

UNITED ARAB EMIRATES

# Investment rules of the world



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## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# United Arab Emirates

*Last modified 23 January 2020*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

There are a number of restrictions on offering and selling debt securities under UAE law.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities (including foreign debt securities) to the public in the UAE or to provide trading services in respect of those debt securities without an appropriate license or approval from the Securities and Commodities Authority (SCA).

The SCA has published detailed rules and guidance on the restrictions for offers of debt securities in the UAE. These restrictions are aimed at preventing a breach of the rules on financial promotion and the protection of retail customer. However, the SCA's rules and regulations are still evolving and there continue to be changes in respect of permitted exceptions and exclusions to the SCA's regime.

Acting as a principal in respect of financial products that affect the financial position of any of the licensed financial institutions, including (but not limited to) debt securities will also be considered financial activities subject to UAE Central Bank licensing and supervision in accordance with the provisions of the New Banking Law.

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#### *What are common issuing methods and types of debt securities?*

The most common types of debt securities issued in the UAE are bonds, *Sukuk* (also known as Islamic bonds) or notes issued on a stand-alone basis or under a program.

Many different types of debt securities are offered in the UAE. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed-rate securities and floating-rate securities;
- Islamic debt securities (*Sukuk*) characterized by the type of underlying Islamic structure or payment profile such as fixed-rate Islamic securities and floating-rate Islamic securities;
- guaranteed securities, subordinated securities, securities issued for regulatory capital purposes (Tier 1 or Tier 2);
- asset-backed securities; and
- convertible or exchangeable bonds.

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## *What are the differences between offering debt securities to institutional / professional or other investors?*

In summary, the promotion of debt securities or trading service to any person in the UAE requires a Securities and Commodities Authority (SCA) license or approval. The SCA does, however, make certain exclusions from this requirement:

- There is a distinction between institutional 'Qualified Investors' and other investors for the purposes of offering and selling debt securities under UAE law, and promoting to (or introducing) institutional investors and licensed financial institutions, or government bodies (and entities owned by them) is permitted.
- Acting on the basis of a reverse solicitation may also be permitted in certain circumstances.

However, promoting or introducing in relation to UAE retail or high net worth individuals is not permitted without the relevant license or approval (which may involve a locally authorised firm).

If in any doubt as to the scope or application of an exemption, we would always recommend contacting the SCA directly to clarify the latest position in this regard.

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## *When is it necessary to prepare a prospectus?*

The general position under UAE law is that a prospectus is required where there is either:

- an offer to the public of the relevant debt securities; or
- an application is made for listing on one of the exchanges in the UAE.

However, on the basis that debt securities are often also marketed outside of the UAE, the local debt securities market has seen a degree of alignment with prospectus requirements under the EU Prospectus Directive.

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## *What are the main exchanges available?*

In the UAE, there are three main exchanges:

### **Dubai Financial Market (DFM)**

DFM was created in 2000 and operates as a secondary market for the trading of securities issued by public shareholding companies, bonds issued by federal or local governments, local public institutions and mutual funds as well as other local or foreign DFM approved financial instruments. DFM is governed and regulated by the Securities and Commodities Authority (SCA). In 2010, DFM consolidated its operations with NASDAQ Dubai, which means investors can trade across the two exchanges. However, both exchanges are regulated separately, DFM by the SCA and NASDAQ Dubai by the Dubai Financial Services Authority (DFSA).

### **Abu Dhabi Securities Exchange (ADX)**

ADX was also established in 2000 and operates as a secondary market for the trading of different types of securities. It currently has trading locations in Al Ain and in the Emirates of Fujairah, Sharjah and Ras Al-Khaimah. ADX is governed and regulated by the SCA.

### **NASDAQ Dubai**

NASDAQ Dubai was created in 2005 and is based in the Dubai International Finance Centre (DIFC) which has an independent commercial legal system based largely on English law. The exchange is regulated by the DFSA. There is also a greater emphasis on a regional (and global) role for NASDAQ Dubai by contrast to the domestic focus of DFM and ADX.

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## *Is there a private placement market?*

The UAE has a relatively active private placement market.

There is no dominant standard for documentation, but private placement documentation will often take into consideration the style /approach of the Loan Market Association and International Capital Markets Association (if appropriate to do so).

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## *Are there any other notable risks or issues around issuing or investing in debt securities?*

### Issuing debt securities

Issuers, originators and obligors are required to take responsibility for prospectuses for debt securities. Misleading statements in, or omissions from, any applicable offering document can give rise to both civil and criminal liability under UAE law.

### Investing in debt securities

Debt security terms and conditions typically contain provisions which may permit their modification without the consent of all investors and confer significant discretions on the trustee (or delegate), which may be exercised without the consent of investors and without regard to the individual interests of particular investors. The conditions also provide for meetings of investors to consider matters affecting the investors interests. These provisions typically permit defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

In certain respects, the legal and regulatory framework in the UAE is still developing for debt securities (and is therefore viewed as an emerging market). Accordingly, there may be certain additional risks for investors in terms of enforceability of obligations and the ability to exercise certain rights. However, this will ultimately depend of the nature of the debt securities and careful consideration will need to be made as to the appropriate risk factors to be included in the prospectus or offering document in this regard.

Before making an investment decision, prospective investors in debt securities should always consider carefully – in the light of their own financial circumstances and investment objectives – all of the information in the prospectus (and consult their own financial, tax, legal and other professional advisors regarding the suitability of any debt security).

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## Establishing and investing in debt / hedge funds

### *Are there any restrictions on establishing a fund?*

#### Onshore UAE

The federal securities regulatory authority of the UAE is the Emirates Securities and Commodities Authority (SCA), which is responsible for regulating the rules applicable to the incorporation and establishment of domestic funds as well as the promotion and marketing of foreign funds, in the UAE.

Generally speaking, under the relevant regulations (notably SCA Board Decision No.3 of 2017 regarding the Promotion and Introduction Regulations (PIRs)), the promotion of financial products to persons in the UAE requires a SCA license for which an onshore UAE business presence is required. Any person introducing UAE investors to a service provider in order to receive financial services, including trading services, needs to get the SCA's approval. However, neither the SCA license nor the SCA approval requirements apply when an exclusion is available. For example, promoting to, or introducing, institutional investors and licensed financial institutions, or government bodies and entities owned by them are excluded as is acting on the basis of a reverse solicitation. Promoting or introducing in relation to UAE retail or high net worth individuals is not permitted without the relevant license/approval. Finally, while licensed promoters need only

notify the SCA of any promotions they make in the UAE, promoters proposing to market foreign funds in the UAE must obtain the SCA's prior approval.

These requirements also apply to firms located in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global market (ADGM) when they wish to approach retail or high net worth individuals who are located in the UAE.

## DIFC

In the DIFC, the Dubai Financial Services Authority (DFSA) is the relevant regulatory authority that oversees funds established and marketed in the DIFC. Similarly with the position onshore in the UAE, various licencing requirements must be met before a fund can be established and promoted in the DIFC. For example, depending on the type of fund there may be requirements to register the fund with the DFSA or notify the DFSA of the fund's activity, as well as certain licencing requirements that fund managers operating in the DIFC must meet.

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## *What are common fund structures?*

### Onshore UAE

The SCA Chairman Decision No. 9 of 2016 Concerning the Regulations as to Investment Funds (Investment Fund Regulations) governs the establishment, licensing and management of funds in onshore UAE. The types of funds that are able to be established under the Investment Fund Regulations include:

- public investment funds (i.e. funds which target any type of investor); and
- private investment funds (i.e. funds which target only qualified investors).

The Investment Fund Regulations provide that these public or private funds may either be "open-ended" (i.e. a fund with variable capital where the number of unitholders can increase or decrease) or "close-ended" (i.e. a fund with generally fixed capital). Under the Investment Fund Regulations:

- all funds established have corporate personality and independent financial liability; and
- all funds must be managed by a management company that is licensed in accordance with the Investment Fund Regulations, meets certain minimum capital requirements and meets other operational requirements set out in the Investment Fund Regulations.

### Dubai International Finance Centre (DIFC)

The three types of corporate entity that can be used to establish a domestic fund in the DIFC are:

- investment companies;
- investment trusts; and
- investment partnerships.

Trust structures are predominately used for property funds and investment partnerships are commonly used for private equity funds. An investment partnership is a limited partnership registered with the DIFC, comprised of general partners and limited partners. The general partner must be authorized by the Dubai Financial Services Authority (DFSA) to act as the fund manager.

The three types of fund that can be established in the DIFC are:

- public funds (including REITs);
- exempt funds; and

- qualified investor funds (QIFs).

As public funds are open to retail investors, more extensive regulatory requirements apply to these funds. Exempt funds are only open to professional clients who must make a minimum subscription of US\$50,000, and cannot be offered to the public (distribution is only allowed through private placement). Private equity funds are usually exempt funds.

A QIF provides a lower cost and less regulated alternative to an exempt fund. The QIF regime is specifically targeted at sophisticated investors such as high net worth individuals and family offices. To qualify as a QIF, the fund must meet all of the following criteria (both at inception and on an ongoing basis):

- units in the QIF must only be offered by way of private placement to unit holders who meet the 'professional client' criteria; and
- unit holders must subscribe for at least US\$500,000 of units in the QIF.

The DIFC has also adopted a special purpose company (SPC) structure through which many managers effect their private equity, real estate and alternative investments. Managers have looked to the SPC structure due to the short time frame to establish an SPC (ie one week versus potentially months to establish in other local jurisdictions), as well as the DIFC's legal regime (which is based on English law) and the general recognition and treatment of DIFC companies as onshore companies for tax and regulatory purposes in the GCC.

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## *What are the differences between offering fund securities to professional / institutional or other investors?*

### Onshore UAE

When it comes to offering or marketing securities in onshore registered funds, the main rule is that fund securities may not be offered if such funds securities have not been approved and registered with the SCA. Very limited exceptions however may apply in the context of a private offering made to Qualified Investors (noting that the Qualified Investors exception does not apply to natural persons whether or not such natural persons are high-net worth individuals).

### DIFC

In relation to offering or marketing securities in DIFC registered funds, the governing regulations (i.e. the Collective Investment Law DIFC Law No. 2 of 2010 (Collective Investment Law)) provides that, for offering securities to both professional/institutional investors (known as "Professional Clients") and for offering securities to other investors (such as retail investors), a prospectus must be prepared and the offer must be made by a qualified fund manager. However where the regulations differ between professional/institutional investors and retail investors is when it comes to publication of the prospectus, given that the Collective Investment Law provides that where an offer of securities is in relation to a "Public Fund" (i.e. any fund which includes retail investors) then the prospectus must be filed with the relevant DIFC authority.

### General comments

Care should be had when marketing an onshore registered fund in an offshore jurisdiction and vice versa, given that the relevant regulatory authorities may have memorandums of understanding in place which set out separate regulations with respect to these situations.

We also note that the fund regulations, both onshore and offshore, are subject to any guidance notes issued by the respective authorities that may be published from time to time.

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## *Are there any other notable risks or issues around establishing and investing in funds?*

In certain respects, the legal and regulatory framework in the UAE (both onshore UAE and the Dubai International Financial Centre (DIFC)) is still developing for the funds market (and is therefore viewed as an emerging market). Accordingly, there may be certain additional risks

for investors in terms of enforceability of obligations and/or the ability to exercise certain rights. However, this will ultimately depend of the nature of the fund and careful consideration will need to be made as to the appropriate risk factors to be included in the prospectus or offering document in this regard.

Before making an investment decision, prospective investors in funds should always consider carefully – in the light of their own financial circumstances and investment objectives – all of the information in the prospectus (and consult their own financial, tax, legal and other professional advisors regarding the suitability of any debt security).

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## Managing and marketing debt / hedge funds

### *Are there any restrictions on marketing a fund?*

#### Onshore UAE

Funds promoted and introduced to investors based onshore in the UAE will need to be registered with the UAE Securities and Commission Authority (SCA) unless a statutory exemption applies (noting that the regulations provide for exemptions for reverse solicitation and for marketing to "Qualified Investors", among others). For an issuer to be able to obtain a licence to promote funds to investors in the UAE, the issuer must:

- seek approval of the SCA ;
- meet certain minimum capital requirements;
- pay applicable licence fees; and
- undertake to comply with the relevant SCA rules and conditions.

Once the fund is registered then, in order to market securities/units in the fund, the issuer will be required to comply with various rules regarding prospectuses, documentation regarding key investor information and ensuring that the fund has an investment policy.

#### DIFC

In the Dubai International Financial Centre (DIFC), "Public Funds" are required to be registered with the Dubai Financial Services Authority (DFSA). An application to register a Public Fund must include, among other things, the fund's constitution and prospectus. Other funds established in the DIFC such as "Exempt Funds" and "Qualified Investor Funds" are not required to be registered with the DFSA, however the DFSA must be notified prior to any offering of securities/units with respect to such funds.

When it comes to offering securities/units, the governing regulations (i.e. the Collective Investment Law DIFC Law No. 2 of 2010 (Collective Investment Law)) provide that before any offer a prospectus must be prepared by a qualified fund manager which, for Public Funds, is to be registered with the DFSA.

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### *Are there any restrictions on managing a fund?*

#### Onshore UAE

All entities that practice the activities of establishing and running onshore funds must be licenced with the UAE Securities and Commission Authority (SCA). In order to obtain a licence then the management entity must meet the criteria specified in the SCA Chairman Decision No. 9 of 2016 Concerning the Regulations as to Investment Funds (Investment Fund Regulations), which includes:

- being a company operating in the area of securities / fund management, or being a local or foreign bank specified in the Investment Fund Regulations;
- meeting certain minimum capital requirements;



- having its Memorandum of Association authenticated;
- paying the prescribed licencing fees;
- appointing personnel with the necessary technical and administrative expertise; and
- meeting certain other operational requirements.

## DIFC

Hedge funds in the Dubai International Financial Centre (DIFC) are regulated by the Collective Investment Rules module of the Dubai Financial Services Authority (DFSA) Rulebook, similar to other investment funds. The DFSA has implemented the Hedge Fund Code of Practice (Code), which sets out the principal risks associated with hedge funds and similar structures and sets out best practice standards. Hedge fund managers are permitted a degree of flexibility to adapt the standards to suit their particular businesses in light of market conditions and emerging issues. These standards, *inter alia*, address back-office systems, valuation procedures, and the skills and resources of the manager.

The Code, which sets out best practice standards for Fund Managers of Hedge Funds in the DIFC (ie Fund Managers of Public Funds, Exempt Funds or qualified investment funds (QIFs) which are classified as Hedge Funds), addresses risks inherent in the operation of Hedge Funds and are set out under the following nine principles:

- **principle 1** – appropriate skills and resources to conduct the operations of the fund;
- **principle 2** – robust and flexible investment process in line with the risk profile of the fund;
- **principle 3** – systems and controls to mitigate trading related risks;
- **principle 4** – adequate back-office systems and controls;
- **principle 5** – appropriate measures to identify and manage portfolio risks;
- **principle 6** – adequate valuation policies and procedures;
- **principle 7** – no arrangements where material benefits are given only to some investors;
- **principle 8** – adequate systems and controls to deal with market sensitive information; and
- **principle 9** – no investment in underlying hedge funds without appropriate due diligence.

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## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

The development of derivatives in the UAE has not been without its challenges for a number of years due to the lack of recognition of close-out netting and the absence of a UAE law dealing with derivatives contracts. This is no longer the case with the recent introduction of Federal Law No. 10 of 2018 (the "Netting Law") which applies to counterparties based 'onshore' in the UAE.

Before the Netting Law, financiers would effectively be taking their chances with the UAE Federal Bankruptcy Law - which only allows set-off or netting of debts that are contractually agreed before the onset of insolvency. This left a great deal of uncertainty as to the enforceability of netting provisions in any post-insolvency scenario involving a UAE counterparty.

The new Netting Law is expected to provide greater certainty by recognising the principle of close-out netting as incorporated into a master level agreement (intended to cover a series of derivatives transactions between two parties), by providing for a single 'net' amount to be payable - as between those parties - upon a close-out or termination. Furthermore, qualified financial contracts under the umbrella of a master agreement constitute a 'single' agreement which is essential for the purposes of netting multiple financial contracts entered into between the same two counterparties.

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## *What are common types of derivatives?*

Although a variety of derivatives structures exist in the UAE, so far, the only relevant court decisions relate to foreign exchange contracts.

The new Netting Law contemplates a number of qualified financial contracts as well Shariah compliant contracts: murabaha, musawamah, master collateralized murabaha, restricted and unrestricted wakala, alternative profit rate swap, alternative cross-currency swap and alternative foreign exchange forward are all mentioned.

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## *Are there any other notable risks or issues around entering into derivatives contracts?*

UAE courts are in general not very experienced in dealing with complex financial transaction structures, and will often require an expert to be appointed to guide the court on such matters. The Netting Law is relatively new and remains largely untested with very few case law dealing with derivatives transactions. Accordingly, the parameters around its implementation remain to be seen.

The ISDA has commissioned a law firm to provide a netting-law opinion in respect of the enforceability in the UAE of the ISDA Master Agreement.

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## Debt finance

### Lending and borrowing

#### *Are there any restrictions on lending and borrowing?*

##### Lending

###### LICENSING REQUIREMENTS IN THE UAE

The Central Bank of the UAE (Central Bank) and the Securities and Commodities Authority (SCA) are the main regulatory bodies for financial services in the UAE (except in the DIFC and ADGM). Pursuant to Federal Law No. 14 of 2018 (New Banking Law), the Central Bank regulates financial institutions, including those who wish to provide financing in or from onshore UAE.

Lenders including commercial banks, investment banks, investment companies, finance companies, Islamic banks, Islamic finance companies and real estate finance companies are regulated by the Central Bank and require a license. .

In order to obtain a license from the Central Bank to carry out one or more licensed financial activities, a letter of application, certain corporate documents of the applicant and a business plan are submitted to the Central Bank. The specific documents required for the license are not listed by the Central Bank but the applicant should expect to be notified if additional documents are necessary for the process to be finalized. The New Banking Law provides that the Central Bank should issue its acceptance within 60 working days from the date all documents and conditions are met. If the applicant does not receive a decision within 60 working days, then this would mean the Central Bank has rejected the application.

UAE lenders who enter into financial arrangements with a borrower in the UAE without a license may face imprisonment and/or a fine and the relevant institution may be liable for civil and criminal claims.

###### LICENSING REQUIREMENTS IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE (DIFC)

The principal regulator for regulating financial services within the DIFC is the Dubai Financial Services Authority (DFSA). An individual or entity based in the DIFC which provides a financial service must be authorized by the DFSA by obtaining the appropriate license.

An entity who wishes to satisfy the eligibility requirements in the DIFC must be structured as any one of the following forms of business: limited liability company; company limited by shares; limited liability partnership; protected cell company; investment company; branch of foreign company or partnership; or special purpose company.

The consequences of licensing violations can be severe. If a lender does not satisfy the requirements, then the DFSA (under the regulatory law and DFSA's Enforcement Rulebook) can enforce the following actions as punishment:

- a fine of US\$100,000 per contravention; damages or restitution;
- injunctions and restraining orders; corporate penalties – unlimited fines through the Financial Markets Tribunal (FMT); and
- a banning order through the FMT.

As a consequence of violating the Financial Services Prohibition section of the regulatory law, lenders will also face censure by way of publication of any enforcement action leading to critical reputational damage and the loan arrangement may also be considered unenforceable.

## Borrowing

### MORTGAGE FOR PROPERTY

In the last quarter of 2013 the Central Bank issued set of regulations (Regulations) on mortgage lending which defines the eligibility of various categories of borrowers based on a loan-to-property value ratio (LTV). The primary aim of the Regulations is to ensure that banks, finance companies and other financial institutions providing mortgage loans to UAE nationals and expatriates do so in accordance with best practice and have control frameworks in place. The Regulations applies without exemption to banks and institutions providing *Shari'a*-compliant loans for the purchase of properties.

Whether these Regulations would still be in force or new set of regulations would be issued by the UAE Central Bank following the implementation of the New Banking Law, remains to be seen. As of now, these Regulation would appear to continue to apply as they are still made available to banks in the Central Bank's website. Pursuant to these Regulations, the following LTV requirements apply.

#### UAE NATIONALS (INCLUSIVE OF GULF CORPORATION COUNCIL (GCC) NATIONALS)

- Properties >AED 5 million, the LTV = 80% of the property value
- Properties <AED 5 million, the LTV = 70% of the property value
- Off-plan properties, the LTV = 50% of the property value

Each borrower is only entitled to seek a loan for one property falling within these two categories and therefore it would appear that these LTV ratios are intended for owner occupiers.

If UAE nationals seek loans for a second home or investment property, the LTV must not exceed 65% of the value of the property.

#### NON GCC NATIONALS

- Properties >AED 5 million, the LTV = 75% of the property value
- Properties <AED 5 million, the LTV = 65% of the property value
- Off-plan properties, the LTV = 50% of the property value

Each borrower is limited to one loan for the purchase of properties within these categories.

In the event of a second home or an investment property purchase by a non-UAE national, the Regulations state that the maximum loan available will be 60% of the value of the property.

UAE Law No. 2 of 2015 concerning Commercial Companies provides that shareholders in LLCs can pledge security, and that such pledges must be made in accordance with the company's memorandum and articles of association, and be notarized. For more information, see [Giving and taking guarantees and security](#).

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## What are common lending structures?

Lending in the UAE can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents which fulfil certain roles for the finance parties), and are more highly structured, involving more complex documentation. Larger financings will typically be done on a 'club' or syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, equity bridge facilities, project, real estate facilities, trading finance and letter of credit facilities.

## Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

## Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see [Giving and taking guarantees and security](#).

## Loan commitment

A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

## Loan repayment

A loan can also be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or scheduled (usually meaning the loan is repayable in full at maturity).

## Shari'a and Islamic finance

Islamic banking and finance transactions are based on Islamic principles and jurisprudence (together referred to as *Shari'a* or Islamic law) which is derived from a number of sources, including the Qu'ran. Islamic finance structures and techniques have developed in accordance with *Shari'a* principles and these principles must be adhered to when deciding whether a proposed financing structure or product is Islamically acceptable.

The key principles are as follows:

- **No interest** – Under *Shari'a*, money is regarded as having no intrinsic value and also no time value. The payment and receipt of interest (*riba*) is prohibited under Islamic law and any obligation to pay interest is considered to be void. This rule also prevents a financier from charging penalties and/or default interest.



- **No uncertainty** – Uncertainty (or *gharrar*), particularly any uncertainty as to one of the fundamental terms of an Islamic contract (such as subject matter, price or delivery), is considered to be void under *Shari'a*. This principle is fairly broad as it requires certainty on all fundamental terms of a contractual arrangement.
- **No speculation** – Contracts which involve any speculation are not permissible (*haram*) and are considered to be void. This does not, however, prevent a degree of commercial speculation which is evident in a lot of commercial transactions. The prohibition applies to forms of speculation which are regarded as gambling. The general test is whether something has been gained by chance.
- **Unjust enrichment/exploitation** – A contract where one party is regarded as having unjustly gained (at the expense of another) is also void. The principle also extends to the enrichment of one party who exercises undue influence or duress over the other party.
- **Investments** – The proceeds in Islamic finance should not be used for the purposes of purchasing or investing in products or activities that are prohibited. These prohibited items and activities include the manufacture and/or the sale or distribution of alcohol, tobacco, pork products, music or pornographic productions, the operation of gambling casinos or manufacturers of gambling machines – but also extend to conventional banking and insurance activities, as well as defense and weaponry.

Islamic financiers or investors work closely with *Shari'a* scholars – Muslim scholars who specialize in providing guidance on the application of *Shari'a* principles to commercial activities – to make sure that structures and products remain compliant with the rules and principles outlined above. In effect, these scholars have the controlling say in whether or not a particular structure, product or document should be approved. However, it is important to note that *Shari'a* is not a codified system of law and interpretations of the key principles can vary, particularly between the different 'schools of thought' within Islam.

Islamic principles do not prohibit a financier in an Islamic finance transaction from making a *profit*, *rental* or other *return* on its asset or investment. To that end, a number of contemporary structuring techniques (or Islamic contracts) have developed which allow Islamic bankers to structure transactions and products in a way that comply with Islamic principles While also replicating the economics of conventional loans and products. Alternatively, a structure may demonstrate that the financier has assumed some of the commercial risk inherent in an underlying transaction or business venture. Sometimes these structures or approaches can be combined.

#### SOME EXAMPLES OF *SHARI'A* CONTRACTS

- **Sukuk** – These are a type of certificate or note (often called Islamic bonds) which represent a proportionate interest (sometimes also described as a participatory interest) in an underlying asset or investment. They are generally considered to be debt securities (akin to bonds) which, depending on the underlying asset or transaction, can be traded in the secondary market. The *Sukuk* certificates are often 'layered' on top of an underlying Islamic financing technique which is intended to derive a return from an underlying asset or investment (such as *Ijara* – see below).
- **Ijara** – This is Islamic financing's equivalent of leasing and is often described as a hybrid between an operating lease and a finance lease. In general terms, the financier will act as lessor and the borrower entity will act as lessee and will pay rentals to the lessor.
- **Murabaha** – The financier will buy an asset or a commodity from a supplier and will then on-sell the asset to the customer on deferred payment terms at an agreed marked-up price (cost price plus profit).
- **Wakala** – This is an agency relationship between an investor or principal (*muwakkil*) and the agent (*wakil*).
- **Istisna'a** – This is essentially a sale contract whereby the seller or manufacturer undertakes to deliver a specific asset according to certain agreed specifications. The price of the asset and the date of delivery are specified at the outset.
- **Mudaraba** – This is a contractual arrangement between investors (*rab al-maal*) and a manager (*mudareb*). The investors typically put up capital which the manager then invests.

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## *What are the differences between lending to institutional / professional or other borrowers?*

Lending to institutional/professional borrowers is subject to different regulatory oversight and may be less burdensome from a compliance perspective.

The Central Bank issued regulations No 29 of 2011 regarding Bank Loans & Services Offered to Individual Customers. The regulations control lending activities and excessive charges by banks and aim to protect banks by regulating lending and encouraging banks to carry

out detailed due diligence on their potential borrowers. The regulations enable individual customers to borrow only up to 20 times their salary or monthly income and requires that repayment instalments should not exceed 50% of the borrower's gross salary or any regular income from a specific source. With the introduction of the New Banking Law, it is expected that a new set of regulations for loans made available to consumers will be issued in the next 2-3 years.

For more information, see [Lending and borrowing – restrictions](#).

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## *Do the laws recognize the principles of agency and trusts?*

The concept of 'trusts' and 'trustees' are more regularly referred to in the UAE as 'agent' or 'security agent' or due to concerns around trusts not being recognised onshore in the UAE. By contrast, agency is a largely recognized concept and often utilized in onshore, offshore (including the Dubai International Finance Centre) and Islamic finance structures. In Islamic transactions, if the transaction is structured in compliance with Shari'a, the addition of an agent is not uncommon, in order for them to represent a group of lenders and guard their interests.

Further, onshore and offshore entities in the UAE may require a security agent to be employed, particularly in the context of security over certain type of assets (such as shares) which is granted in the region and can only be enforced by local institutions or entities that have specific licenses. Typically, this only becomes an issue upon enforcement; however, lenders should be mindful of this as it may affect the value they place on such types of security.

It is also worth noting that parallel debt language is often used to support a security agent's rights to claim against a security provider in the UAE.

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## *Are there any other notable risks or issues around lending?*

### Financial assistance

Under the Companies Law it is not possible for a public joint-stock company (PJSC) target, or any of its subsidiaries, to provide any financial aid (such as loans and guarantees) that will assist a purchaser in acquiring its shares. However, limited liability companies are exempt from such restrictions under Ministerial Resolution No. 272 of 2016 on the Implementation of Certain Provisions of the PJSC to LLCs.

### Standard form documentation

Most syndicated finance transactions are governed by documentation based on recommended forms published by the [Loan Market Association](#). Bilateral finance transactions are more likely to be documented on bank standard form documentation prepared in-house.

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## *Are there any other notable risks or issues around borrowing?*

Borrowers may often be limited in the kinds of transactions and financings they can enter into, particularly in cases where the transaction is highly structured and involves the issuance of debt securities. In addition, restrictions arise when the relevant financiers or borrowers are *Shari'a*-compliant. However, most of the major international lenders have their own Islamic banking desks and many retain *Shari'a* advisory boards. Such institutions are growing more comfortable with the main Islamic financing mechanisms.

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## Giving and taking guarantees and security

## *Are there any restrictions on giving and taking guarantees and security?*

Some of the key areas affecting the giving of guarantees and security are as follows.

### Capacity

It is important to check the constitutional documents of a company giving a guarantee or security to ensure it has an express or ancillary power to do so and there are no restrictions on the directors' powers to do so. In general, the directors'/managers' duties requirements under the Companies Law require the directors/manager to 'preserve' the company's rights which is similar to the English law requirement that directors act in the best interests of the company. However, provided that the giving of a guarantee or the granting of security is considered to be in the best interests of the group as a whole, there should be no issues from a directors' duties perspective. This should be recorded in the authorizing resolutions when the security is granted.

### Public joint-stock company (PJSCs)

Special care needs to be taken if a PJSC is granting security or giving a guarantee. Article 154 of the Companies Law requires directors to have express powers to enter into mortgages (over moveable and immovable property). Consequently, a separate shareholders' resolution will be required if such express powers are not already provided in, for instance, the company's constitutional documents. Although the legislation would appear to capture LLCs as well, it was clarified by a 2016 Ministerial Decision that this requirement does not apply to LLCs.

In addition, there is a broad prohibition on PJSCs providing financial assistance for the purchase of its own (or of its holding company's) shares. It is important to note that there is no 'whitewash' procedure available of the type seen in other jurisdictions.

### Insolvency

Guarantees and security may be at risk of being set aside under the UAE Insolvency Law if granted by a company within a certain period of time prior to the onset of insolvency.

### No concept of trust

There is no concept of trust as exists in common law jurisdictions and the use of a local security agent holding security for the benefit of lenders through a parallel debt mechanism has become market practice (although has not been tested by the courts).

### Notarization

With respect to security over certain assets (such as share security taken with respect to certain companies), it is necessary that the signing of the security is notarized in front of a UAE notary public. In order to notarize the signing of a document, the notary public will generally require all relevant documents (such as constitutional documents of the grantor, required board or shareholder resolutions and licenses to be translated into Arabic, notarized in the relevant jurisdiction of the shareholders and then legalized both in the country of the shareholder and then brought onshore and stamped by the Ministry of Justice).

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## *What are common types of guarantees and security?*

### Common forms of guarantees

Guarantees are common in the UAE and it is also quite common to see personal guarantees given in relation to a loan for commercial purposes.

Guarantees are specifically codified in Chapter V of the Civil Code. Separate rules apply to bank guarantees under the Commercial Transactions Law. Although UAE courts have taken different approaches as to whether a guarantee of a bank loan is a civil or commercial transaction, it is common to disapply certain provisions of the Civil Code which may have an impact on the lenders' position (such as Article 1092 of the Civil Code which provides that a creditor must claim for a due debt within six months from the date of maturity).

The Commercial Code recognizes bank guarantees (which often take the form of a bond). Certain rules apply to these instruments such as assignment and time limits and there is a provision that 'in exceptional circumstances', the guarantor can successfully resist payment. It should be noted that the courts have been reluctant to apply this provision.

## Types of security

Security over real estate and real estate interests (such as *usufructs* and *musatahas* (akin to a development agreement) are taken by way of mortgage. Some of the Emirates (and free zones) have specific laws dealing with mortgages but in the absence of legislation, mortgages are governed by the Civil Code. Although the practices of the relevant registrars may differ (and the practice at a particular registrar might evolve as well), generally mortgages over real estate may only be granted in favor of a bank which is licensed by the UAE Central Bank, be translated into Arabic and notarized prior to registration.

In relation to moveable property, UAE Law No. 20 of 2016 on the Mortgage of Moveable Assets to Secure a Debt (Pledge Law) governs how security is taken over certain classes of moveable assets such as accounts, trade payables, equipment and tools, goods and raw materials and agricultural products. The Pledge Law provides that security over such moveable property should be by way of written security agreement or mortgage and, contrary to the previous position in the UAE, allows security to be taken over property without demonstrating possession and also allows security to be taken over future property (including bank accounts with fluctuating balances). It is therefore possible to take security over such moveable property which is similar in effect to an English debenture or law floating charge (provided that the requirements of the Pledge Law are adhered to).

We note, however, that the Pledge Law does not govern security over all moveable assets, and so care should be taken when securing a particular asset class to ensure that the security is in the correct form. For example, the Pledge Law specifically excludes insurance contracts and proceeds from its operation, meaning that any security taken over insurance contracts and proceeds should follow the traditional form (which is security by way of assignment). Security over ships, aircrafts and vehicles are also subject to different laws and regulations in the UAE. Depending on the nature of a transaction, this may require the security document to be notarized and for registration to be made in an appropriate asset register.

Due to the introduction of the new Companies Law, it is possible to take security over the shares in a company, including onshore LLCs. (It should be noted that the position differs from free zone to free zone and would need to be checked.) The process for taking security over pledges of shares should be checked with the relevant department in each Emirate as the process differs. However, generally the practice has been that this security may only be granted in favor of a bank licensed to carry out business in the UAE and is subject to notarization requirements.

*Last modified 23 Jan 2020*

## Are there any other notable risks or issues around giving and taking guarantees and security?

### Giving or taking guarantees

The Civil Code provides that a lender should not be obliged to first prove the bankruptcy of the borrower before claiming against the guarantor and that the borrower and the guarantor shall not be discharged from the balance of the debt if the parties agree a composition in relation to part of the debt. These provisions can be set aside.

There is no concept of a deed under UAE law and accordingly, guarantees should be executed in the same manner as any other contract. There is also no requirement for guarantees to be notarized, although it is quite common for the signature of a personal guarantor to be witnessed.

However, if a guarantee were to be brought before a local court, it would need to be translated into Arabic by a certified translator and the Arabic version would prevail- for this reason, parties sometimes require a guarantee to be translated into an agreed version of Arabic prior to execution although there is no universal practice in this regard.

### Giving or taking security



As mentioned above, there is no concept of a deed under UAE law. Depending upon the type of security and where the asset is located (onshore or in a free zone), there may be a prescribed form of security (for example, the Dubai Land Department requires a short form mortgage to be registered, so a practice has developed that both a long form and short form mortgage are signed).

In relation to security taken over moveable property pursuant to the Pledge Law, in order to perfect such security it is necessary to register the security on the register established under the Pledge Law, which is known as the "Emirates Moveable Collateral Registry". The Emirates Moveable Collateral Registry is an online registry, and so in order for a secured party to effect a registration with this registry it is a matter of the secured party creating an online account with the registry and then submitting via an online form the required information about the secured property and the security provider.

The registration requirements in relation to other forms of security should always be checked as there are time periods required by some free zone registries.

*Last modified 23 Jan 2020*

## Financial regulation

### Law and regulation

*What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

#### Generally

##### LEGISLATION IN THE UAE

The Consolidated Constitution of the UAE (as amended) – (Article 7 establishes the *Shari'a* law as a fundamental source of legislation)

UAE Central Bank Federal Law No. 14 of 2018

UAE Federal Law No. 8 of 2018 on Financial Leasing

Central Bank Circulars

UAE Basel II Guidelines for Banks

Corporate Governance Guidelines 2009

Foreign Account Tax Compliance Act (FATCA)

UAE Federal Law No. 10 of 2018 regarding Netting

UAE Civil Code Federal Law No. 5 of 1985

UAE Law of Civil Procedure Federal Law No. 11 of 1992 and Federal Law No. 10 of 2014

UAE Commercial Transactions Law Federal Law 18 of 1993

UAE Commercial Companies Law Federal Law No. 2 of 2015

UAE Insurance Law Federal Law No. 6 of 2007

Central Bank Framework on Stored Values and Electronic Payment Systems of 2017

UAE Federal Law No. 9 of 2018 (Regarding Public Debt)

## FREE/SPECIAL ECONOMIC ZONES IN THE UAE

There are over 40 free zones in the UAE currently which are set up under the laws of its host emirate regarding free zone companies and establishments. There is no federal free zone authority (although one was discussed extensively in 2007 and 2008) those free zones are given a degree of freedom to self-regulate so long as such regulation does not violate the provisions of local/national law, or constitute a violation of public morals or be contrary to public interest.

In addition to the free zones generally, Abu Dhabi Global Market (ADGM) and Dubai International Financial Centre (DIFC) are two financial free zones which have their own court system and legislative capacity.

While we do not cover the free zones in any great detail on this site, it is important to recognize that ADGM and DIFC have signed memoranda of understanding and mutual recognition with the local courts and/or federal court systems in their respective Emirates which means a decision from either of ADGM or DIFC can be enforced and executed directly through the local courts respectively without the case being heard *ab initio*.

- [UAE Federal Law No. 8 of 2004 on the Financial Free Zones of the UAE](#)
- [DIFC Laws and Regulations](#)
- [Dubai Financial Services Authority \(DFSA\) Laws and Regulations](#)
- [ADGM Laws and Regulations](#)
- The Free Zones Laws and Regulations
- [Emirates Securities and Commodities Authority](#)
- UAE Insolvency Law Federal Law No. 9 of 2016
- UAE Penal Code Federal Law No. 3 of 1987
- UAE Decree-law No. 20 of 2018 on Anti-Money Laundering

## Consumer credit

UAE Credit Information Law Federal Law No 6 of 2010 and Cabinet Resolution 16 of 2014 (information requirements and sharing)

UAE Consumer Protection Law Federal Law No 2 of 2006 and Executive Regulations of 2007

## Mortgages

UAE Civil Code

UAE Commercial Transactions Law

UAE Central Bank Circular October 2013 established a loan to value ratio for mortgages

Dubai Law No. 8 of 2008 and 9 of 2009

Dubai Mortgage Law Decree No 31 of 2016

UAE Law No. 20 of 2016 on the Mortgage of Moveable Assets to Secure a Debt and its executive regulations (Cabinet Resolutions No. 5 and No. 6 of 2018). This law which came into effect on 15 March 2017 has established the Emirates Moveables Collateral Registry which is an online registry allowing the registration of security over moveables in the UAE. This law is perceived as a much welcomed addition to the UAE financial landscape (especially for cross-border financing).

## Corporations

UAE Civil Code

UAE Commercial Companies Law Federal Law No. 2 of 2015

## Funds and platforms

SCA Chairman's Regulation No. 9 of 2016

SCA Chairman's Regulation No. 3 of 2017

Taken together, these regulations establish procedures for licensing, management, offer document contents, subscription, issuance and listing of funds.

Funds are listed on the Dubai Financial Market and NASDAQ Dubai. There are many trading platforms available including online trading platforms.

## Other key market legislation

The United Arab Emirates is a federation of seven independent states, each of which has judicial capacity. In addition, through changes to the UAE Constitution, special free economic and financial free zones have been set up to attract foreign direct inward investment, each of which has its own regulatory authority.

It is possible that in order to establish the regulatory framework applicable to a company, fund, investment scheme, or activity that one or more and potentially all of the following legislation will need to be reviewed:

- UAE Federal legislation;
- legislation passed by each individual emirate but note:
  - Ajman, Fujairah, Sharjah, and Umm Al Quwain generally follow the same or substantially similar laws and adhere to the Federal Court System; and
  - Dubai, Abu Dhabi and Ras Al Khaimah have derogated from the Federal Court System and each have their own court system or judicial departments (independent from the federal system) – they pass laws which affect their emirate alone;
- DIFC Legislation;
- The Law and Regulations enacted in each other free zone;
- DFSA Rules and Regulations;
- ADGM Legislation;
- UAE Central Bank Circulars and Resolutions; and
- UAE Securities and Commodities Authority.

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## Regulatory authorization

### *Who are the regulators?*

This depends on the entity, its location and the relevant regulations and laws that apply.

The UAE is a federation of seven independent emirates each of which has its own judicial capacity. The applicable laws are those federal laws passed by the federal government of the UAE but each can be supplemented by laws passed by the rulers of individual emirates.

The UAE has a federal court system which is followed in the Emirates of Ajman, Fujairah, Sharjah and Umm Al Quwain. The Emirates of Abu Dhabi, Dubai and Ras Al Khaimah have separate court systems or judicial departments (independent from the federal system).

In addition, through changes to the UAE Constitution, two financial free zones have been created (Abu Dhabi Global Market (ADGM) and Dubai International Financial Centre (DIFC)) which have their own court systems based not on the federal Civil Code but English common law.

The Central Bank of the UAE (Central Bank) and the Securities and Commodities Authority (SCA) are the main regulatory bodies for financial services in the UAE. Pursuant to Federal Law No. 14 of 2018 (New Banking Law), the Central Bank regulates financial institutions, including those who wish to provide financing and engaged in financial licensed activities in or from the UAE. The New Banking Law replaces and repeals the Federal Law No. 10 of 1980 and Federal Law No. 6 of 1985 (together the Old Banking Laws).

Taking this together when considering the question of regulation of a particular entity or activity, it may be possible that any of the following regulatory bodies may have authority:

- UAE Central Bank;
- UAE Securities and Commodities Authority;
- Abu Dhabi Global Market Authority Courts;
- Dubai International Financial Centre Courts;
- Dubai Financial Services Authority;
- a relevant Free Zone Authority;
- UAE Penal Code; and
- laws and regulations passed by individual emirates.

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### *What are the authorization requirements and process?*

This is dependent upon what type of business/financial activity the firm would be participating in the UAE. Secondly, it depends where the firm is located either onshore UAE or in one of the economic free zones (in the case of finance, most likely to be in the Dubai International Financial Centre (DIFC) or Abu Dhabi Global Market (ADGM)). The institutions listed in our answer to [Regulatory authorization – regulators](#) (ie the Central Bank, DIFC, Dubai Financial Services Authority and ADGM etc) have their own authorization requirements and processes in place.

If in doubt, the first port of call is the relevant Emirate's Economic Development Department who can advise further.

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### *What are the main ongoing compliance requirements?*

Whether the firm is located onshore or in a free zone, the firm will have ongoing compliance requirements. For example, if the firm is located in the Dubai International Financial Centre (DIFC) it will have to apply for an annual trading license from the Registrar of Companies and will need to comply with the relevant regulations and rules found in the Dubai Financial Services Authority (DFSA) Handbook. Furthermore, from time to time, the Central Bank will issue circulars with updated regulations/rules which financial firms will need to comply. In order to be clear which compliance regulations apply it is necessary to consider each case on its specific facts. But in any case, failure to comply with ongoing compliance of the relevant regulator can result in sanctions for firms including severe fines.

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### *What are the penalties for failure to be authorized?*

Depending on the individual circumstances, this could lead to corporate fines and trading privileges being removed, individual directors and corporate officers being held accountable personally for breaches of fiduciary duties, and in the case of compliance breaches and crimes this can include fines and/or terms of imprisonment of varying degrees of severity.

UAE lenders who enter into financial arrangements with a borrower in the UAE without a license may face imprisonment and/or a fine and the institution may be liable for civil and criminal claims. The relevant UAE authorities, such as the Central Bank of the UAE (Central Bank) and the Securities and Commodities Authority (SCA) may in addition impose administrative sanctions and fines.



In the case of the DIFC, if a relevant lender does not satisfy the requirements of the Dubai Financial Services Authority (DFSA), under the regulatory law and DFSA's Enforcement Rulebook the DFSA can enforce the following actions as punishment:

- a fine of US\$100,000 per contravention;
- damages or restitution;
- injunctions and restraining orders;
- corporate penalties – unlimited fines through the Financial Markets Tribunal (FMT); and
- a banning order through the FMT.

As a consequence of violating the Financial Services Prohibition section of the regulatory law, lenders will also face censure by way of publication of any enforcement action leading to critical reputational damage (and the loan arrangement may also be considered unenforceable).

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## Regulated activities

### *What finance and investment activities require authorization?*

#### Generally

Everything that is classified as financing and investment activities under various legislation.

Any licensed financial activities onshore in the UAE is governed by the UAE Central Bank. Depending on the category of activity, different rules and regulations and circulars will apply. Accordingly, interested parties should refer to the UAE Central Bank [website](#) where all current laws, regulations and circulars are provided. The scope of licensed financial activities is relatively broad and are listed in the New Banking Law. The board of directors of the Central Bank has also the power to review the list of licensed financial activities and add, exempt or remove certain activities from that list.

Any offshore entities conducting business activities within the UAE will need to be appropriately licensed by the UAE Central Bank. The types of licenses generally issued by the UAE Central Bank include commercial bank, investment companies and investment consultation, branches of foreign licensed institutions.

#### Anticipated regulatory changes

We understand that the UAE is contemplating reforming the financial services sector's regulations, which is intended to cover, among other things, custody, collective investments and broker dealing. The UAE has recently enacted the New Banking Law. As a result, a number of regulations and circulars are expected to be implemented in the next two to three years. The New Banking Law states that the Central Bank will establish an electronic guideline (i.e. a rulebook) which will include all regulations, standards, decisions and circulars issued by the Central Bank. Such electronic guideline will be published and regularly updated on the Central Bank's website. This will be a welcome change in the UAE (and follows the position adopted by the Dubai Financial Services Authority).

However, there currently exists something of a vacuum and market participants and practitioners should pay a close attention to the upcoming implementing regulations.

*Last modified 23 Jan 2020*

### *Are there any possible exemptions?*

#### Tolerated practices

While the relevant legislation clearly prohibits entities or persons from engaging in regulated activities (unless licensed to do so), under the Old Banking Laws (i.e. Federal Law No 10 of 1981 and Federal Law No. 6 of 1985) the UAE Central Bank would not always strictly monitor performance within the regulations. These are generally referred to as the 'tolerated practices' in the UAE.

To fall within the scope of the tolerated practices, the activity in question must be:

- carried out from offshore and not involve local currency (being dirhams);
- 'low profile' (that is, targeted and marketed to a defined and select group of non-retail customers); and
- one-off (anything that involved approaching residents on an unsolicited basis, road shows etc are less likely to fall within the scope of these tolerated practices).

It is important to note that the concept of 'tolerated practices' is neither a legal concept nor officially recognized by the UAE Central Bank. While it has not been tested in the UAE courts, we are not aware of any examples of any action being taken against foreign entities under the Old Banking Laws. Whether these tolerated practices will be more closely regulated or supervised by the Central Bank under the New Banking Law remains to be seen..

*Last modified 23 Jan 2020*

## *Do any exchange controls or other restrictions on payments apply?*

There are no foreign exchange controls in the UAE or restrictions on payments, except to the extent these may violate anti-money laundering rules or international sanctions.

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## *What are the rules around financial promotions?*

Under the New Banking Law, financial promotion refers to any form of communication by any means, aimed at inviting or offering to enter into any transaction, or offering to conclude any agreement related to any of the Licensed Financial Activities. Since such communications can influence consumers, entities are restricted from communicating financial promotions unless they are licensed to do so by the UAE Central Bank.

### Exemptions

Even though engaging in regulated activities is clearly prohibited (unless the person is licensed to do so), the UAE Central Bank has tolerated certain practices under the Old Banking Laws. To fall within the scope of a tolerated practice, the foreign entity must ensure that, for instance:

- only a discrete and defined group of pre-identified clients (who are either institutional, professional or sophisticated clients) are approached;
- no mass advertising campaign is carried on in the UAE;
- the person marketing the product or service is not resident in the UAE; and
- marketing activities are performed from outside the UAE (except for 'low profile' activities).

It is important to note that the concept of 'tolerated practices' is neither a legal concept nor officially recognized by the UAE Central Bank. Whilst it has not been tested in the UAE courts, we are not aware of examples of foreign entities being found liable under the Old Banking Laws. Whether these tolerated practices will be more closely regulated or supervised by the Central Bank under the New Banking Law remains to be seen.

*Last modified 23 Jan 2020*

## Entity establishment

## *What types of legal entity are generally used to undertake financial or investment activity?*

### Generally

This question varies according to the type of financial activity being practiced and the rules of the emirate and free zone in which the vehicle is set up.

Pursuant to the New Banking Law:

- Banks shall take the form of public-joint stock companies (through an incorporating law or through a decree). This does not apply to branches of foreign banks operating onshore UAE. As a general rule, a Bank shall at least have 60% UAE national shareholding.
- Other Financial Institutions (i.e. any juridical person other than a Bank) carrying one or more Licensed Financial Activities may take the form of joint-stock companies or limited liability companies in accordance with the rules and regulations issued by the board of directors of the Central Bank.
- Exchange houses and monetary institutions may be a sole proprietorship or take any other form legal form in accordance with the rules and regulations of the board of directors of the Central Bank.

In the Dubai International Finance Centre (DIFC), the type of entity and activity will generally depend on which category of license being applied for.

In each case this question needs to be examined on a case-by-case basis depending on the financial or investment activity to be carried out.

*Last modified 23 Jan 2020*

## *Is it possible to conduct lending or investment business through a branch or establishment?*

Generally, it is not possible to engage in lending or investment activities through a branch office.

*Last modified 23 Jan 2020*

## FinTech

### FinTech products and uses

## *What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

### Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Products under development are generally understood to include:

- virtual credit cards;
- consumer loans;
- student lending products;
- small and medium-sized enterprises (SME) lending; and
- residential property and commercial property mortgage lending.

It is likely that the volume of lending in these product areas as well as further and additional product areas will significantly increase over the coming years, as financing becomes more readily available to support the marketplace lending sector.

#### HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P)-type structures, often operated through an electronic platform provider as well as crowdfunding and also direct-to-retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds, as well as institutional sponsors. Funding platforms will now often be backed by institutional finance in addition to, or rather than, individual investors on a traditional P2P basis.

#### ISSUES FOR STARTUP MARKETPLACE LENDERS

Following the initial incorporation and startup funding for a new marketplace lending business, there will be a need to establish funding lines which can accommodate growth of the ongoing lending activities of the platform. As the startup lender will not have an established track record, deposit base or asset pools, the funding structure will often follow the format of a warehouse securitization structure. Origination of new assets will be funded through drawings on a note issuance facility backed by security over the new assets. Each of the new assets will be subject to eligibility criteria determined by reference to the nature of the underlying asset. In order to provide an efficient financing structure, the assets will typically be held through a SPV with origination and servicing provided by the marketplace lender. In order to cover expected losses on the asset pool, the senior facility will be subject to the lending platform maintaining sufficient subordinated capital in the form of equity, or a combination of equity and subordinated debt.

## Blockchain, smart contracts and cryptocurrencies

#### WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features, such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.



Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third-party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

#### **WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?**

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another, or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of the transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

#### **WHAT IS A CRYPTOCURRENCY?**

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

### **Initial coin offerings and token-based products**

#### **WHAT IS AN INITIAL COIN OFFERING (ICO)?**

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

The Abu Dhabi Global Markets free zone has set out guidance on its approach to ICOs and virtual currencies under the Financial Services and Markets Regulations (see here). The Dubai Financial Services Authority, the financial regulator of the Dubai International Financial Centre, has stated that it does not regulate any of these types of offerings and that 'these offerings should be regarded as high-risk investments'.

It should be noted that any promotion of securities in the UAE (outside of the financial free zones) will require registration with the Securities and Commodities Authority (SCA) unless a qualified investor exemption applies (which does not include individuals). Public offers of securities in the UAE are outside the scope of our answer to this question.

## Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms, which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

## Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

*Last modified 23 Jan 2020*

## *Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?*

### General financial regulatory regime

The relevant regulation and regulator will depend on where an entity is operating in the UAE.

The UAE is a federation of seven independent emirates:

- Abu Dhabi;
- Ajman;

- Fujairah;
- Sharjah;
- Umm Al Quwain;
- Dubai; and
- Ras Al Khaimah.

The majority of regulation relevant to FinTech companies operating in onshore UAE will derive from federal laws.

The Central Bank of the UAE (Central Bank) and the Securities and Commodities Authority (SCA) are the main regulatory bodies for financial services in the UAE. Pursuant to Federal Law No. 14 of 2018 (Banking Law), the Central Bank regulates financial institutions, including those who wish to provide financing in or from the UAE. A FinTech company operating in onshore UAE conducting, for instance, peer-to-peer (P2P) lending-type activities, would require a license under the Banking Law in order to legally operate.

In addition, through changes to the UAE Constitution pursuant to Federal Law No. 8 of 2004, two 'Financial Free Zones' have been created:

- Abu Dhabi Global Market (ADGM); and
- Dubai International Financial Centre (DIFC).

These two financial free zones are entitled to make their own financial regulations and are consequently regulated separately from onshore UAE, certainly in respect of financial activities. The regulators are the Financial Services Regulatory Authority (FSRA) for ADGM and the Dubai Financial Services Authority (DFSA) for DIFC.

Both of these financial free zones have specific licensing regimes for companies wishing to operate in the financial services sector. Interestingly, however, both ADGM and DIFC have created sandbox-type regimes for FinTech companies specifically, namely: the [ADGM RegLab](#) and the DIFC's [Innovation Testing License](#).

Although FinTech is at an early stage of development in the UAE, the UAE is promoting a number of initiatives to be at the forefront of FinTech developments, such as:

- FinTech Hive at the DIFC (see [here](#));
- Dubai Future Accelerators (see [here](#));
- Dubai Blockchain Strategy (see [here](#)); and
- the UAE's National Innovation Strategy (see [here](#)).

## Electronic payments platforms and regulation of peer-to-peer lenders

### UAE

The Regulatory Framework for Stored Values and Electronic Payment Systems (Payment Systems Regulations) issued by the UAE's Central Bank came into effect on 1 January 2017. The Payment Systems Regulations apply to Payment Service Providers (PSPs), which are effectively any entity that provides digital payment services (including using electronic, mobile or magnetic means but excluding credit and debit card payments) within the UAE.

The Payment Systems Regulations further define the concept of a PSP into four distinct sub-categories:

- **Retail PSP** – authorized commercial banks and other licensed PSPs offering retail, government and P2P digital payment services as well as money remittances;
- **Micropayments PSP** – PSPs offering micropayments solutions facilitating digital payments targeting the unbanked and under-banked segments in the UAE;
- **Government PSP** – federal and local government statutory bodies offering government digital payment services; and
- **Non-issuing PSP** – non-deposit taking and non-issuing institutions that offer retail, government and P2P digital payment services.

The Payment Systems Regulations also apply to so-called 'Stored Value Facilities', defined as non-cash facilities, whether in electronic or magnetic form, that are purchased and used by an individual or legal person to pay for goods or services. The Payment Systems Regulations provide that these services include:

- cash-in services (the exchange of cash for digital money, which is placed in a payment account);
- cash-out services (the exchange of digital money for cash, which is taken out of the payment account);
- retail credit/debit digital payment transactions;
- government credit/debit digital payment transactions;
- P2P digital payment transactions; and
- money remittances.

The Payment Systems Regulations also provide a list of services excluded from the Payment Systems Regulations as follows:

- payment transactions in cash without any involvement from an intermediary;
- payment transactions using a credit card/debit card;
- payment transactions using paper checks;
- payment instruments accepted as a means of payment only to make purchases of goods/services provided from an issuer/any of its subsidiaries (ie closed-loop payment instruments);
- payment transactions within a payment/settlement system between settlement institutions, clearing houses, central banks, and PSPs;
- payment transactions related to transfer of securities/assets (including dividends, income, and investment services);
- payment transactions carried out between PSPs (including their agents/branches) for their own accounts; and
- 'Technical Service Providers'.

In the above exclusions, 'Technical Service Providers' is perhaps the least apparent but these are effectively defined in the Payment Systems Regulations as an entity that 'facilitates the provision of payment services to PSPs', without at any time being in possession of or transferring any funds. Examples cited include data processors, authentication service providers, payment terminal maintenance companies and network providers.

#### **DIFC**

The DIFC Innovation Testing License provides a controlled environment for a firm to develop and test FinTech ideas without being subject to all the requirements that would otherwise apply to it as an 'Authorized Firm' under the DIFC rules and regulations. To be considered for this type of license, a firm must:

- involve innovation and the use of FinTech (ie have a business model, product or service that uses new, emerging or existing technology in an innovative way, and in a way that brings a new benefit to consumers or industry);
- involve an activity that, if carried on in the DIFC, would amount to a 'Financial Service' (or combination of 'Financial Services') within the scope of the DFSA's regulatory regime, for example, arranging deals in investments or advising on financial products;
- be ready (or soon be ready) to start testing with customers or industry; and
- intend to roll out its business on a broader scale in or from the DIFC after it has successfully completed testing.

The testing period will be for a finite period of time, normally six to 12 months. In exceptional cases, the DFSA will consider extending that period.

[Beehive](#) was the first P2P lending platform to receive a license from the DFSA to operate in the DIFC.

#### **ADGM**

According to the ADGM RegLab brochure (['The Regime For FinTech Innovation'](#)), the ADGM RegLab is for all participants active in the FinTech space, from startups to existing, regulated companies. To qualify, the participant must be able to demonstrate that it has an

innovative technological solution that is at the stage of development ready for testing. The solution should contribute to the development of the financial sector in UAE. In particular, it should:

- promote growth, efficiency or competition;
- promote risk management and better regulatory outcomes; or
- improve consumer choices.

The first five FinTech companies to be admitted to the ADGM RegLab were announced in May 2017 (see [here](#)).

## Regulation of payment services

### UAE

Organizations that wish to commence and maintain digital payment services must comply with the Payment Services Regulations.

If such a service falls within the Payment Services Regulations, a company needs to make sure that they (among other things):

- apply for and obtain the requisite licenses/approvals from the Central Bank, before commencing new digital payment services;
- have the facility to store and retain all user and transaction data exclusively within the borders of the UAE (excluding the UAE financial free zones) for a period of five years from the date of the original transaction;
- three months before the implementation of any outsourcing of an operational function, have written approval from the Central Bank and ensure such services are provided onshore in the UAE under a contract which satisfies the relevant safeguard requirements;
- prepare customer service agreements which meet the required standards of the regulation and ensure those agreements are put in place with all users; and
- do not use or process any form or type of virtual currency.

## Application of data protection and consumer laws

At a UAE federal law level, there is no specific federal data protection or privacy law, although there are several laws which relate to data protection and privacy. Within each UAE emirate, the applicable law is a combination of:

- federal law, which applies, in the main, across the UAE;
- the law of the emirate in which business is being undertaken (to the extent that this law is different to, but not inconsistent with, the federal law); and
- free zone legislation (such as ADGM and DIFC legislation).

The Federal Law No. 24 of 2006 on Consumer Protection defines consumer's rights and obligations and outlines certain protection measures to fight monopoly, overpricing and fraudulent commercial activities against consumers.

## Money laundering regulations

The UAE Decree-law No. (20) of 2018 on Anti-Money Laundering and Combating the Financing of Terrorism and Financing of Illegal Organisations provides a list of criminal offences and penalties, as well as the institutional arrangements regarding anti-money laundering and combating terrorism financing. Both DIFC and ADGM have their own anti-money laundering regimes as well.

*Last modified 23 Jan 2020*

## *What type of funding arrangements and incentives are available to FinTech businesses?*

### Early stage

#### SEED INVESTMENT



Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

## CROWDFUNDING

The crowdfunding sector may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform, such as Crowdcube or Crowdfunder.

There are two main types of crowdfunding: equity and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

In the UAE, crowdfunding was not until recently provided for and those seeking to raise capital by such means would have had to work within the general financial regulatory framework in the UAE, including in relation to offers of securities. However, in August 2017 the Dubai Financial Services Authority (DFSA) launched its crowdfunding regulatory framework for loan and investment-based crowdfunding platforms, the first such framework among the Gulf Cooperation Council countries.

## ACCELERATORS

Both the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) have their own accelerators, as more fully described in [FinTech products and uses – particular rules](#); performing financial services in or from the DIFC or the ADGM requires a license from the DFSA or the Financial Services Regulatory Authority (FSRA) respectively.

## Venture capital and debt

Venture capital (VC) funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. VC provides a viable alternative to traditional lending, given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of VC and involves an equity investment by a corporate fund, examples of which include Santander InnoVentures and Citigroup's Citi Ventures. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), which is secured against a company's assets and includes an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through VC.

## Warehouse and platform funding

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV). The loan is secured on the assets acquired by the SPV from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

Some FinTech companies may see warehouse funding as a temporary form of financing to be followed by a larger capital markets transaction at a later date.

Another alternative form of funding is by way of peer-to-peer (P2P) lending platforms, which bring individual borrowers and lenders together without the involvement of traditional banks. [Beehive](#) was the first P2P lending platform to receive a license from the DFSA to operate in the DIFC.

## Senior bank debt and capital markets funding

As in many jurisdictions, listings via equity capital markets or debt capital markets are an option only for those of a certain size (local securities laws present various hurdles). Other debt financing options may be possible but, at this stage, equity and VC investment is a more common funding course for FinTech developers/users.

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

## Incentives and reliefs

One of the biggest attractions for corporates wishing to setup in the UAE (whether offshore or in the free zones) is the fact that the UAE is a (near) tax-free jurisdiction. Setting up in onshore UAE is more difficult for international firms given the rules around local ownership; however, the financial free zones are specifically setup to incentivize international corporates. They also offer clients a 50-year guarantee of zero taxes on corporate income and profits, complemented by the UAE's network of double taxation avoidance treaties.

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## Portfolio sales

### Loan transfers and portfolio sales

#### *What are common ways of buying and selling loans?*

The most common ways of selling loans are:

- **Novation** – A novation is a full legal transfer of the party's rights and obligations. It is a tripartite arrangement between the existing parties and the transferee and results in a fresh contract being formed between the continuing party and the transferee and the transferor being released from its obligations.
- **Assignment** – An assignment is a transfer of rights only. There is some doubt as to whether an assignment can be done without an acknowledgment of the debtor and case law varies from Emirate to Emirate. For this reason, it is good practice to ensure that the debtor consents to and acknowledges any assignment.
- **Sub-participation** – A sub-participation is a transfer of the economic interest in a loan without changing the legal relationship between the existing parties. Sub-participations involve the buyer taking on double credit risk, both on the seller as well as the borrower.

Similar to other jurisdictions, loan transfers are commonly documented using standard form contracts made available by the Loan Market Association. However, as mentioned in [Giving and taking guarantees and security](#), as the concept of trust does not exist in the UAE, it will be necessary to consider any security arrangements governed by UAE law and it would be usual for a transferee to accede to any security agency arrangements.

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#### *What are the main considerations when transferring a loan and related security?*

There are a number of issues to consider before transferring a loan. Some key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser. In this respect, reference should be had to UAE data protection legislation;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;

- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **security arrangements** – whether it is necessary for the new lender to accede to a security agency agreement or appoint a security agent on its behalf to hold security (if the security is of a type which needs to be granted in favor of a bank who is licensed by the Central Bank to carry out business in the UAE).

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## Projects

### Financing / investing in energy / infrastructure

#### *To what extent are energy and infrastructure assets publicly or privately owned?*

##### Generally

Article 23 of the UAE Constitution provides that: 'The natural resources and wealth of each Emirate shall be considered the Public Property of that Emirate. Society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.'

In general, although the ownership structure of an infrastructure project varies according to its type, it is generally the case that a government or quasi-government entity will be involved in it and benefit financially from the project. The actual involvement varies on a case-by-case basis.

##### Energy

###### ABU DHABI

Abu Dhabi National Oil Company (ADNOC) and its subsidiaries are part (usually the majority shareholder) in every project regarding the exploitation of its hydrocarbons. Traditionally because the Abu Dhabi hydrocarbon industry is mature, foreign stakeholders would enter into long-term concession agreements but with respect to newer fields, some of these have been placed on a production sharing agreement basis. More detailed information about the difference between concession agreements and productions sharing agreements is available on request.

###### DUBAI

Dubai's hydrocarbon industry has been in decline for many years and started out with minimal reserves in comparison to the Emirate of Abu Dhabi. Previously its hydrocarbon production was done on the basis of concession agreements with strategic investors. Dubai's Emirates National Oil Company (ENOC) remains a key player but much of its activity is now on the midstream (transmission and refining and sales and marketing through its chain of petrol stations).

###### SHARJAH

The government works closely with one of the largest privately – owned oil companies in the Gulf, Crescent Petroleum and Crescent Enterprises, which is owned by the Jafr family, on most hydrocarbon projects, whether oil or gas,. In addition, Crescent Petroleum is a 20% shareholder of the listed company, Dana Gas. Its gas reserves are more significant than its oil reserves.

The Northern Emirates of Ajman, Fujairah, Ras Al Khaimah and Umm Al Quwain have negligible hydrocarbon resources but were viable fields to be discovered, then there is a strong possibility that they would use a similar model to that adopted by the other governments in the Emirates.

##### Renewables

Increasingly pressure is being put on the UAE and its Gulf Cooperation Council (GCC) neighbors to reduce their carbon footprints. Accordingly a number of Emirates are responding enthusiastically to this challenge.

#### ABU DHABI

Masdar City is an integrated green development company and wholly owned subsidiary of Mubadala Development Company PJSC, a state-owned holding company and wholly-owned investment company set up to diversify Abu Dhabi's economy.

In addition, Mubadala has invested in solar power and has started to consider other renewables projects such as wind and wave power. While all projects are at an early stage, there is considerable optimism that investment in solar power will continue to grow due to the abundance of sunlight available in the UAE,

#### DUBAI

While not as robustly as Abu Dhabi yet, Dubai has already invested in solar power, commissioning a 200 MW solar project located in Mohamed Bin Rashid Solar Park.

### Electricity and water

Each of the seven Emirates has a government-owned monopoly supplier of water and electricity services.

In summary, investment in any conventional and alternative power projects in UAE will involve significant interface and contracting with a government or quasi-government entity to some degree.

The Emirates have a nascent nuclear program which is under the direct control of the International Atomic Energy Agency but the initiatives are implemented through the Emirates Nuclear Energy Corporation.

### Telecoms infrastructure

There are two majority government-owned providers of telecommunications services in the UAE, Etisalat being the older entity (set up in 1976) and Du. While the majority shareholders are government-owned or backed companies, Du has over 20% public ownership and it is listed on the Dubai Financial Market.

The regulator of the Telecommunications networks is the Telecommunications Regulatory Authority (TRA).

### Transport infrastructure

This depends on the type of transport.

Generally, the Road and Transport Authority in Dubai (RTA) is responsible for roads, monorail and marine; each of which has its own section under the general supervision of the RTA.

At a federal level, transport is regulated and supervised through the Ministry of Infrastructure and Development.

### Aviation

Each of Abu Dhabi and Dubai has its own international airline, Etihad and Emirates respectively. All aviation issues are regulated by either Dubai Civil Aviation Authority or the General Civil Aviation Authority for other Emirates.

Developments and investment in aviation will involve contracting with a quasi-government entity, including services contracts in the airports and around the aviation infrastructure.

*Last modified 23 Jan 2020*

## Are there special rules for investing in energy and infrastructure?

### Generally

There is no specific regime governing or restricting investment in energy or infrastructure projects in the UAE except to the extent that may be set out in UAE Law and an invitation to tender (ITT) for such projects.

In addition, the ownership of the infrastructure must not violate the laws of foreign ownership of land and assets by a foreign national and company laid down in the New Commercial Companies Law, Federal Law No. 2 of 2015 (CCL) or any relevant regulations and circulars issued by the UAE Central Bank.

The interested investment party will need to examine the ITT carefully to ensure it complies with any specific requirements for that project including specific procurement provisions there may be. To this end the UAE public procurement legislation may be relevant.

A particular proposed investment may be subject to legislative or regulatory control (eg merger control rules). As regards the planning and implementation of the underlying energy or infrastructure project (in which the investment is to be made), the legal/regulatory position relevant to that project must be considered. For example, a project involving development on land will require planning permission or a development consent order; and a project may require environmental authorizations/permits and/or sector specific regulatory consents or licenses. If a public body (eg a government department, or a local authority) is procuring a project using private finance, and the public body is to benefit from central government funding towards the cost, the project will be subject to central government approval. Key sector-specific issues are flagged in the sections below.

There are specific rules governing the ownership of land in each of the seven Emirates. Some of the free zones allow purportedly 100% foreign 'freehold' ownership of land. However, this applies only to residential property. With the exception of nationals from other Gulf Cooperation Council countries (GCC) it is generally very difficult for foreign nationals or companies to own land to develop for commercial purposes.

It follows from the above paragraph that any foreign investors in infrastructure projects must do adequate due diligence to ensure they can secure use of the land on which the infrastructure is to be built for the entire duration of the project. Failure to secure such rights will have a serious economic effect on the project.

## Energy

Energy projects in the UAE are complex due to arrangements in respect of licensing, subsidies and revenue flow structure. In addition, current regulations are apt to change frequently, meaning that investors will need to have a good understanding of the current framework and the potential directions in which the market may move. Investors need to understand how political and technology changes may impact on the overarching regulatory framework.

Since natural resources belong to the public as a whole, another issue to address in project documentation will be that of 'sovereign immunity' and specific warranties and waivers need to be included in the project documents.

Specifically with respect to energy infrastructure projects and power generation, the investor should pay attention to the power purchase agreement/offtake agreement/tolling agreement etc, as if the off-taker is a government or quasi-government entity, it is possible that the project will not be able to sell its power/services at a full-y commercial rate which will impact the commercial value and project economics.

## Other infrastructure

On other forms of infrastructure, much of the regulation and standard contracting terms should be set out in the ITT.

It is likely that long-term projects will include 'change in control' clauses which restrict change in ownership structures. For example, in most sectors there is a restriction on change in control during the construction period but this is often relaxed post construction provided any change in control is not to an 'Unsuitable Third Party'.

How strict these restrictions are will often depend on the sector. For example, the energy sector has a deep-rooted fear of contractors bringing sub-contractors from cheaper territories, which is often considered to infer there may be quality and performance issues. As a result, the project sponsor will often require strict non-assignment provisions to ensure an assignment cannot be made without its reasonable consent.

Specific restrictions may be included depending on the nature of the project and how revenue for the project parties is being raised and shared. In general, in the UAE most infrastructure projects will use as their contracting base variations of internationally recognized contracts especially AIPN, FIDIC and JCT. In addition, most project financing follows international best practice and often involves the use of Loan Market Association standard agreements. While form is familiar, the details will be specific to the project and the project sponsor.

*Last modified 23 Jan 2020*

## *What is the applicable procurement process?*

These issues must be understood on a case-by-case basis.

*Last modified 23 Jan 2020*

## *What are the most common forms of funding / investing in energy and infrastructure?*

In the UAE, the principal forms of private sector funding/investment in energy and infrastructure are:

- loans made on a corporate finance basis (balance sheet debt, which may include Shari'a compliant financing);
- loans made on a project-finance basis (to a special purpose project company domiciled either in a UAE free zone or in a traditional offshore jurisdiction such as the Cayman Islands or British Virgin Islands) on medium- to long-term bases – such loans may later be syndicated to other funders;
- bond finance; and
- refinancing of the debt in operational projects.

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## Restructuring

## Enforcement and sanctions

### *When can there be regulatory investigations?*

This question needs to be considered from two main perspectives:

- firstly, is the activity itself regulated; and
- secondly, if regulated, by which body or bodies?

While it sounds simple it needs to be established which authority or authorities may regulate a given activity. From a lender's point of view, the UAE Central Bank has published numerous regulations and produced circulars that inform banks as to the necessary capital adequacy ratios and also provided many circulars on internal regulatory controls. Breach of these by the banks could see preventative and punitive action taken against them by the UAE Central Bank.

If a lender, or in a syndicated loan situation, lenders are based in Dubai International Financial Centre (DIFC), then breaches by them of the Dubai Financial Services Authority (DFSA) regulations could see sanctions imposed, or if they exceed the terms of their licenses this can lead also to regulatory problems. The same can be said for lenders based in Abu Dhabi Global Markets (ADGM).

If the lenders have not done sufficient due diligence on their clients and performed their obligations under the Anti-Money Laundering Law, then this may also constitute a regulatory breach. For instance, they may have been in receipt of funds from either sanctioned countries or blacklisted people and entities.

As well as initial breaches such as those set out above, as the term of infrastructure projects tends to be long and financing arrangements commensurate with the term, the lenders need to ensure that they maintain all regulatory controls throughout the term of the financing. What this looks like in practice will depend on the financing structure and will be different for term credit facilities opposed to revolving credit facilities. In addition to regulatory issues there could be contractual problems for example for failure to be able to make 'repeated warranties' or satisfy conditions subsequent.

*Last modified 23 Jan 2020*

### *What regulatory penalties may apply?*



This depends on the nature of the transgression but can be anything from fines to suspension and revocation of licenses.

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## *What criminal penalties may apply?*

There are many circumstances that can lead to criminal penalties for individuals involved in corporate wrongdoing and these have been expanded for directors under the new provisions of the Federal Commercial Companies Law, the Banking Law, the Bankruptcy Law and the Anti-Money Laundering Law.

There are criminal penalties for anyone that has been liable for transgressions under the Foreign Corrupt Practices Act; The UK Bribery Act; Dubai Financial Services Authority anti-money laundering and bribery regulations; as well as people engaged in business practices that may amount to violations of the UAE Penal Code Federal Law No. 3 of 1987. These go from fines to periods of imprisonment for the most serious offences.

Note that if a crime has been committed in either of the Financial Free Zones or Free Zones, the provisions of the UAE Penal Code will prevail.

*Last modified 23 Jan 2020*

## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### *Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?*

##### **ADVANCE OF LOAN**

No stamp, registration, transfer or other similar taxes are payable on the advance of a loan. However, a customer may be required to pay value added tax (VAT) in connection with fees for certain products or services provided by a bank in respect of a loan.

##### **TRANSFER OR ASSIGNMENT OF A DEBT UNDER A LOAN**

No stamp, registration, transfer or other similar taxes are payable on the assignment or transfer of a debt under a loan.

#### *Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?*

Certain security interests created under United Arab Emirates (UAE) law must be registered in order to perfect the security and ensure that it is valid against third parties. For example:

- The grant of any security interest over real estate needs to be properly registered at the land department (in the relevant Emirate where the real estate is located) in order to ensure that the security interest takes effect as a mortgage. A registration fee will typically be payable to the relevant land department and the amount of that fee will depend on the amount secured and/or the value of the property (in accordance with their published fees at the relevant time).
- The grant of any security interest over moveable collateral pursuant to UAE Law No. 20 of 2016 on the Mortgage of Moveable Assets to Secure a Debt is required to be registered at the "Emirates Moveable Collateral Registry", which will attract nominal security registration fees.

- The grant of any security over shares in a UAE company may also need to be registered at the economic department or at the relevant free zone authority (ie in the relevant Emirate or free zone where that company is registered). A registration fee will also be payable to the relevant economic department or relevant free zone authority (in accordance with their published fees at the relevant time).

Other forms of registration may also be required (or be advisable), depending on the nature of the asset over which security is being taken. Such registrations may also require the payment of fees.

If security needs to be registered, then in certain circumstances it will also be necessary for the security document to be notarized before a notary public in a certified Arabic text (which may also include English, in a dual-text format). This process will involve additional costs in terms of translation charges and notary fees. A notary public will also require proof of authority for signatories, which can involve constitutional documents and resolutions needing to be translated then formally attested and/or legalized before they will be accepted.

## Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?

### ISSUE OF DEBT SECURITIES

No stamp, registration, transfer or other similar taxes are payable in the UAE on the issue of a debt security (eg a bond). However, it is possible that a securitization structure or an Islamic bond (*sukuk*) may incur registration or transfer fees depending on the underlying transaction structure (for example, if real estate is involved).

### TRANSFER OF BONDS

No stamp, registration, transfer or other similar taxes are payable in the UAE on the transfer or assignment of a debt security (eg a bond).

## Are any filings or registrations with the local tax authority required in connection with a loan or a debt security (eg a bond)?

No. It is not necessary to file, register or record a loan or debt instrument with any tax authority, public authority or government agency in the UAE, save that:

- all documents brought before the UAE courts must be in Arabic (or accompanied by a court-certified translation); and
- any applicable court or other fees must be paid upon any court filing of those documents for enforcement purposes in the UAE courts.

However, a bank or any customer operating in the UAE should be registered separately with the FTA for VAT purposes.

*Last modified 23 Jan 2020*

## Do tax authorities take priority on enforcement?

Preferred creditors (including any amounts owed to the government) will take priority over both ordinary unsecured creditors and secured creditors.

We note that the new United Arab Emirates (UAE) Federal Bankruptcy Law came into effect on 29 December 2016, and this law similarly provides that amounts payable to government authorities are considered to be preferred debts. However (to our knowledge) this law remains relatively untested before the UAE courts and so we are unable to express a view on the scope or application of that new law (or its executive regulations, if any) on preferred creditor status.

*Last modified 23 Jan 2020*

## Is withholding tax on interest payments applicable?

## Is there withholding tax on interest payments under a loan?

No.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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### *Are foreign lenders and debt security holders subject to tax on interest payments?*

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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