for foreign courts to have jurisdiction.

REFORM

44. Are there any recent or proposed legal developments affecting project finance?

Dubai promulgated a new PPP Law at the end of 2015. This should facilitate a new range of PPP transactions in the Emirate of Dubai in the near future. These are likely to be project financed. For example, this will allow developers to approach the Government of

Dubai with unsolicited bids (without first requiring a public tender process).

In addition, there is a New Pledge Over Commercial Movables Law coming into force in the next year or so across the UAE. This will affect how security over project assets can be taken, and will need to be studied carefully when further details are available (see *Question 11*).

ONLINE RESOURCES

UAE Central Bank

W www.centralbank.ae

Main activities. The Central Bank's main responsibility is the formulation and implementation of banking, credit and monetary policies. All banks and financial institutions in the UAE (outside the Dubai International Financial Centre (DIFC)) are regulated by and required to obtain a licence from the CBUAE.

Ministry of Economy (MOE)

W www.economy.ae

Main activities. The MOE has a broad range of activities. The MOE regulates joint stock companies, licenses branches of foreign companies, registration of commercial agencies and trade marks.

Practical Law Contributor profiles



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Non-professional qualifications. Cardiff University, 1995, LLB, Law and Japanese, Hons

Recent transactions

- Advised on US\$8 billion expansion of the refining and petrochemical complex in Saudi Arabia owned and operated by Rabigh Refining & Petrochemical Company. The project included a US\$1 billion captive IWSP. The project was supported by JBIC and PIF and included two Islamic tranches of funding, as well as a conventional tranche.
- Advising the successful consortium led by KEPCO on the US\$800 million project financing for the Jordan IPP3, supported by K-EXIM and NEXI.
- Advised a syndicate of banks on the AED900 million term and revolving facilities to Aujan Coca Cola Beverages Company. This transaction was recognised by Islamic Finance News as the Syndicated Deal of the Year for 2015.



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Non-professional qualifications. University of Sydney, LLM, 2007; University of Sydney, LLB, 2005; University of Technology, Sydney, BBus, Finance and Law, 2000

Recent transactions

- Advising the borrower in relation to long term project financing for the expansion of a US\$2.2 billion steel project in the Emirate of Abu Dhabi, UAE.
- Advising sponsors in relation to a restructuring and on-going issues relating to the project financing of a wastewater project in Emirate of Ajman, UAE.
- Advising the Sumitomo Corp/Malakoff/Al Jomaih consortium that had been appointed as preferred bidder in the circa US\$7 billion Ras Azzour IWPP project in Saudi Arabia with respect to certain hedging arrangements.
- Advising a prospective purchaser with respect to a proposed acquisition of companies holding power plant assets in Oman.