

Ship Finance

In 21 jurisdictions worldwide

Contributing editor
Lawrence Rutkowski



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GETTING THE
DEAL THROUGH

GETTING THE
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Ship Finance 2015

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United Arab Emirates

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Due diligence

1 How does one demonstrate title to or legal ownership of a vessel registered under the laws of your jurisdiction?

Vessels are registered at the Marine Affairs Department of the Ministry of Communications. Title to or legal ownership of a vessel is demonstrated by a transcript of the ship's register in which the name and address of the shipowner is set out together with the date on which title was registered.

2 How can one determine whether there are any liens recorded over a vessel?

A mortgage on a vessel can be recognised in the transcript of the ship register. In respect of other liens (possessory or maritime), there are no means of determining whether any liens are registered against a vessel since these types of liens are generally not registerable in the UAE.

3 How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

We can ascertain the amount of the mortgage by viewing the transcript of registry. However, in respect of security agreements, liens, charges or other encumbrances, such information is usually private between the parties and if this is not disclosed voluntarily, there is no direct means to ascertain the existence of such obligations.

4 Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

There is no public registry in the UAE to search for this type of information. There is no concept of good standing in the UAE. However, in practical terms, to ensure the existence and capacity of a UAE company to enter into any proposed transaction, one should request copies of:

- constitutive documents;
- a trade licence;
- the commercial registration certificate; and
- a chamber of commerce certificate.

5 Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

There is no public registry in the UAE to search for this type of information. It is prudent to request copies of the documents set out in question 4, which should be verified by an officer of the company, confirming that it is a true copy and no change has been made to such copy.

6 What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

There is no restriction relating to the legal capacity of UAE companies entering into a guarantee. However, it would be prudent to obtain a copy of

the company's memorandum and articles of association to ascertain any relevant limitations. The UAE company must operate its business within the ambit of the powers provided for in its constitutive documents and relevant trade licence. In terms of entering and performing its obligations under any transaction, the constitutive documents of the company must empower it to borrow, lend, grant security, give guarantees or grant other security, whether on its own account or on account of the debt of a third party (to the extent the transaction involves such activities). In addition, the company needs to hold the necessary quorum of directors or shareholder's meetings, or both, and obtain the relevant approvals to enable the company to enter into the relevant transaction to which it is a party.

7 Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

No, UAE companies may borrow abroad and in foreign currencies directly. Foreign lenders will not be considered to be resident simply by extending a cross-border loan or credit to a UAE-based obligor.

Repayment

8 Is central bank or other regulatory approval required for repayment of a loan in foreign currency?

No, UAE Central Bank or other regulatory approval is not required.

9 Do usury laws limit the interest payable to a lender in respect of a vessel financing?

Article 76 of the Commercial Code allows lenders to charge simple interest, which cannot exceed 12 per cent per annum.

10 Are withholding taxes payable on principal or interest payments to non-resident lenders?

There is no withholding tax in the UAE and, accordingly, principal or interest payments by a UAE company to a non-resident lender is not subject to any withholding tax.

Registration of vessels

11 What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?

A vessel under construction may not be registered for the purpose of recording a mortgage over it. Article 18(1) of the UAE Maritime Code (the UAE Code) provides that all vessels are eligible for registration under the UAE flag with limited exceptions - these include fishing and pleasure boats. The UAE Code also prohibits the registration of any oil tanker that is over 10 years old (unless special dispensation is obtained).

A vessel is defined as any structure normally operating in navigation at sea, without regard to its power, tonnage or purpose for which it sails. A hovercraft is deemed to be a vessel and can be registered on the UAE ship registry.

Offshore drilling rigs and mobile offshore drilling units are considered 'vessels' and, as such, can be registered on the UAE Ship Registry.

12 Who may register a vessel in your jurisdiction?

The UAE Register is a closed or national register catering only for ships owned by companies or individuals that are majority-UAE-owned. The UAE Register requires the vessel-owning entity to be either a UAE national or a UAE corporate entity, with the majority of shares being held by UAE nationals.

The UAE Registry does not allow foreign owners or companies to register their vessels on the UAE flag, although it is possible for foreign registered vessels to obtain UAE navigation licences in some instances.

13 Is there an alternate registry for international shipping operations?

There is no alternate registry in the UAE for international shipping operations, such as an offshore register, for foreign owners to have their vessels registered.

Ship mortgages and other liens over vessels**14 What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?**

There are no standardised forms of mortgage agreements and provided that the agreement meets the basic requirements (set out below) generally as stated in the law, the parties are free to draft the agreement. The main points to bear in mind are as follows:

- the mortgage must be effected through an 'official instrument'. In practice, this means that the mortgage must be in Arabic and should be properly notarised. There is no statutory short form mortgage or prescribed form for drafting a mortgage; it should contain all the essential elements as set out in the UAE Code; and
- the loan amount set out in the mortgage should have a specific maturity date, the maximum mortgage amount should be fixed, interest, if any, should be stipulated and the mortgage should cover a particular vessel.

Please also note that:

- the law in respect of provisional mortgages over a vessel that has not been registered is unclear; it is preferable to ensure that a mortgage is created over a vessel that is already registered with the National Transport Authority (NTA); and
- the mortgage can be in any currency; however, should proceedings be initiated in a UAE court (or if a UAE court accepts jurisdiction) the amount will be converted into UAE dirhams.

15 Give details of any required form for ship mortgages in your jurisdiction.

Under UAE law, a ship mortgage agreement has no prescribed form. In practice, dual English/Arabic documentation is accepted; however, it is important to bear in mind that the Arabic version will generally prevail if there is a dispute over language. In the mortgage agreement itself, the parties may, by and large, insert whatever provisions they wish. This can include the rights and obligations of the mortgagor and mortgagee. We have seen recently that loans or guarantees of obligations of considerable complexity can be expressed to be secured by such a mortgage deed. The mortgage must be notarised.

The signed mortgage agreement, together with the respective application and other supporting documentation must be submitted to the relevant authorities. We have noted in some instances that the bank must also consent for mortgage registration through a simple letter addressed to the NTA. Again this needs to be in English and in Arabic but does not need to be notarised.

16 Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

A ship mortgage is registered with the ship registry in which the relevant ship is registered. The main registries are in Abu Dhabi, Dubai and Sharjah. Upon an application being filed, the registrar will enter the mortgage into the registry. The transcript of register is endorsed by a stamp confirming the mortgage registration. The mortgage only becomes effective upon its registration.

17 Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

The beneficiary bank, the amount of the secured debt and the interest rate (if any) must be recorded. The mortgage needs to specify a maturity date. There is no requirement for the underlying debt instrument to be filed with or attached to the recorded mortgage; however, it is commonplace to do so.

18 Can a mortgage be registered in the name of an agent or trustee for the benefit of multiple lenders?

Yes a security agent can be used in the UAE jurisdiction for the purpose of holding and administering security. Please note that the UAE does not recognise the concept of a trust and, to the extent that this concept is used, there is no certainty that this will be enforced by the courts. Other techniques such as parallel debt are also used.

19 If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?

Although it is not necessary to make any fresh filing on transfer of a portion of the underlying debt among existing lenders to a new lender, as a matter of good practice, financial institutions usually amend their filings to accommodate such modifications. With a security agent structure, transfers of underlying debt positions need not be registered at the UAE Ship Registry.

20 If the mortgagee transfers its interest to a new lender, agent or trustee what filings are required? Is the mortgagor's consent required?

The transfer of the mortgage position by assignment is not required to maintain the validity of the mortgage, but should be done for the protection of the assignee mortgagee's rights with regard to the assignor and to also avoid difficulties and delays in establishing the assignee's right to foreclose on the mortgage in the future. Please note that we have received conflicting responses when conducting our inquiries at the various ship registries in the UAE. To be certain, it may be worthwhile to register a new mortgage in the name of the new lender.

21 What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?

The UAE Code lists the debts that give rise to maritime liens. In summary these are as follows:

- legal and judicial costs in maintaining and selling the ship;
- crews' wages;
- claims for salvage reward and the ship's share in general average;
- damages for collisions, bodily injury to passengers and crew and loss or damage to goods; and
- debts arising from contracts made by the master within the scope of his or her authority for the supply of necessities to the ship while the ship was away from her home port.

Under UAE law a maritime lien gives rise to a right to arrest the respective vessel regardless of who the vessel's owner is. Maritime liens cease to exist on either a judicial sale of the ship or on a commercial sale if the purchaser has taken certain steps to advertise and register the sale.

Article 116(1) of the UAE Code permits the arrest of a sister ship at the time the debt arose, except where the claim concerns disputes over ownership, joint ownership and mortgages. The arresting party is only entitled to arrest the vessel to which the debt refers. Mere associated ship arrests are not permitted under the UAE Code.

In relation to a claim against a vessel not owned by the owner but by a demise charterer, the claimant may arrest either the vessel in respect of which the claim arose or any other vessel owned by the demise charterer. The claimant may not arrest other vessels owned by the owner of the vessel in respect of which the claim arose.

22 What maritime liens rank higher than a mortgage lien?

Under the UAE Code, ship mortgages rank immediately after the first five categories of maritime liens set out in question 21.

23 May non-mortgage liens be recorded over a vessel?

Non-mortgage liens cannot generally be recorded over the vessel. The UAE Code provides for the endorsement in the Ship Registry of any claim in rem against a registered ship. This procedure is certainly followed in respect of registered mortgages, however, we have never had experience of the registration of, for example, a maritime lien over a registered ship. Our due diligence has shown that it is unclear whether in practice the Ship Registry would be prepared to make such a registration.

24 Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?

Mortgages on foreign-flagged vessels are recognised and may be enforced in the UAE. The UAE courts will normally treat a foreign registered mortgage in the same way as a UAE registered mortgage, insofar as both are maritime debts under the UAE Code. The UAE courts will also generally uphold claims from foreign lenders for debts secured over vessels that are registered in another jurisdiction provided that the UAE court is satisfied that they have jurisdiction and the mortgage is validly recorded in the relevant foreign jurisdiction and contains no provisions that are considered contrary to the public policy of the place of enforcement.

25 What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?

A vessel may only be arrested to secure payment of a 'maritime debt' as defined in article 115 of the UAE Code.

To arrest any vessel in the UAE, the claimant bank must first prepare a power of attorney (POA) in favour of the lawyers with a right of audience in the UAE to represent them in the UAE courts. If the POA is executed abroad, it must be notarised, legalised by the relevant Ministry of Foreign Affairs of the country of execution and authenticated by the UAE embassy in that country. Upon its arrival in the UAE, the POA must be further authenticated by the UAE Ministry of Foreign Affairs and then translated into Arabic. This can take time, which can be an issue, especially if the arrest is urgent. If an arrest order is granted, a letter from the UAE court will be sent to the relevant port authority requesting the arrest of the vessel.

The claimant needs to file substantive proceedings within eight days of an arrest order being granted. Otherwise the arrest can be challenged. The UAE court will then, typically, schedule a number of hearings and determine the case on its merits. In the meantime, the arrest order will remain in place unless the defendant provides a UAE bank guarantee or pays cash into court. A judicial sale typically takes between two and three years. This is for a relatively straightforward case of non-payment.

Costs vary depending on the emirate, however, and these are roughly US\$4,000 in Dubai and US\$8,000 in the other emirates.

26 May a vessel be sold privately by a mortgagee? Will the sale discharge liens over the vessel?

The private sale of mortgaged vessels by a mortgagee is not allowed. In the UAE, the enforcement process is only possible through a court and under UAE law there is no provision for 'self-help remedies' whereby lenders can take possession of, and sell the vessel, in the event of a default free from a court order.

27 What are the limitations on rights of self-help by a mortgagee?

There is no express prohibition on self-help remedies. These are contractual arrangements between parties. Accordingly, if all parties agree, self-help remedies can be exercised, but it should be noted that it is possible for a third party to approach the court and challenge such arrangement.

28 What duties does a mortgagee owe to an owner or third-party creditors?

In the Emirate of Dubai, simultaneously with an arrest application, an undertaking needs to be given by the arresting party indemnifying the port authorities in Dubai if the vessel under arrest is abandoned. We are not aware of similar undertakings requested by other emirates, although this may change.

Collateral**29 May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?**

No, finance leases or other charters may not be recorded over UAE-flagged vessels.

30 May finance leases be recharacterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

It is possible that the UAE courts may recharacterise certain finance leasing transactions as being conventional loans or other arrangements. We are aware of a Dubai Court of First Instance decision that recharacterised an Islamic lease as a sale by way of instalments. This is indicative of how the UAE courts may recharacterise lease financings. To the extent that the UAE Civil Code is applicable, it contains various provisions that impact upon leasing arrangements and which could prevail over contractual provisions contained in a lease. The Civil Code contains a number of provisions that protect the lessor's interests, for example, one of the statutory provisions include the lessee not being able to sub-lease unless the lessor consents (article 787).

31 How is a security interest created over earnings of a vessel, charter contracts, insurances, etc? How are these security interests perfected?

Usually, the security interest over a vessel's earnings is established by the owner assigning all earnings and all other income of the vessel in favour of the financier. The concept of perfection of security is unknown under UAE law. It is recommended, however, that the relevant debtor (ie, the charterer) is notified of the assignment.

32 Must security interests against non-vessel collateral be registered to be enforceable? If so, where are such filings made?

Except for land charges, security interests against non-vessel collateral do not have to be registered to be enforceable.

33 How is a security interest over a deposit account established? How is a security interest perfected?

A security interest over accounts is established by pledging the relevant account and notifying the relevant account holder of the pledge. It is recommended that such account is blocked or fixed in order to be valid security under UAE law. It is appreciated that for operating accounts this may not be feasible and there are various methods such as the use of addenda to address this.

34 How are security interests in non-vessel collateral enforced?

Security interests in non-vessel collateral is normally enforced by notifying the relevant debtor of the event of default and granting him or her a reasonable period to rectify such default before enforcement action commences.

35 How are share pledges for vessel financings established? Are share pledges or share charges common in your jurisdiction?

It remains rare for lenders to take share pledges over limited liability companies (LLCs) in Dubai as there is a question of their enforceability. In addition, the cost is relatively high. Recently, the Department of Economic Development in Dubai has introduced a procedure for the filing of a lender's interest in the shares and by noting such interest on the LLC's trade licence. It is currently unclear whether this will be sufficient to perfect a shares pledge or ensure it is enforceable under UAE law.

36 Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

If the lender exercises the shares pledge and either the lender or a third party purchaser becomes a shareholder in the company, it will be exposed to the debts or other liabilities under the same conditions that would apply to a shareholder of the company.

Update and trends

The UAE Ship Registry is currently undergoing some change. One of the plans that has received substantial press coverage is to change the laws that require all ships flagged in the UAE to have 51 per cent ownership. The change could allow vessels with up to 100 per cent foreign ownership to carry the flag on the condition that they are operated outside of the UAE. We understand that the UAE Ship Registry is also working with the government to alter laws governing vessel mortgage registration to comply with international standards. However, the proposals for change have been under review since 2009. The economic crisis has clearly slowed down the approval process.

The ownership laws may be changed in a phased process. The first phase would enable citizens of Gulf countries to have rights equal to UAE nationals regarding the registration of commercial ships. Based on the success of the first phase, this will determine the next stage for other nationalities. If the changes are carried through, there is a distinct possibility that the UAE's ambition to become a major flag registry, similar to those such as Singapore, may become possible.

The new law provides structured arrangements, administered under direct court supervision, which seek to balance the debtor's and creditors' needs.

The new law applies to:

- companies incorporated under the Commercial Companies Law, establishments and individuals engaged in commercial activity; and
- individuals.

The Law does not apply to governmental authorities (although it does apply to companies owned by the government) and entities in financial free zones.

42 Will the courts of your jurisdiction respect the rulings of a foreign court presiding over reorganisation or liquidation proceedings?

Absent a treaty or convention, a foreign judgment will not be enforced in Dubai if the local courts have jurisdiction over the subject matter of that judgment.

43 What is the order of priority among creditors? In what circumstances will creditors be required to disgorge payments from an insolvent company?

Regardless of the contractual provisions in the underlying finance documents, the position of lenders will rank after those interests having priority pursuant to law. The following claims are given priority:

- the UAE Commercial Code contains provisions that prefer secured creditors. If the trustee in bankruptcy terminates a lease (as a tenant) then the lessor has a privilege guaranteeing the rent due to him or her for the year prior to the pronouncement of the bankruptcy judgments and for the current year (article 715 of the Commercial Code);
- the government has a privilege for taxes due to it but this only extends for taxes in the two years preceding the pronouncement of bankruptcy – other taxes rank as ordinary debts (article 716 of the Commercial Code);
- pursuant to Federal Labour Law (Federal Law No. 8 of 1980, as amended) employees have priority in respect of wages and benefits owed to them by their employer over all other indebtedness of the employer; and
- the Civil Code contains certain provisions relating to priorities enjoyed by certain categories of persons.

Tax considerations for vessel owners**37 Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?**

There is no income tax or corporate tax regime in the UAE.

38 Is there an optional tonnage tax exempting vessel owners from tax on income?

The UAE does not have an optional tonnage tax regime.

39 What special tax incentives are available to shipowners registering vessels in your jurisdiction?

There are no particular tax incentives to note.

40 Are there any other noteworthy tax provisions specifically applicable to shipping, shipping income or ship finance?

There is no particular tax regime to note.

Insolvency and restructuring**41 Is there a general scheme of reorganisation or insolvency administration in your jurisdiction?**

The insolvency regime in the UAE is very underdeveloped and there are very few published available cases related to insolvency in the UAE. Accordingly, there is very little in the way of precedent on bankruptcy and liquidation issues in the local courts.

A new Financial Restructuring and Bankruptcy Law has been drafted but has not, at the time of writing, been gazetted to come into effect.

44 May a vessel owner provide security on behalf of other related or unrelated companies? What are the requirements for it to be enforceable?

An owner of a vessel may provide security on behalf of other related or unrelated companies and no particular relation to the owner or borrower is required.

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45 Is there a law of fraudulent transfer that permits a third party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

There is no law relating to fraudulent transfers, but following an insolvency of a UAE borrower, any contract to which it is a party can be challenged on the following grounds:

- if the contract falls within the definition of a contract based on 'personal considerations' (article 721 of the Commercial Code); and
- article 696 provides, among other things, that by entering into a mortgage within a specified period, these actions will not be binding on the mortgagor's creditors.

46 How may a creditor petition the courts of your jurisdiction to declare a debtor bankrupt or compel liquidation of an insolvent obligor?

A declaration of bankruptcy will be made by a court where an entity is unable to pay its debts. An application for bankruptcy can be made:

- at the insolvent debtor's request;
- at the creditor's request;
- at the request of the prosecution services; or
- on the court's own initiative.

47 Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)? If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

The UAE has not adopted the Model Netting Act of the ISDA but it should be noted that the Model Netting Act has been adopted by the Dubai International Financial Centre (DIFC) as per DIFC Law No. 2 of 2014, which came into force on 14 December 2014.

Getting the Deal Through

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