
THE
PROJECTS AND
CONSTRUCTION
REVIEW

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, *Critique de la pensée juridique moderne* (Dalloz (Paris), 1976).

In this preface I would like to recognise the great contributions of Robert S Peckar and Douglas S Jones, two leading professionals and lecturers, to the area of projects and construction law. Despite living miles away from each other – in the heartlands of the United States of America and Australia – they have equally influenced generations of lawyers, owners, contractors, engineers, designers, lenders and public authorities in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package.

But Bob and Doug's long-celebrated experience has never prevented them from being generous enough to share their knowledge; and we are happy to have two chapters they have specifically prepared for the introductory part of this book, discussing new trends in dispute resolution and relationship contracts. These chapters have been included alongside another from the prestigious law firm Milbank, Tweed, Hadley & McCloy LLP, which offers us a clear and instructive view on the international aspects of project finance and construction.

I would also like to thank all the law firms and their members who graciously agreed to contribute their countries' chapters. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by these leading experts in 26 countries has shown us that in order to understand the world we must first comprehend what happens in our own communities; to further advance our understanding of the law, we must resist the modern view that all that matters is global and what is local is of no importance.

Finally, I would like to note that this book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP-IBA), the American College of Construction

Lawyers (ACCL), the Society of Construction Law (SCL) and the Forum Committee on the Construction Industry of the American Bar Association (ABA). Those institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice. I would like to thank their leaders and members for their important support in the preparation of this book.

I hope you enjoy the book and we look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

September 2011

Chapter 25

UNITED ARAB EMIRATES

*Leonora Riesenburg**

I INTRODUCTION

The year has been spent by UAE authorities facilitating the restructuring of systemic and viable entities while ensuring the smooth exits of non-viable ones, and implementing the new long-term economic outlook supported by local oil-based revenue and recapitalisation based on private sector investment. The fostering of project finance transactions in the financing of investments in infrastructure continues to be paramount, with project sponsors turning to other liquidity pools for funds such as commercial banks, bonds, export credit agencies ('ECAs'), mezzanine financing and private equity. In addition to the emergence of ECAs, particularly in the power and petrochemical sectors, multilateral agencies including the International Finance Corporation, the Islamic Development Bank and Arab Fund for Economic and Social Development are of increasing importance in support of ongoing and future capital expansion.

II THE YEAR IN REVIEW

Despite the challenges to the local economy, growth in the construction industry continues to be overwhelming by international standards. The focus has to some extent been diverted from Dubai, which revised its 2012 Strategic Plan into the 2015 Strategic Plan. In Citiscap Abu Dhabi 2010, Abu Dhabi's grand vision to house a global premiere urban landscape was launched by Abu Dhabi Urban Planning Council ('the UPC'). Major inroads have since been made in Abu Dhabi with the development of new urban areas including Al Reem Island, Lulu Island, Saadiyat Island, Sowwah Island and Yas Island. Free trade zones to include the Abu Dhabi Khalifa Port and Industrial Zone and twofour54 media free zone business park in Mina Zayed have also recently been

* Leonora Riesenburg is a senior associate at Galadari & Associates.

established to diversify the country's heavily oil-based economy and encourage sector-specific foreign investment. The northern Emirates have been locked into a period of review and consolidation. Development is said to be in line with the UAE Government Strategy 2011-2013 launched in early 2010. At a federal level, a three year plan for federal spending has been drawn up.

While other Gulf country tenders have been monopolising the limelight – particularly in Qatar after the successful bid to host the 2022 FIFA World Cup – deals are still being made in territory. There has been an aggressive drive in the energy and infrastructure sectors, and a paradigm shift in the way that business is being conducted. 'Transparent dealings' have never been more pronounced, with the Dubai Real Estate Regulatory Authority ('RERA') openly announcing in May of this year, and in its review of more than 450 projects, the cancellation of 217 real estate projects. This has had a ripple effect on commercial and investment transactions, and fostered a culture of negotiation and renegotiation of contracts in line with the financial viability of existing project contracts.

Project financing and debt restructuring has been critical to the economic outlook. A policy of promotion of PPPs has been adopted at a federal level. This marks a transitional policy, particularly in Dubai which has in the past been more hesitant to capitalise on PPP arrangements. In the first quarter of 2011, Dubai Government Roads and Traffic Authority ('the RTA') issued a new Policy on Public Private Partnerships for Transport and Services.¹ In January 2011, the RTA further launched an internal PPP Committee and committed to model 30 per cent of its projects on PPP procurement. The PPP policy is also intended to facilitate projects such as the 1,500MW Hassyan independent power and water project ('IWPP') administered by the Dubai Electricity and Water Authority.

Local, regional and international commercial banking sources and other conventional or non-Islamic sources continue to support domestic infrastructural projects. In Abu Dhabi, the majority of IWPPs developed by the Abu Dhabi Water and Electricity Authority's ('ADWEA') procurement and privatisation programme has been financed using conventional debt. Islamic or shariah-compliant funding similarly plays an important role. As shown by Abu Dhabi Emirates Steel Industries' \$1.1 billion seven-year project finance deal in August 2010 with nine banks (comprising seven conventional banks and two Islamic banks), 'mutual funding' amassed from various sources is providing a good solution to liquidity blocks.

The lack of availability of good long-term commercial bank debt remains an issue. Regional capital markets fail by and large to offer an alternative source of long-term financing. The market has sought to compensate by fuelling high-quality infrastructure through international equity investment. The available cover from Sinosure/C-Exim and more aggressive funding from Chinese commercial banks has given Chinese contractors a considerable competitive advantage over other suppliers. ECAs, the IFC and regional financial institutions, including the Islamic Development Bank and Arab Fund for

1 Policy on Public Private Partnerships (PPP) for Transport Infrastructure & Services (Issue 1).

Economic and Social Development, also provide a good conduit for project sponsors to tap into vast credit pools.

Domestic government-linked infrastructure funds in Abu Dhabi, the Mubadala Infrastructure Partners and ADIC-UBS,² and sovereign wealth funds are already active players in local infrastructure projects. Long-term government lending is expected to continue. In an aim to boost domestic liquidity, in May 2011 Dubai amended Dubai Law No. (24) of 2009³ allowing the DFSF to provide loans and credit facilities to both government and non-governmental entities.

The real estate sector continues to be of marked significance to the UAE business landscape, as is shown by a host of new real estate investor protection laws. Significant advances have been made in relation to ownership rights through registration. Dubai has taken the lead in tightening the reigns in regulating off-plan sales in a bid to avoid the speculator-driven property bubble created after 2006. Dubai saw the first addition to its real estate laws in February 2010 with the publication of Resolution No. (6) of 2010,⁴ implementing Dubai Law No. (13) of 2008⁵ in relation to off-plan sales and the Interim Real Estate Register. This has provided much needed clarity and remedies to developers on default of payment, termination rights for both developers and purchasers, and tighter controls on off-plan sales by developers and brokers through more rigorous registration requirements. May 2010 saw the issue of 'Jointly Owned Property Directions' clarifying the Dubai 'Strata Law',⁶ defining rights, responsibilities and obligations of all the parties to jointly owned property. The directions cover:

- a* jointly owned property declarations;
- b* the establishment of owners' associations and the association constitution;
- c* general regulation, including consumer rights provisions, financial obligations for owners' associations and developers, and an enforcement regime;
- d* preparation of survey plans, qualification requirements, duties and standards for registration as a surveyor; and
- e* direction for surveyors.

Abu Dhabi has not opened up its real estate to the same extent as Dubai and a regulatory overhaul, to include the establishment of an independent regulatory agency akin to RERA, is rumoured. In December 2010, Abu Dhabi Resolution No. (64) of 2010⁷ was

2 The Abu Dhabi Investment Company and UBS Global Asset Management.

3 Law No. (24) of 2009 Establishing Dubai Financial Support Fund (as amended).

4 Executive Council Resolution No. (6) of 2010 Approving the Executive Regulations of Law No. (13) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai.

5 Law No. (13) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai.

6 Law No. (27) of 2007 Concerning Ownership of Jointly Owned Properties in the Emirate of Dubai.

7 Resolution of the Chairman of the Executive Council No. (64) of 2010 Concerning Property Ownership Regulations.

issued on the back of Abu Dhabi Law No. (3) of 2005⁸ (as amended), specifying the framework and general laws relating to procedures for the registration of property rights in Abu Dhabi and Al Ain. This was followed by Abu Dhabi Law No. (1) of 2011⁹ prohibiting overcrowding of residential properties, to stimulate residential demand, and the first ‘rent-to-own’ scheme in Abu Dhabi for Sun Tower and Reem Island (propagated by Sorouh).

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

More complex and sophisticated agreements are at the forefront of transactional development. PPP models have been adapted in line with governmental policy and guidelines, encouraging private sector participation. In practice, PPPs often lack consistency in commercial terms, documentation and what procurement authorities will accept. The position is confounded by the absence of a unified federal ‘one-stop shop’ mechanism. Different official bodies operating different procedures need to be approached to obtain licences, consents and permits.

At present, the only Emirate with an ‘informal PPP cell’ is Abu Dhabi. Independent models such as the standalone ADWEA IWPP model have taken off as the first generation of regional PPPs in wastewater deals. Second-generation PPP models have been seen in Abu Dhabi and underpinned the successful closing of three university PPP projects (including Zayed University) and in March 2011 the Shams 1 solar power project. In recent university PPP schemes, including the Mubadala Paris Sorbonne, the PFI model with no construction guarantees or other explicit supports has been favoured. The Skynet 5 PFI UK Ministry of Defence deal has been heavily relied upon on the quasi-PPP Mubadala Yahsat satellite project. Long-term BOT and BOOT structures are also commonly operated. BOT is the preferred model for Abu Dhabi’s first nuclear power plants in Braqa to be built by a South Korean consortium, as announced in December 2009. Concession-based DBFO models have equally been tested, for example, on the Abu Dhabi Department of Transport Mafraq-Ghweihat project. The Mafraq-Ghweihat PPP hangs in the balance and alternative procurement methods are being considered by the Abu Dhabi government, marking a critical blow to future success of the DBFO model. Development is consistent with UNECE’s mandate for supporting PPP uptake in the Middle East.

ii Documentation

Collaboration contracts such as NEC3 have not been reinvigorated since Abu Dhabi’s Aldar Properties’ failed test case in 2007 on the Al Raha Beach mixed-use waterfront development. FIDIC forms of contract continue to be preferred models, with Abu

8 Law No. (3) of 2005 Regulating the Registration of Real Property in the Emirate of Abu Dhabi.

9 Law No. (1) of 2011 Regulating Occupation of Residential Units and Utilisation of Citizens Estates in Abu Dhabi.

Dhabi having issued its heavily modified FIDIC municipality construction contract under special licence. The past year has continued to witness a slow transition of the construction industry to FIDIC 1999 forms (to include the EPC turnkey contract) from the earlier FIDIC 1987 forms.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The principle of freedom of contract is rudimentary in the UAE and controlled by federal and local law. Parties remain at the mercy of individual project terms. Unfair contract terms are not openly adopted principles. Similarly the concept of actionable misrepresentation is limited to instances of intentional, deliberate action or inaction to deceive by fraudulent means.¹⁰ Risk in project management can be managed by tight drafting and offset mechanisms. Principles of good faith and custom play an integral role, and gauging local industry practice and customs is, in the absence of express provisions to the contrary, integral to determining risk allocation.¹¹ It is a settled principle of contract law that contracting parties must perform their obligations with good faith and in a manner consistent with the ordinary and natural meaning assigned to terms and conditions of the contract.

The general rule is that parties can agree division of liability and caps on liability to suit. Some exceptions can be found in relation to:

- a* liability for quality of materials (if not expressly provided otherwise, to be borne by the party responsible for its provision, as regulated by Article 875(1) and (2) of the Civil Code);
- b* liability for the balance of materials (to be borne by the contractor if the employer provides the work materials, as regulated by Article 875(2) of the Civil Code);
- c* liability for acts or work (the contractor is liable for loss or damage resulting from his acts or work, as regulated by Article 878 of the Civil Code);
- d* decennial liability (imposed on architects, engineers and contractors for defects in construction of buildings or other fixed installations that threaten the stability or safety of a building in proportion to their project involvement from time of delivery of work for a mandatory term of at least 10 years, as regulated by Article 880 of the Civil Code); and
- e* liability of employers towards *sub*contractors (excluded in the absence of an assignment in favour of the *sub*contractor against the employer, as regulated by Article 891 of the Civil Code).

Principles of fitness for purpose, while not expressly addressed in law, are implied in light of the obligations agreed between two parties and the expressed scope of work.

10 Articles 185 to 192 of the Federal Law No. (5) of 1985 Issuing the Civil Transactions Law (‘the Civil Code’).

11 Articles 246(1) and 264 of the Civil Code.

UAE law does not recognise concepts of speculative or indirect losses, or punitive or exemplary damages. Pursuant to Article 1 of the Civil Code, there is no scope to invoke provisions of international law to fill gaps in local law and '[...] there shall be no innovative reasoning in the case of provisions of definitive import'. If there is no provision in law, judgment will be passed according to shariah law, and in default according to custom.

ii Limitation of liability

Liability is restricted to 'direct or consequential harm' (Article 283(1) of the Civil Code). Damages payable for 'direct loss' are to be distinguished from damages payable for 'consequential loss'. For loss of profit and consequential loss, a 'malicious element' needs to be demonstrated. This has been interpreted by the Dubai Court of Cassation as requiring a 'stronger' element than mere negligence. Consequential damages are generally confined to tortious liability. Loss of profits, albeit normally entertained as part of tortious liability (Article 292 of the Civil Code), have been awarded where the occurrence of damage is certain in future. Compensation for loss of opportunity has been construed by the courts to form part of or assimilated to the loss of profit. Equally, moral damages are entertained in cases of infringement of liberty, dignity, honour, reputation, social standing or financial condition (Article 293(1) of the Civil Code). Case law has afforded compensation for moral damages as contractual liability. Judges' discretion to intervene is limited by Article 390 of the Civil Code to instances where the debtor proves that agreed compensation is excessive or that the creditor did not sustain any damage. Damages at law are based on the loss to claimant and not gain to the defendant. The acid test is the extent of the damages sustained and not the category of breach as such. Limitation of liability provisions and penalty clauses are to this extent subject, on application, to court or expert assessment.

An inventive interpretation of *force majeure* has been applied to avoid liability. Attempts have been confounded by the lack of definition of *force majeure* in the Civil Code. The concept is generally accepted to be limited to events that are unforeseeable and of exceptional circumstance of a public nature. In April 2010, the Dubai Civil Court ruled that the global credit crunch did not qualify as an 'unexpected circumstantial factor', allowing a corporation to renege on a resettlement agreement affecting a real estate investment in the Dubai Pearl project.¹² In June 2010 and in the context of a claim by Better Homes against a property developer of Al Reem Island, the Court of Cassation of Abu Dhabi equally held that the financial crisis did not constitute 'exceptional circumstances' so as to allow companies to escape liability for debt repayment obligations. While an economic recession may in itself be foreseeable, unless contractually agreed otherwise, there could be consequences flowing from an economic event that in themselves could be considered to be unforeseeable *force majeure*; for example, an inability to make a fund transfer on a payment date due to a particular bank or system collapsing.

12 The principle was set out in Dubai Court Case No. 2009/359: in the case of *force majeure* negating liability for compensation for damage for breach of an obligation, it is a prerequisite that the event should be the result of an unforeseen event that could not have been averted.

iii Political risks

The UAE market remains relatively immune to the political unrest in Egypt, Libya, Yemen, Tunisia and Yemen, and continues to enjoy political stability. The UAE is a member country of MIGA, which plays a key role in the promotion of foreign direct investment at a macro level by underwriting political risk and, by way of membership of the World Bank Group, intervening with host governments to resolve claims. In continued support to the World Bank Group's Arab World Initiative, the DIFC¹³-MIGA political risk guarantee programme facilitates access to cross-border financing via the provision of political risk insurance in relation to:

- a* currency conversion and transfer;
- b* expropriation;
- c* political violence;
- d* breach of contract by the host government; and
- e* dishonouring of sovereign financial obligations.

In July 2010 the World Bank committed a record \$3.8 billion in the fiscal year to help the Middle East–North Africa region recover from the financial crisis.

Abu Dhabi's credit profile remains strong, with Abu Dhabi government support remaining constant in TDIC,¹⁴ Mubadala¹⁵ and IPIC.¹⁶ The Yas Marina Formula One circuit builder, Aldar, has in January of this year received \$5.2 billion in assistance from the Abu Dhabi government. This marks the first major public bail-out of a state-linked entity in the Emirate. The credit risk perception of Dubai has improved markedly since the successful restructuring of Dubai World. The Dubai Financial Support Fund ('the DFSF'), set up in 2009 to service Dubai World's troubled assets, has since its inception overseen the \$24.9 billion debt restructuring of Dubai World, and DFSF financing has also been used to repay a pair of Nakheel's Islamic bonds in 2009 and 2010. In April 2011, the DFSF has committed to providing a further \$8 billion to fund Nakheel's operations and to settle outstanding liabilities and proposed to convert its existing \$1.2 billion debt claim in Nakheel into equity.

While more and more government establishments have been the subject of litigation or dispute resolution, filing of lawsuits by or against the government of Dubai and any state department (including public corporations) remains subject to the exemption of federal sovereign immunity from the Ruler's office.¹⁷ An important distinction has been drawn in Dubai between explicit sovereign guarantees and the implicit support guarantees in the Dubai World saga.

13 Dubai International Financial Centre.

14 Tourism and Development Investment Company – Abu Dhabi.

15 Mubadala Development Company – Abu Dhabi.

16 The International Petroleum Investment Company – Abu Dhabi.

17 The Immunity Orders of 1972 and 1992, and the Law on Government Lawsuits of 1996 (Dubai Law No. (3) of 1996 Concerning Government Claims, as amended).

V SECURITY AND COLLATERAL

The UAE houses two distinct and separate financial regulatory jurisdictions in land. The DIFC is regulated by its own financial services regulator, the Dubai Financial Services Authority.¹⁸ The rest of the UAE is overseen by the Central Bank, the Emirates Securities and Commodities Authority ('ESCA') or the Ministry of Economy of Planning depending on the financial activity.¹⁹ There is no unified federal system regulating the comparatively young UAE financial markets. The first security exchange in the UAE was incepted only a decade ago, with the Abu Dhabi Securities Exchange and Dubai Financial Market having been established in 2000. NASDAQ Dubai²⁰ opened in 2005 to trade international stocks. The UAE's first infrastructure fund and real estate investment trust was only very recently listed on NASDAQ Dubai and the Singapore Exchange. Credit support and collateral is subject to regulations placed by both financial institutions, and on financial and monetary intermediaries.

Security law is predominantly governed by Federal Law No. (18) of 1993 ('the Commercial Code')²¹ and the Civil Code. Bank guarantees, documentary credits and the arrangement of discounting are all recognised commercial transactions in UAE law.²² The same can be said of mortgages over immovable property, which can be perfected by registration with the applicable local municipality, land department or local regulatory ministry. Pledges of rights contained in instruments such as promissory notes, bills of exchange and company shares can also be perfected by registration on the company register and by marking the share certificate. In principle, recordation with the central registry gives the mortgagee or pledgee a priority right over other creditors.

The position is more precarious in relation to security interests such as assignment of contractual proceeds and other intangible rights, guarantees, account pledges, pledges over moveables, and special security power of attorney; these are not registrable. The UAE has not yet introduced a sophisticated system to enable searches for liabilities against companies. Security will greatly depend on the assets of the borrower and assurances that shares, assets or accounts have not already been secured to other lenders will need to be taken at face value.

Security assignments can, however, be protected or 'perfected' by notice of and acknowledgement and consent of assignment by each counterparty agreement. UAE law contemplates guarantee primarily by way of suretyship, thereby facilitating limited recourse financing secured by a surety from sponsors against riskier public projects. While there is no tested legal practice in the UAE for pledging rights to funds held in bank accounts, account pledges are considered to be perfected upon the bank at which the account is held if both the account holder and the bank in question consent to the transferee's interest over the account. UAE law does not support the

18 Regulatory Law DIFC Law No. 1 of 2004.

19 Union Law No. (10) of 1980 Concerning the Central Bank, the Monetary System and Organisation of Banking

20 Formerly the Dubai International Financial Exchange (DIFX).

21 Federal Law No. (18) of 1993 Concerning Commercial Transactions.

22 See, for example, Articles 411, 428 and 440 of the Commercial Code.

concept of a 'floating charge'. Set-off rights of UAE banks with respect to accounts held by them are, however, broad in application where expressly provided for in the finance documentation. Similarly, pledges over property are not valid in the absence of delivery by the pledger to the pledgee (or a nominated third party) of actual or constructive possession and control of the pledged items. Security against early revocation of special security power of attorney can be assured by use of liquidated damages provisions or, in the event of default, 'step-in rights'. Post-dated cheques can provide useful additional security. It is a criminal offence to issue cheques without sufficient funds. Detention of the drawer of the cheque remains a powerful deterrent and security guarantee.²³

Security law is still being tested before UAE courts and not without difficulties. There is no national treatment for investors in the UAE and foreign ownership is restricted. A federal law for foreign direct investment ('FDI') is intended to facilitate FDI and improve transparency.

VI BONDS AND INSURANCE

Abu Dhabi Law No. (8) of 2008²⁴ and Dubai Law No. (6) of 1997,²⁵ both government procurement laws, support the provision by non-public establishments of an interest-free performance bonds equal to 10 per cent of the tender value in the form of an unconditional irrevocable letter of guarantee from a recognised bank operating in the UAE; 'unconditional' or 'on-demand' bonds are standard custom and practice. Decreasing clauses in performance bonds are recognised in divisible supply contracts, providing that the performance bond is not less than the 10 per cent margin of the value of the outstanding portion of the subject contract.

Project bonds, including tender bonds, advance payment guarantees ('APGs'), performance bonds ('PGs'), retention money guarantees or employer payment guarantees, all backed by banking institutions, are commonly recognised commercial transactions. The phenomenon of security bonds underwritten by insurance companies is being examined as an alternative to on-demand performance securities in the aftermath of defensive bank lending and bond practices.

APGs and PGs continue to be a cause for concern. *Ex parte* applications for 'freezing orders' before the local courts pursuant to Article 417 of the Commercial Transactions Code to prevent the cashing in of such securities have continued from 2010 to 2011, albeit to a lesser extent than in 2008 to 2009. Application for precautionary attachment orders can be instituted to safeguard the amount of the guarantee in the event of a legitimate fear that it may be lost and where a substantive dispute is to be filed before the courts within

23 Article 401 Federal Law No. (3) of 1987 Promulgating the Penal Code (Criminal Law) ('the Penal Code').

24 Law No. (8) of 2008 Relating to Contracts with Government Departments in the Emirate of Abu Dhabi.

25 Law No. (6) of 1997 Concerning Contracts of Government Departments in the Emirate of Dubai.

eight days of the date of order.²⁶ The DIFC courts and Special Tribunal have taken a lead in preventing the cashing of bonds prematurely, as shown by the Tribunal's injunctive order of November 2010 to stop Nakheel from cashing in performance bonds against Bin Belaila Baytur until resolution of the substantive dispute.²⁷

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Corporations that have faced financial difficulty in the UAE have typically resorted to private restructurings with their relationship lenders. Creditors have favoured the speedier process of filing a criminal complaint for a dishonoured cheque, and insolvency or bankruptcy law has by and large been strategically avoided. Bespoke legislative solutions are also visible in the case of Dubai World. The special judicial committee of the Dubai World Tribunal established in the DIFC²⁸ has been entrusted with resolving disputes relating to the financial position of the Dubai World establishments and its subsidiaries. Another good example is seen in the formation of a special judicial committee to settle disputes in relation to the former troubled mortgage lenders Amlak Finance PJSC and Tamwell PJSC.²⁹ Al Murjan Real Estate LLC, a joint venture between His Highness Sheikh Abdullah bin Rashid, Deputy of Umm al Quwain, and Al Khalijia Investments, filed for bankruptcy in November 2010. This marks a rare example of a substantial property developer in the UAE filing for bankruptcy.

Bankruptcy and corporate rescue regimes in the UAE are governed by the UAE Commercial Code and are broadly available to 'traders'.³⁰ A trader is legally obliged to file for a declaration of bankruptcy if 30 days lapse from the date on which its financial position is disrupted and the payment of its debts has been suspended (Article 649 of the Commercial Code). Failure to do so results in 'negligent bankruptcy', which is a criminal offence. Directors and corporate officers of a company can be held personally liable to shareholders and third parties for acts of fraud, abuse of power, violation of law and constitutional documents and mismanagement of the company (Article 417 of the Penal Code). One of the principal elements of UAE bankruptcy law is the use of protective composition to facilitate the survival of businesses and prevent bankruptcy. *De facto* 'clawback provisions' are available in the event of:

26 Article 252 of the Federal Law No. (11) of 1992 Issuing the Law of Civil Procedure ('the Civil Procedure Code').

27 Case No. DWT-APP25-003-2010 *Bin Belaila Baytur General Contracting LLC v. Nakheel PJSC*.

28 Decree No. (57) of 2009 Establishing a Tribunal to decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries (as amended by Decree No. (11) of 2010 Amending Decree No. (57) of 2009 Establishing a Tribunal to decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries).

29 Decree No. (61) of 2009 Forming a Special Judicial Committee to Settle the Disputes Related to Amlak Finance, PJSC and Tamweel, PJSC.

30 As defined more fully in the Federal Law No. (8) of 1984 concerning Commercial Companies ('the Commercial Companies Law').

- a* the giving of gifts;
- b* payment of debts prior to the repayment date;
- c* payment of debts with something other than that agreed upon or the provision of security; or
- d* guarantees for a pre-existing debt after suspension of payment and before adjudication of bankruptcy ('the suspect period') will not be binding (Article 696 of the Commercial Code).

Preferential creditor rights exist in relation to payment of wages and salaries to employees accrued in the 30-day period prior to a declaration of bankruptcy, rents due in respect of business premises and sums due to the government. Public funds used to cover the cost of the bankruptcy or liquidation procedures are also given priority status and are reclaimed out of the trader's estate ahead of all other creditors. Secured creditors are regarded as 'preferred creditors' with rights over the specific assets pledged. The UAE courts' approach in assessing ranking of priority claims among priority creditors is a grey area.³¹

The DIFC Insolvency Law,³² as supported by the DIFC Insolvency Regulations to include DIFC Preferential Creditor Regulations, is equally largely unused.³³ With very few exceptions, in and out-of-court settlement of creditors' debt claims remains in fashion.

In principle, both regulatory systems afford creditors rudimentary protective rights. It is important to note however that, unless otherwise provided by local decree, bankruptcy provisions may not apply to state-owned entities. Seizure of 'public or private assets owned by the state or any of the Emirates' is expressly precluded in law. The UAE courts may defer or refuse a declaration of bankruptcy or the enforcement of a DIFC court declaration if to do so would be in the best interests of the national economy. The UAE has not incorporated the UNCITRAL Model Law on Cross-Border Insolvency into national law. There is currently no harmonised approach to recognition of cross-border insolvencies.

31 This comment does not apply to the DIFC. Sophisticated DIFC Preferential Creditor Regulations set out the category of preferential creditors and their rights in an insolvency process.

32 Insolvency Law, DIFC Law No. 3 of 2009.

33 By January 2010, the DIFC announced only two cases: the first, a winding-up petition by Orion Holdings Overseas, a subsidiary of Shuaa Capital, which ceased trading in 2009; and the second a liquidation of Forsyth Partners Global Distributors and Forsyth Partners Middle East for failing to meet applicable regulatory capital requirements in 2007 and having its licence withdraw.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Although federal laws relating to the protection of the environment³⁴ and Emirate-specific laws have been in place for some time, this past year saw further steps taken toward the preservation of the environment. Laws on sustainable development have added to the substantial demands on industry. Estimada requirements have been published by Abu Dhabi's UPC and Abu Dhabi Municipality. The implementation of the Estimada Pearl Villa manual and the One Pearl Rating is now mandatory for all new villas constructed in Abu Dhabi. Four other pearl ratings are being set up in the near future. Dubai subscribes to separate Dubai Green Building Regulations. In practice, standards vary wildly across Dubai and there is no designated rating system; generally, LEED, BREEAM or Greenstar standards all fit the bill. Building on any land controlled by Dubai World must achieve 29 compulsory LEED credits, many of which cover energy and water use (just short of a LEED silver rating). Tecom, which controls Dubai Internet City, has another set of requirements. All areas are subject to controls by Dubai Municipality Regulations and Circulars, as issued from time to time. To stimulate building works, the enforcement of many green building regulations in Dubai have, however, been put on hold.

The reduction in use of water and electricity across the design, construction and operational stages of a development's life cycle has been given particular legislative attention in Abu Dhabi. In 2010, Abu Dhabi issued two noteworthy sustainability regulations: the Recycled Water and Biosolids Regulations to ensure appropriate standards for treated water in the Emirate, and the Trade Effluent Control Regulations to govern all non-domestic discharges into Abu Dhabi's sewerage system. A formal Environmental, Health and Safety Management System by way of Circular No. (12) of 2010³⁵ has further addressed HSE concerns of buildings and construction sites in the capital. The construction of buildings in Abu Dhabi is not allowed to commence until a comprehensive safety plan is in place. In December 2010, the Coastal Zone and Waterways Management Section of the Environment Department of Dubai Municipality launched a comprehensive technical manual on guidelines to be followed in infrastructure development in the coastal zones in Dubai. In 2011, a high-level government committee on climate change has been established by the Ministry of Energy to oversee sustainable development. A new regime in respect of occupation health and safety regulations for the construction sector is presently under consideration and expected to sweep up current lacunas in the law.

Building permits need to be systematically submitted to the governing municipality. Infrastructural and building projects require an EIA before construction, modification or expansion.³⁶ Supporting documents in line with local directions, to include the Health

34 To include Federal Law No. (24) of 1999 for the Protection and Development of the Environment.

35 Circular No. (12) of 2010 applying the Environment, Health and Safety Management System in the Emirate of Abu Dhabi.

36 Federal Law No. (24) of 1999 for the Protection and Development of the Environment.

and Safety Management System Regulatory Framework in Abu Dhabi, are mandatory requirements.

ii Equator Principles

While project finance transactions and construction contracts are not overtly subject to the Equator Principles ('EPs'),³⁷ the National Bank of Abu Dhabi is planning to be the first local banking institution to introduce 'responsible social lending' through the EP model later in the year. The step is in clear recognition of the lending power of EP financial institutions.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

Federal procurement and the management of public finances are closely regulated government activities. Article 9 of Federal Decree No. (8) of 2006 on the United Nations Conventions against Corruption sets out a minimum legal framework for the establishment of appropriate systems of procurement, based on transparency, competition and an objective criteria in decision-making. The UAE is not a signatory to the WTO Agreement on Government Procurement.

Abu Dhabi Law No. (6) of 2006 concerning Purchasers, Tenders, Auctions and Warehouses and Dubai Law No. (18) of 2006 concerning Management and Procurement of Public Funds of the Government of Dubai remain in currency. The new procurement policies and guidelines of government authorities, to include the discussed RTA Procurement Policy, will affect the way in which the Finance Department will handle management, procurement and collection of public funds of the government departments in future.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The Emirates Securities and Commodities Authority published drafts of two new proposed investment funds regulations in January 2011: the Investment Funds Regulation and the Investment Management Regulation. The proposed changes to UAE investment funds regime follow the adoption of revisions to the regulatory regimes governing collective investment funds in the DIFC, effective as at 11 July 2010.³⁸ The new DIFC regime provides for lighter-touch regulatory burdens, including:

- a* a DIFC-based fund manager to manage external funds established in a jurisdiction other than the DIFC in specific circumstances;
- b* an external fund manager based in a jurisdiction other than the DIFC to manage a DIFC-based domestic fund; and
- c* relaxed restrictions on marketing of foreign funds in or from the DIFC.

37 Modelled on the World Bank and social practices of International Finance Corporations.

38 Collective Investment Law DIFC Law No. 2 of 2010.

A draft Foreign Investment Law intended to form part of wider regional trend toward liberalisation (to include incentives for foreign investment through 100 per cent foreign ownership in some industries) is reported to have been approved by the UAE Federal Supreme Legislative Committee.³⁹

Under current law, foreign investors may not own more than 49 per cent of UAE limited liability companies (except in dedicated free zones). Entities operating within a free zone may be 100 per cent foreign-owned and are permitted to distribute profits (subject to any statutory reserve requirements) to shareholders or a parent company even if the same resides in a foreign country. Other investment incentives in the free zones include exemptions from companies' tax and no restrictions on the repatriation of capital and profits. Locally licensed commercial agents or distributors are required to facilitate the sale of products and provision of service in UAE proper, and custom duty is levied on exit and re-entry. In addition to a foreign entity establishing an 'indirect' business presence in the UAE via an agency/distributorship relationship, there are several alternatives by which a foreign entity may be licensed to undertake specified activities on a direct, permanent basis in the UAE. Favoured alternatives include:

- a* the registration of a branch or representative office; or
- b* incorporation of a limited liability company with a UAE national 'partner'.

Except for certain free zone operations, businesses in the UAE must be registered and licensed in the concerned Emirate. It is a requirement, for example, for businesses operating in both Abu Dhabi and Dubai to be registered in both Emirates and any applicable special purpose regulatory authorities.⁴⁰ By comparison, each free zone has its own respective laws and regulations regulating licensing and governance of entities operating within its borders.

i Removal of profits and investment

The UAE has no restrictions or regulations on foreign exchange. Capital, profits, interest, and royalty payments may be repatriated freely. There are no special purpose income tax laws or regulations, corporate or individual, issued at UAE federal level.

XI DISPUTE RESOLUTION

Alternative dispute resolution has in recent years been favoured over conventional methods. Arbitration is fast becoming commonplace in the settlement of disputes or differences, particularly in Dubai. The Dubai International Arbitration Centre ('DIAC') has rapidly developed into a preferred institutional framework for the resolution of international disputes, and is fast monopolising the resolution of Dubai-based construction disputes. In early 2008, the DIFC entered into a strategic partnership with the London Courts of International Arbitration ('LCIA'). The DIFC-LCIA Arbitration Centre operates as an independent and standalone regional arbitration center, and is

39 However pending Cabinet approval.

40 To include compulsory registration with the applicable chamber(s) of commerce.

equally popular for the settlement of disputes relating to project finance transactions in the DIFC. Both DIAC and DIFC–LCIA are accepted by the international forum as major advances in the convergence of local and international practice, and arguably set Dubai apart from its neighbours. The ICC and LCIA are also prominent in the region, and often favoured on neutrality and cost grounds. The Abu Dhabi Chamber of Commercial Conciliation and Arbitration Centre, and other regional centres⁴¹ are also operational. Their regional influence is not to be underestimated.⁴²

The UAE has no specific provisions mandating a particular model for dispute resolution. The introduction of a much-awaited UAE arbitration law, based on international best practice and shariah, is intended to provide regulation at a federal level. Parties are free to agree the rules of arbitration, the seat of arbitration, the ruling language and the laws applicable to the dispute.

Executive Council Resolution No. (23) of 2010 introducing an Organisation Unit in Dubai Courts for the amicable settlement of disputes was issued last year. The mechanism is not mandatory and its success yet to be seen. It builds upon the conciliation and arbitration committee in the federal courts⁴³ and the UAE's membership of the International Centre for the Settlement of Investment Disputes. In Abu Dhabi all non-arbitrable commercial disputes will only be commenced if parties are unable to reach settlement brought to the Abu Dhabi Conciliation Department. By way of its municipality construction contract, Abu Dhabi has made some major inroads in regulating the management of construction contracts with the mandatory appointment of a standing dispute adjudication board once a dispute has arisen. These developments mark a significant advancement to the 'UAE court's jealous guarding of jurisdiction', as remains the case, for example, in relation to disputes regarding commercial agency and distributorship.⁴⁴ Additionally, Article 20 of the Civil Procedures Law states that the UAE courts have the competence to hear any actions filed against UAE parties except for suits regarding real property located outside the UAE. Any agreement contrary to the provisions of the Civil Procedures Law is invalid (Article 24 of the Civil Procedures Law).

Except in the case of state entities, there is generally no immunity from civil procedures (including arbitration proceedings). Pursuant to principles of reciprocity as codified in the Civil Procedures Law, primarily Article 235, foreign judgments are enforceable in the UAE, subject at all times to:

- a* there being a reciprocal arrangement in place with the 'home jurisdiction'; and
- b* the condition precedent of the UAE courts having no jurisdiction over the matter in issue (Article 235(2)(a) of the Civil Procedures Law).

41 Including the Ajman Commercial Conciliation and Arbitration Centre, Ras Al Khaimah International Commercial Arbitration Centre, and Sharjah Commercial Arbitration Centre.

42 Particularly that of ADCCAC.

43 Federal Law No. (26) of 1999 Establishing Conciliation and Arbitration Committees at Federal Courts, as amended.

44 Subject to the exclusive jurisdiction of the UAE Courts (Article 6 of Federal Law No. (18) of 1981 Concerning the Organisation of Commercial Agencies, as amended).

The UAE subscribes to a number of international and multilateral conventions regarding the recognition and enforcement of arbitral awards, to include most notably:

- a* the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which it joined in 2006;
- b* the Riyadh Convention on Judicial Cooperation between States of the Arab League (1983);
- c* the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1987); and
- d* the ICSID Convention, also known as the Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States (1965).

XII OUTLOOK AND CONCLUSIONS

The position at ground level is optimistic, with the UAE authorities taking a proactive role in facilitating a more robust and better regulated project finance framework; in turn supporting its vision of a large-scale and diverse economy, and healthy demographic growth.

Appendix 2

ABOUT THE AUTHORS

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