

The Age of Registration: An Update on the Moveable Assets Security Law

Mark Brown - Partner - Banking & Finance
m.brown@tamimi.com - Abu Dhabi

Following the law's enactment, two key issues were pending resolution — the introduction of regulations via a Cabinet Resolution to support the law's implementation and the establishment of a security register which is to record all security interests created pursuant to the law.

In July it was announced by the Ministry of Finance (the "Ministry") that Emirates Development Bank was appointed to create the security register for the Moveable Assets Security Law. Importantly, it was made clear that the register will be electronic and accessible by the public. This is a radical shift from current security registration methods across the Emirates as they are principally paper based and third parties do not have ready access to registers maintained by government departments and free zone authorities.

An electronic register readily provides a number of benefits: costs associated with searching and registration will be significantly less than a paper based system; individuals and organisations will not require specialised legal or technical advice to undertake a search or register a security interest so bank operational teams will easily be able to operate and interact with the system; bulk registration of security interests will be more easily facilitated (an important feature when the system initially goes live); the general public will, for the first time, have ready access to a new source of information about movable assets they are contemplating acquiring. Financial institutions will certainly use this resource, in conjunction with the Al Etihad Credit Bureau, when undertaking its due diligence of potential borrowers offering their movable assets as security.

The agreement between the Ministry and Emirates Development Bank contemplates the electronic registry being managed in accordance with international best practices. There are a number of Western-common law jurisdictions that use electronic registers for the registration of security interests in moveable assets, including New Zealand, Australia, Canada, the United Kingdom and the United States — the Canadian system has been in place for multiple decades. Experience from these jurisdictions indicates that electronic registers are kept simple and user friendly, with access akin to any other online service. Low cost for registration and undertaking searches of the register are also a prominent feature, meaning that the service is available to all and not just large organisations capable of absorbing significant transaction charges. Overall, the goal is to rely on ease of use and a low cost model to make the taking of security over movable assets and access to information as frictionless as possible — thus lowering the cost of doing business and encouraging economic growth.

The law mandates that regulations are to be implemented within six months from the date of it coming into force, which was at the end of September. At the time of printing, the regulations were drafted and under consideration by the interested government authorities but were yet to be enacted. The regulations are important as they will provide more information on the functioning and operational aspects of the register so will act as a key guide to how the market responds to implementation of the Moveable Assets Security Law.

Emirates Development Bank has begun public education forums to update the market on current status. We expect that these will be helpful in giving market participants an introduction to the register and how it will benefit their business. Wide and extensive market education is a critical factor in the success of a new asset security regime and the public reaping its benefits. This is clearly illustrated by the first case examples following the introduction of similar laws in other jurisdictions which are an exposition of the "old way of doing things" being in competition with the new framework. In such cases, both parties lay claim to

the priority interest in the same collateral but one party will have protected its interest following traditional procedures and not registered on the security register (and will commonly be the interest created first in time) while the opposing party will have taken security and registered using the new system. Of course, in these circumstances the party following the “old ways” is not rewarded — the judgment is not in their favour as they discover their assumed right of priority to the collateral in question is non-existent under the new law. In summary, early understanding of the law and its implications are very important and changes to existing practices should already be underway.

Encouragingly, we have seen a number of bank clients in the process of determining their approach to the Moveable Assets Security Law in the context of corporate and commercial lending and, in some cases, commence updating their documentation to take the new law into account. Two divergent approaches warrant consideration.

The first, and most straightforward, approach would be to maintain current market practice and existing documentation. Accordingly, security providers would continue to see the existing menu of options such as account pledges, assignment agreements and asset pledges (with asset pledges possibly becoming more prominent on establishment of the register). Amendments to these documents would simply introduce the core advantages of the legislation, such as confirming the rights to enforce directly against the assets without the need for reference to court, taking security over existing and future assets and registering the security interest on the register once established. We have seen and assisted clients that want to update their documents in this manner. In transactions, specific further assurance obligations are being inserted so that security providers must cooperate and update or replace security once the register is established. These courses of action have the benefit of simplicity but may not yield the full advantages of the Moveable Assets Security Law.

The Moveable Assets Security Law gives banks the opportunity to take “all assets” security against corporate borrowers. This means the borrower (or its credit support provider) grants a security interest over all of its present and future moveable assets. This would be akin to corporate debentures or general security agreements that are common to other jurisdictions. The closest analogue in the UAE is the commercial business mortgage — a form of security contemplated by the Commercial Transactions Law (Fed. Law 18 of 1993) which grants security over a commercial company’s existing tangible and intangible assets.

The commercial business mortgage is not commonly employed due to the cost and complexity of the perfection process making it an unwieldy solution outside of large, project based transactions. The potential under the Moveable Assets Security Law, with a low cost and simple registration process, is for customers to grant security over all movable assets in a far greater range of circumstances than possible under the previous legal framework. Banks may, consequentially, have a different risk assessment of customers where this form of security is granted. This assessment should gain further legal certainty from the new Bankruptcy Law (Fed. Law No. 9 of 2016) which affords secured parties the right to enforce their rights against collateral in the event of insolvency (subject to receiving court approval and the asset not being deemed critical to the operation of the business in the case of a preventative composition or restructuring).

Where a bank is taking security over a defined asset, in place of the various categories of security agreements, a specific security agreement could be employed. Such an agreement would provide general covenants applicable to all types of collateral alongside tailored provisions where necessary for different categories of collateral (e.g. account pledges, tangible assets etc).

Once the regulations are made publicly available, the likelihood of implementing a new approach to taking security over moveable assets can be better determined. The regulations are to set out the procedures of registration, the fees, and the information to be included at registration and how collateral may be described in the security document. This information will feed into how market participants fully adopt the Moveable Assets Security Law into their business. It is essential to emphasise that the importance of the

Moveable Assets Security Law is not limited to financial institutions. The law also applies to hirers of goods on a long-term basis (one year or more) and owners of goods on sale (i.e. consignees).

The market remains in a transitional phase pending the release of regulations for the Moveable Assets Security Law and the creation of the security register. However as the law is in force, experience from other jurisdictions highlights that it is essential to understand and address its implications now to avoid adverse consequences in the future. Preliminary steps can be taken by amending current documentation to gain the benefits of the law while simultaneously requiring security providers to take additional steps once the register is established. Most important, all market participants will need to understand the practical impact the Moveable Assets Security Law may have and the benefits it can bring to their business.

Al Tamimi & Company's Banking & Finance team regularly advises on the Moveable Assets Security Law. For further information please contact Mark Brown (m.brown@tamimi.com).