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## Facilitating industry progress

▲ Regulations are essential to developing the banking landscape. (PHOTO CREDIT: SHUTTERSTOCK/CORGARASHU)

► **Clint Dempsey**, Partner, Head of Banking & Finance, and **Gareth Lond**, Associate, Banking & Finance, both from Eversheds Sutherland UAE, provide a succinct overview of trends and regulatory developments in the region

**T**here have been several legal developments in the banking and finance sector in the region recently. Both a new bankruptcy law and a new moveable pledge law in the UAE are examples of progressive legal changes that are likely to increase confidence amongst financial institutions by harmonising existing laws with international best practises. Furthermore, regional bank consolidations, such as the merger of The National Bank of Abu Dhabi and FGB, offer the prospect of international

growth and increased competitiveness in increasingly challenging global market conditions.

### BANKRUPTCY LAW

UAE Federal Law No. 9 of 2016 on Bankruptcy (new Bankruptcy Law) was published on 29 September 2016 and came into force on 20 December 2016. It repealed the bankruptcy provisions in Chapter 5 of the Commercial Code (previous Bankruptcy Law). It applies to; (i) all entities governed by the Commercial Companies Law;

(ii) free zone companies (excluding those incorporated in the Dubai International Financial Centre and the Abu Dhabi Global Market); and (iii) decree-incorporated companies who have 'opted in' through their articles of association.

The test for insolvency has been expanded from that applied under the previous Bankruptcy Law to include a balance sheet test, rather than only a cash flow test. This means that creditors will be able to take swifter action and commence bankruptcy proceedings against a debtor if that debtor is balance sheet insolvent, rather than wait for non-payment by that debtor. While in practise the decision to commence insolvency proceedings is situation specific, broadening the definition provides greater potential recourse and an early warning indicator for creditors to assist in making that decision.

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The new Bankruptcy Law also expands the preventative composition procedure (PCP) and opportunity for rescue within a bankruptcy scenario, through the imposition of a moratorium on creditor action during the PCP. Secured creditors will be able to enforce their security, subject to court approval, notwithstanding a moratorium while the PCP or rescue within bankruptcy process is ongoing. Unsecured creditors will not have such recourse. Furthermore, criminal proceedings for bounced cheques against a director, shareholder or manager of a company will also be stayed once a creditor enters into the PCP or rescue within bankruptcy process.

The creation of a financial restructuring committee (FRC) will provide a structured approach to the process of reorganising an insolvent debtor. The FRC will be responsible for selecting a roll of insolvency experts (possibly from private practise) and setting up public registers of insolvent companies and disqualified directors, which will be continuously monitored alongside preventative composition and bankruptcy proceedings. More guidance is expected to be provided in the near future.

The new Bankruptcy Law is considered to be an important step towards modernising insolvency law in the UAE and providing a template to other countries across the region. According to a World Bank report on the ease of doing business, the UAE was ranked sixth in the Arab region and 104th globally for resolving insolvency. By updating the previous Banking Law; (i) creditors should benefit from greater likelihood of debt recovery when a debtor is struggling financially, and (ii) bankruptcy is beginning to become destigmatised in the region; which is expected to result in a reduction in the number of directors

and managers fleeing, and leading to better recovery for creditors and restructuring for insolvent debtors.

**MOVEABLES PLEDGE LAW**  
UAE Federal Law No. 20 of 2016 on mortgaging moveable assets as security for debts (new Moveables Pledge Law) was published on 15 December 2016 and is now in force. While the new Moveable Pledge Law is a significant development in security arrangements for creditors, much of the necessary infrastructure remains outstanding and is expected to be introduced by way of implementing regulations in the near future.

Under the Federal Commercial Transactions Law (previous Law), physical possession of moveable asset was required to be delivered to a creditor to perfect the security over that asset. Evidencing constructive possession through sufficient control by a creditor creates practical problems where a debtor needed to retain control of the asset.

The new Moveables Pledge Law grants lenders the opportunity to create security without taking possession of the secured asset. Security over moveable assets may now be created by written agreement, which complies with the requirements of executive regulations that have yet to be introduced. The agreement can be registered electronically. Further legislation on who can access the electronic register and how, is to be introduced.

Security created in this way will also extend to ancillary rights arising in connection with the secured assets following registration. The new Moveables Pledge Law allows a period of one year from the date of its enactment to register existing secured assets. It is worth noting that there is no requirement for a secured creditor to be a licenced UAE

bank under the new Moveable Pledge Law, although this requirement may be included in the later published executive regulations.

The new Moveables Pledge Law provides self-help remedies to creditors depending on the nature of the security, such as set-off for secured bank accounts. These measures should help secured creditors recover debts quickly and in a more cost effective manner, without necessitating a claim before the courts.

#### BANK CONSOLIDATION

With increasingly challenging economic conditions which have adversely affected profits, regional banks are looking at ways to align synergies and keep costs low. The recent merger of FGB and the National Bank of Abu Dhabi to create First Abu Dhabi Bank (FAB) is the first real example of an anticipated trend of bank consolidation in the Middle East in response to an overcrowded market.

The merger has created the largest financial entity in the UAE and the second largest in the Middle East. A more dominant market position, lower costs (reported to be 28 per cent) and greater cost synergies should allow FAB to be more competitive locally and internationally.

#### IN A NUTSHELL

Ultimately, the new Bankruptcy Law and the new Moveables Pledge Law enabling better positions for both debtors and creditors, should act as stimulant for liquidity and encourage bank lending across sectors to drive the economy forward. Further bank consolidations might follow in order to increase competitiveness and profit margins. Legal developments are facilitating market growth and activity and banks and corporates are keen to take advantage. ☑