



New Mortgage Law in UAE – briefing on
key issues

C L I F F O R D
C H A N C E



Based on a proposal of the Minister of Finance, the President has issued a Federal Mortgage Law which provides the framework for a new form of non-possessory registered mortgage over movable assets in the United Arab Emirates (the UAE). UAE Federal Law No. (20) of 2016 on the Mortgage of Movable Property to Secure Debt (the Mortgage Law) was published on 15 December 2016 in the UAE official gazette (Issue 609) and will enter into force on 15 March 2017.

The Mortgage Law contemplates that a mortgage can be created over certain asset classes of "movable" property and will be perfected against third parties upon registration in a centralised and publicly searchable register. It is hoped that this will be a milestone for parties seeking to create effective security packages with more certainty on enforcement procedures over movable assets in the UAE.

However, the efficacy of the Mortgage Law will ultimately be dependent on the mechanisms put in place to implement its provisions in practice. A further decision of the UAE Council of Ministers, establishing the register and determining the competent registration authority, is still awaited. Implementing regulations setting out details as to how the register will be administered, the procedures for registration, the basic information to be included on the register and the relevant fees, are due to be issued within six months from the date of the law entering into force (the Implementing Regulations). As such, there are many outstanding questions to be answered, and practical steps which need to be taken, before a definitive overview of the impact of the Mortgage Law can be provided.

This technical briefing note considers the current regime for taking security over movable assets in the UAE, the key provisions of the Mortgage Law and what the new regime might potentially offer to those seeking to utilise it. It also sets out some areas of uncertainty which will require further clarification from the competent bodies in due course, and some recommendations for further action in the interim period. In particular, it will be critical for parties to remain aware over the coming months, that increasingly time-sensitive steps, many of which are yet to be clarified, will need to be taken in relation to existing security packages over movable assets pursuant to the adjustment mechanisms set out in the Mortgage Law.

Background – what are the key features of the current regime for taking security over movables?

To date, security over movables in the UAE has primarily been created by way of a possessory pledge under the relevant provisions of the UAE Civil Code (Federal Law 5 of 1985 (as amended) (the Civil Code)) and the UAE Commercial Code (Federal Law 18 of 1993 (as amended) (the Commercial Code)). A possessory pledge is created by the taking of possession of the movable property by the pledgee. "Movable" property for this purpose has included chattels, debts and cash and, in practice, bank accounts have been treated as if they were a chattel by the courts. The creation and perfection requirements for each type of

asset generally differ and historically there have been a number of key challenges involved in taking a pledge, particularly given that the physical transfer of possession is a fundamental feature of the creation of the security. For example:

- **Constructive possession**

It is not uncommon for the parties to a secured transaction to want to allow the pledgor to retain possession of the secured property, particularly where losing possession would disrupt the pledgor's ability to carry on their business. Attempts have therefore been made to create commercial pledges, for example of machinery or receivables/debts, where the machinery or the instrument representing or evidencing the debt is retained by the pledgor to hold "on behalf of" the pledgee, so the pledgee did not have actual, but rather constructive, possession. It has also been common for lenders to appoint employees of a pledgor as a "bailee" to manage assets on their behalf. The approach of the

UAE courts under UAE law on the effectiveness of these types of arrangement remains uncertain.

■ **Future property**

It has not formerly been possible to create effective security interests over future property under UAE law. This has been a significant obstacle for local law security packages, particularly in relation to the ability to create security over bank accounts with a fluctuating balance or a fluctuating pool of business assets. For example, under the current regime, the security interest is a pledge of specified cash in the bank account at the time of the pledge and is not a "floating" charge over all money in the bank account from time to time, nor is it a security interest over future monies credited to the account (other than interest or any income earned on the pledged cash itself). It has therefore been necessary for parties to agree to take a new pledge over any additional cash credited to the account if the security is intended to extend to this additional property. This can create an administratively cumbersome burden on the pledgor, particularly for bank accounts that fluctuate on a regular basis.

■ **Enforcement sanctioned by the court**

Enforcement of a possessory pledge must usually be sanctioned by the court, normally where the pledgee applies to the court for permission to sell the secured property, which application may be made seven days after the pledgor/ borrower has been given notice to pay (and of the intention to enforce) following a failure by the pledgor/borrower to pay on the due date. Self help remedies, such as a sale at the option of the secured party or an appropriation of the asset to apply against the secured debt, are generally viewed as not being permitted under UAE law.

Other forms of security available over movables include registered mortgages over particular asset classes, such as aircraft, ships and vehicles. Commercial mortgages (otherwise known as "Article 49 mortgages", by reference to the relevant provision of the Commercial Code) in favour of banks and financial institutions licensed in the UAE can be registered on the commercial register in some Emirates over certain tangible and intangible assets of a business, but are cumbersome and expensive to take in practice. For example, because future property has not been permitted to be the subject of security under UAE law, commercial mortgages often provide for an "addendum" to be executed by the mortgagor and registered when significant further assets are added to the mortgaged business. This

involves considerable administration and cost in executing, notarising, publishing and registering each addendum. Further, all such mortgages are subject to a five year renewal period for re-registration.

In light of the issues outlined above, the Mortgage Law introduces a number of concepts, many of which are likely to have a positive impact on local law security packages and, subject to effective implementation of the register, offer practical solutions to some existing challenges. However, there are a number of outstanding issues in relation to the Mortgage Law which need to be resolved over the coming months. Please see below (Which aspects of the Mortgage Law still need to be clarified?) for further comment.

What type of security does the Mortgage Law purport to offer?

A new form of non-possessory registered security over movable assets

The Mortgage Law sets out the broad legal framework for a general form of registered mortgage to be created over movable property, distinct from a pledge which is created by the conveyance of possession and other existing forms of registered mortgage. Translations of the Mortgage Law vary in their use of the words "mortgage" and "pledge" but there is no difference between these two terms in the original Arabic, which uses the word "رهن" interchangeably.

Key points

The Mortgage Law introduces:

- a new regime for registering mortgages over movable assets
- a searchable register (yet to be established) to check secured assets and priority of security
- new enforcement mechanisms, including sale of mortgaged assets with agreement

Which types of "movable assets" will the Mortgage Law cover?

"Movable" assets are defined and the definition appears to capture a wide category of assets (Article 3)

The Mortgage Law provides a wide definition of the types of tangible and intangible "movable" property over which mortgages can be created under the Mortgage Law. The list, which is not expressed to be exhaustive, includes:

- receivables, being cash amounts due currently or in the future to the mortgagor resulting from carrying out its business
- receivables and deposits at licensed banks and financial institutions, including current and deposit accounts
- written bonds and documents, title to which is transferable through delivery or endorsement, providing entitlement to an amount, or ownership of goods, including commercial papers, certificates of deposit, bills of lading and warehouse bonds
- work equipment and tools
- material and moral elements of a business concern, without prejudice to the possibility of a commercial mortgage over such assets under the Commercial Code and the UAE Trademarks Law
- goods intended for sale or lease, raw materials and goods in the process of manufacturing or transformation
- agricultural crops, animals and their products, including fish or bees
- fixtures, provided they can be separated from real estate without being damaged
- any other "movable" property considered by applicable laws in the UAE as validly subject to a mortgage according to the provisions of the Mortgage Law.

Further, the Mortgage Law expressly provides that a mortgage can be taken over any existing or future movable property. This is an important development because although it has been common practice to create a "pledge and assignment" over future property - most notably over fluctuating balances of deposits in a current bank accounts – to date, there has not been a legal basis under UAE legislation recognising such contracted "assignments" over future property as a security interest. Further, the former

requirement to enter into a new pledge over any additional property, such as cash credited to the account, has been cumbersome. It appears that these issues are, to some extent, likely to be resolved by the new Mortgage Law. However, for the time being, questions remain on matters such as whether it will be possible to register, and subsequently enforce, forms of security agreements which purport to create a floating charge.

Which other rights can be registered?

It is contemplated that other rights will be able to be recorded on the register in accordance with the procedures set out in the Mortgage Law, and within the limits to be set out in the Implementing Regulations, including:

- the rights of a lessor on assets leased under an operating lease contract if the contract is for one year or more (Article 11(1)(a))
- the rights of an owner of goods placed for sale (Article 11(1)(b))
- the rights of a lessor in a financing lease (Article 11(1)(c)).

These provisions are likely to be helpful, in particular, for the creation of local law security in project finance transactions and other transactions in relation to assets where operating and finance leases are frequently used.

Are any assets specifically excluded from the Mortgage Law?

Mortgage rights arising solely from possession (Article 2(2))

The provisions of the Mortgage Law specifically exclude possessory pledges, to which the provisions of the applicable laws will continue to apply (the Civil Code and the Commercial Code). However, the Mortgage Law appears to contemplate that possessory pledges will need to be registered in order to establish their priority as against registered mortgages going forwards (Article 44). It will be important for parties with existing security packages to seek further guidance as to the interrelationship between unregistered possessory pledges and registered mortgages in due course, particularly in light of the time limits for registration of existing security set out in Article 44(1).

Please see below (What action will need to be taken with respect to pre-existing possessory pledges?) for further commentary on this point.

Movable assets in relation to which dispositions are registered in a special register are excluded (Article 2(3))

The Mortgage Law does not apply to movable property in relation to which dispositions are registered in a "special register" pursuant to laws in force. However, no further guidance has been provided as to what a "special register" will constitute. Whereas one interpretation of Article 2(3) is that it is intended to refer to asset classes such as ships or shares for which there are already existing registration systems in place to register pledges, guidance will need to be sought from the competent registration authority in due course as to exactly which categories of assets Article 2(3) is intended to exclude. Further clarity will also be required, for example, in relation to property registered on separate security registers within the UAE's free zones, particularly where such free zones have not promulgated supporting security laws.

Certain types of movables, including "public assets", are excluded (Article 4)

With certain exceptions, the law will not apply to other specific types of property, including:

- personal property or property allocated for home purposes
- entitlements of an insured or beneficiary under an insurance contract
- labour and vocational expenses
- "public assets", endowment assets, assets of foreign diplomatic and consular corps and assets of government international organisations
- future rights arising from inheritance or a will.

It remains to be seen in practice how widely some of the exclusions to the law are likely to be interpreted. For example, the term "public assets" is undefined and may have the potential to exclude assets of both wholly owned and partly owned government entities from being mortgaged under the regime offered by the Mortgage Law. Again, this point will need to be clarified further with the competent authority.

View on "excluded assets" and enforcement mechanisms

As one of the key features of the Mortgage Law is to introduce a searchable register for mortgaged assets, there is a clear rationale for excluding movable assets in relation to which there are already existing security registers to avoid duplicate registration requirements. However, given that another significant achievement in the Mortgage Law is to provide a faster enforcement process with certainty of timescales, further value could be gained through guidance or the Implementing Regulations from the competent body limiting the Article 2(3) exclusion to the registration provisions of the Mortgage Law only, so that all types of pledges and mortgages – whichever public register they may be registered on – can benefit from the same certainty of enforcement timescales. In connection with margin lending and structured financing products on UAE dematerialised securities (such as certain types of shares, bonds or sukuk), in our view, certainty on this point would significantly increase international appetite for liquidity injections in to the UAE.

What are the key requirements to create a mortgage?

The key requirements to create a mortgage are as follows:

- a mortgage must be created (as specified by the Implementing Regulations) in writing by a mortgagor competent to dispose of the mortgaged property or a mortgagor authorised to create a mortgage (Article 8(1) and Article 8(2))
- the contract must include a description of the mortgaged property in accordance with the Implementing Regulations (Article 8(3))
- the contract must contain a disclosure by the mortgagor on the presence of rights of others, in relation to the mortgaged property (Article 8(4))
- the mortgagor, principal debtor or mortgagee must notify the owner of the mortgaged property set out

under the mortgage contract (where the mortgaged property is not in the possession of the mortgagor) (Article 8(5))

- the mortgagee must pay the fee agreed upon in the mortgage contract or commit to pay the same (Article 8(6)).

The Implementing Regulations are expected to provide further clarity with regards to the steps to create a mortgage, including any requirements for notarisation of the mortgage contract.

When will a mortgage be effective against third parties?

A mortgage will be effective against third parties upon registration in a register yet to be established in a further decision of the UAE Council of Ministers (Articles 6 and 10). Once the mortgaged right is created and registered in accordance with the Mortgage Law, no subsequent mortgage right over the same property shall be created except through registration.

Generally, a registered mortgage right gives the mortgagee a secured right over the proceeds of the mortgaged property and priority on those proceeds according to the order of priority (as set out in the Mortgage Law), unless otherwise agreed between the parties (Article 19). However, this does not preclude second ranking forms of registered security from being agreed between the parties (Article 24).

The parties to a mortgage can also register an 'in principle' acceptance to create a mortgage right over existing or future property. In this case, the parties may conclude the mortgage contract and register it within five working days from the date of possession of the mortgaged property by the mortgagor or the principal debtor, which period may be extended for no more than 30 days (Article 10(3)).

How is a mortgage registered?

A mortgage shall be declared and registered by filing the necessary registration form, with the competent body (Article 12). The 'basic information' to be included in the mortgage contract will be set forth in the Implementing Regulations, in addition to the information that may be viewed on the public register.

Do third parties need to be notified of registration?

Third party proprietors of mortgaged property not in possession of the mortgagor must be notified at the time of registration (Article 8(5)).

Where possible, written consent of relevant persons to be notified shall be sought by electronic means, but if written consent cannot be obtained, notification shall be made by courier or registered mail with acknowledgment of receipt (Article 12(2)).

Entry in the register shall be considered an effective legal notification to those who accepted the notification by registration.

Can persons object to the registration of a mortgage?

Any person named as mortgagor, principal debtor or mortgagee may "object" to the mortgage before the court within five working days of notification and may register the objection in the register in accordance with the Implementing Regulations. The filing of an objection will not have an impact on the validity of the mortgage right towards third parties, unless and until the court decides to reject or remove the declaration (Article 13(1)).

If the proprietor of the mortgaged property has an unregistered right on the same property, an objection can be made before the court within five days of the date of notification or the date of registration of the mortgage contract, whichever comes later. The court may issue a decision to determine the priority of the proprietor of the property over the registration (Article 13(2)).

Can the mortgage register be searched by the public?

The Mortgage Law provides that the register will be established by a further decision issued by the UAE Council of Ministers (Article 6). The parties to a mortgage contract can specify in their agreement if they would like the public to be able to access the information in the register but, in all cases, the public will be able to view the 'basic information' on the register and request a report in hard or soft copy (Article 7). In practice, the procedures for registration and

the efficacy of the register as a publicly searchable resource will depend on the level of 'basic information' included on the register and the conditions for search, which are to be determined in the Implementing Regulations.

How can a registered mortgage be enforced?

The enforcement mechanisms set out under the new Mortgage Law appear to change the position that enforcement of security over movable property can generally only be sanctioned by the court, normally by way of a court authorised sale of the secured asset. To date, this has meant that "self-help" enforcement remedies which are common in other jurisdictions, such as a sale at the option of the secured party or an appropriation of the asset to apply against the secured debt, are usually not permitted under UAE law.

There are now two main enforcement options available for assets mortgaged under the Mortgage Law, being the sale of a mortgaged asset by agreement and summary execution through the judiciary. There is a distinction between the treatment of bank accounts and bonds and other forms of asset.

Both options are summarised below.

Sale of mortgaged asset with agreement (other than bank accounts or bonds) (Article 27)

If the mortgagor (or principal debtor) fails to perform its obligations under the mortgage contract or if the contract is not implemented for any other reason, then the mortgagee may (following prior notice to the mortgagor) separate the asset from other property and request the sale of the asset at not less than its "market value" within 10 days. However, there are no provisions in the Mortgage Law setting out the method of such separation or the procedure for market valuation in this context. The right of sale is also subject to important conditions, including that the parties must "agree" to the execution without resorting to the courts. It is not clear from the Mortgage Law whether this means that the parties can so agree in advance within the terms of the mortgage contract or whether they must so agree at the time of execution, regardless of the terms of the contract. There must also be no third party mortgage rights over the same asset (and if such third party rights do exist, written consent from all mortgagees must be obtained). Notice of

enforcement must be given to the person holding the asset and, if applicable, the owner of the real property.

Sale of mortgaged assets for bank accounts or bonds (Article 28)

In relation to bank accounts and written documents that transfer ownership through delivery or endorsement, the right of sale of a mortgaged asset without recourse to the courts is expressed slightly differently. This applies only in the case that the mortgagor or principal debtor does not perform its obligations under the contract.

For bank accounts, a practical method of enforcement is envisaged in these circumstances as the mortgaged account may be set off by the account bank against sums owed to the mortgagee (in the case that the mortgagee is the account bank) or the amount in the account can be claimed from the account bank.

For bonds or written documents that transfer ownership through delivery or endorsement, they shall be delivered or endorsed if their value is equivalent to the mortgage right. The law is silent on the position where the bonds or written documents exceed the value of the debt, but presumably an application must be made to the Court for enforcement in these circumstances. Where documents that may be endorsed or delivered and are related to goods, execution shall be by way of summary execution through the judiciary (see below) unless the goods are equivalent to the mortgage right.

Where the mortgagor or guarantor fails to fulfil the obligations under the contract, the mortgagee may execute against the property directly without the need to resort to the courts. The mortgagee must notify the mortgagor in these circumstances and it may expressly be agreed upon in the mortgage contract or in a separate written agreement between the mortgagee and the mortgagor that the latter waives its right of notification of the execution procedures against the property. This provision can be viewed in contrast to the provisions of Article 27, which does not clarify this issue for other types of movable assets.

Summary execution through the judiciary (Article 29 – Article 40)

As an alternative right of recourse, the mortgagee may also submit a request to the Magistrate of Summary Justice to issue a summary decision of seizure of the mortgaged property and execution against the property according to the provisions of the Mortgage Law. This may require placing the mortgaged property in the possession of a third

party at the expense of the mortgagor or principal debtor in preparation for execution against the mortgaged property and its immediate sale according to the provisions of the Mortgage Law. If the court permits the application within the time limits specified, it will permit the mortgagee to take possession of the asset and sell it at "market value" or attach conditions for the sale of the asset, including the sale method and minimum sale price. The law also imposes a duty on the mortgagee to take "adequate care" to achieve a sale price of not lower than market value. The mortgagee must deposit the sale proceeds from the sale of the asset into the treasury of the court, in accordance with the sale procedure to be set out under the Implementing Regulations.

Position on Bankruptcy of Mortgagor (Article 39)

None of the execution procedures on the mortgaged property shall be valid in the case of commencement of preventative conciliation or bankruptcy procedures towards the mortgagor, and therefore will not interfere with the provisions relating to set off under the UAE Bankruptcy Law (Federal Law 9 of 2016) and the restriction of enforcement of secured creditors without permission of the court.

When will a mortgage cease to be effective?

Pursuant to Article 16, a registered mortgage will be ineffective (vis-a-vis third parties) and shall be cancelled by the mortgagee in the following circumstances:

- if the mortgagee agrees with the mortgagor or the principal debtor that the mortgage will be removed from the register;
- if the obligations under the mortgage are discharged before the expiry of the period specified in the register;
- if the registration of the mortgage was not completed in accordance with Article 10(3) of the Mortgage Law and if the mortgage is not registered within five working days from the date of possession of the mortgaged property by the mortgagor or the debtor, such period may be extended by not more than 30 days;
- if the mortgagee does not carry out his obligations after the registration of the mortgage contract; or
- a court orders the mortgage registration to be struck off the register

Does the Mortgage Law impose penalties for non-compliance or certain actions?

There are a number of stringent penalties and fines set out under the Mortgage Law for non-compliance and certain actions in Articles 41, 42 and 43. There are penalties of imprisonment and fines of not less than AED 30,000 if a party:

- deliberately registers the mortgaged right falsely or contrary to the provisions of the Mortgage Law;
- damages the property in any way or disposes of it in violation of the contract;
- decreases the value or the rights of the mortgagee, or carries out any acts that lead to the mortgagee being unable to collect the rights of proceeds or execution proceeds or
- carries out any act that impedes execution against the mortgaged property, including the procedures of sale, distribution of revenues or proceeds of execution according to the provisions of the Mortgage Law.

The penalties apply to boards of directors, boards of managers, joint partners and employees of companies who commit such acts unless they can prove they were not aware of, or did not participate in, the decision making that included the violation of the law or objected to that decision. The penalties set out in the Mortgage Law do not prejudice any more severe penalties provided for in any other law.

Can mortgage rights be assigned?

Under Article 14 of the Mortgage Law, mortgage rights can expressly be assigned by the mortgagee without obtaining the consent of the mortgagor. The mortgagee or assignee may register the assignment as an amendment to the previous registration, but the non-registration of the assignment shall not affect the validity of the mortgage right against third parties. This is therefore a helpful provision, as it appears to resolve some of the previous uncertainties around the perfection of the assignment of rights in this context (given the silence of the Civil Code on the matter).

What action will need to be taken with respect to pre-existing possessory pledges?

The Mortgage Law provides that, going forwards, the register must be searched by mortgagees to verify the existence of any other rights on the object of the security and its priority, before accepting a right of pledge by possession only.

Registration of a mortgage will generally give a mortgagee a secured right over the proceeds of the mortgaged property and priority on those proceeds according to the order of priority (as set out in the Mortgage Law) unless otherwise agreed between the parties (Article 19). Such priority will be determined in accordance with the date and time of the registration of the mortgage right (Article 17). However, the priority of security interests that pre-date the Mortgage Law

Some important aspects yet to be clarified

- Time limits and processes for registration
- Treatment of existing security and priority *vis a vis* registered rights
- The accepted form of security over future property
- Categories of excluded movable property
- How the new enforcement options will work in practice.

and are subsequently registered will be determined according to the date of creation of such rights (Article 44(3)) as opposed to the date of registration.

The Mortgage Law does not specifically address the status and priority of existing unregistered possessory pledges (which are excluded from the ambit of the Mortgage Law) as against registered rights. However, pursuant to Article 13(2), if the proprietor of the mortgaged property has an unregistered right on that property, he may make an objection to the court if the registration entails a right for the benefit of third parties, within five working days from the date of notification of the mortgage or the date of registration of the mortgage contract, whichever comes

later. In these circumstances, the court may decide to issue a decision to determine the priority of the proprietor of the mortgaged property in the declaration.

Importantly, mortgagees will have one year from the date of enforcement of the Mortgage Law (until 15 March 2018) to apply to register pre-existing possessory pledges, attaching proof of the existence of the pledge (Article 44(1)). It is currently unclear how and whether this period will be extended to cater for the time lapse between the date of enforcement of the law and the date of the establishment of the register in practice, given that applications to register mortgages are not likely to be possible for some time. The efficient operation of the register in practice will also be critical to parties being in a position to comply with time limits set out in the Mortgage Law. This will be no doubt be a concern for creditors and borrowers with existing security packages and an important area for further clarification from the competent registration authority once this has been determined.

Which aspects of the law still need to be clarified?

There are a number of important issues in relation to the Mortgage Law which are yet to be determined at this stage and in relation to which further guidance will need to be sought before a definitive view on its impact can be sought.

These issues include the following:

Content of the Implementing Regulations and how the register will be administered

Until further guidance is issued and the competent registration body established, it remains to be seen what exactly the registration process for mortgages over movables will entail, the levels of information the public will be able to access on the register and the relevant administrative procedures such as time limits, notarisation and registration fees. The success of the new regime is therefore dependent on the content of the Implementing Regulations and the mechanisms put into place by the competent body responsible for administration of the register.

Existing security packages and priority

It remains uncertain how existing possessory pledges which are not registered by 15 March 2018 (within one year of enforcement of the Mortgage Law) will rank against registered mortgages and pledges over the same assets

going forwards. It is also questionable whether the time periods set out in the Mortgage Law will be extended to cater for the time lapse between the date of enforcement of the Mortgage Law (on 15 March 2017) and the date of establishment of the register and whether time will be viewed as being of the essence in this regard. In our view, registration of existing security packages over moveable assets is likely to require early action from creditors and borrowers alike and will trigger an influx of registrations at the registry. In practice, the relevant registration department will therefore also need to be equipped and ready to deal with requests upon establishment and at a very early stage.

The form of security over future property

Further clarity is required regarding security over future property and the exact form this should take. It is not expressly clear whether a floating charge which crystallises over a changing pool of assets can be registered, or whether security over future property will need to adopt a more specific form. For example, a pledge agreement which includes a specific list or addendum of such future assets.

Movable property excluded from the Mortgage Law

The Mortgage Law does not apply to movable property of which "all dispositions" shall be registered in a "special register" pursuant to the laws in force. No further guidance has been provided as to what "special registers" this provision is intended to capture and how widely the requirement for "all dispositions" to be registered will be interpreted. Further clarity will be required, for example, in relation to pledges and mortgages over shares and, in particular, listed securities in dematerialised form.

Application of the Mortgage Law to property within the non financial free zones

In theory, the Mortgage Law should apply prima facie to movable property in a UAE free zone (outside of the Dubai International Financial Centre and Abu Dhabi Global Market), unless a separate law governing security exists in that free zone. However, in practice, further confirmation will need to be sought as to how the Mortgage Law will impact upon security taken over movable property located or owned by companies established within the free zones, particularly where the free zone in question operates a mandatory free standing security registration system but does not have a separate law governing security. It is possible that property registered on such free zone registers will be viewed as being excluded from the remit of the Mortgage Law by virtue of being registered on a

"special register" pursuant to Article 2(3), although we note that it is likely that entities with registered security over free zone property would want to be in a position to utilise the new enforcement mechanisms set out in the Mortgage Law going forwards.

Non UAE entities, branches of foreign companies and Central Bank licence

Other points which require further clarification include whether branches of foreign companies or any forms of non UAE entity will be permitted to register mortgages under the new regime and whether mortgages can be registered over assets of UAE companies if those assets are located outside of the jurisdiction.

Further guidance will be required as to whether secured creditors under the Mortgage Law will be required to hold a Central Bank licence, whether by virtue of the Implementing Regulations or required by the competent registration body as a matter of practice.

Security over public assets

The Mortgage Law provides that mortgages will not be able to be registered over public assets. There is no definition of public assets and therefore it remains to be seen whether the provisions of the new law will reinforce existing restrictions on wholly and partly owned government entities from mortgaging their assets.

Enforcement options and how they will work in practice

Although the enforcement mechanisms offered by the Mortgage Law appear to be helpful, there are a number of questions around their implementation in practice which will need to be explored further. For example, how the market value of an asset which is subject to a sale will be calculated and whether the parties to a mortgage contract can "agree" to the sale and execution against assets without resorting to the courts in advance (i.e. in the contract) or whether they must so agree at the time of sale. Further, it is clear that the judiciary will need to be informed and sufficiently familiar with the procedures and stringent timeframes set out in the Mortgage Law in order for the new mechanisms to be utilised effectively in practice.

Other

There are, of course, many other aspects of the Mortgage Law which will need to be further clarified in due course, particularly in relation to the interpretation of the provisions we outline in this technical briefing as the formal position becomes clear.

Conclusion and recommendations for further action

The new Mortgage Law introduces a framework which is likely to help parties in the UAE to create effective local law security packages over movable assets. Importantly, if the register is implemented as appears to be envisaged under the Mortgage Law, the difficulties relating to physical transfer of possession of movable assets will, in many cases, be circumvented and problematic issues relating to security over future assets will be resolved. Enforcement processes may be more expedient and transparency and transactional due diligence over movable assets may be enhanced, given that the register will be, to a certain extent, publicly searchable.

However, the Implementing Regulations setting out the new registration regime in practice will be of primary importance and there are many outstanding questions to be answered before a definitive overview of the impact of the Mortgage Law can be provided. In particular, the implications of the adjustment period for existing security packages will need to be considered carefully in light of the time periods under

the Mortgage Law and, at present, the lack of an established register. Further, we await an announcement of the competent registration body in order to seek the requisite further guidance on the required procedures.

In terms of actions which should be taken now, prior to the Implementing Regulations being issued and the register being established, it will be important to consider, going forwards, whether any security being created may be registered in due course and, in light of the relevant time limits, whether any possessory pledges or other forms of existing security over movables may need to be registered in adjustment to the new regime. It will also be important to ensure that transactional documents which seek to create any security viewed as being capable of registration under the Mortgage Law include appropriate further assurance clauses ensuring, for example, that the parties carry out any additional acts necessary to give effect to, and register, the contract under the new regime and procure any such acts by third parties, where required.

We will issue a further update on the Mortgage Law and the Implementing Regulations in due course once more detail is provided.

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