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CHAMBERS GLOBAL PRACTICE GUIDES

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# Banking & Finance 2022

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comparative analysis from top-ranked lawyers

**Egypt: Law & Practice  
and  
Egypt: Trends & Developments**

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## Law and Practice

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## 1. Loan Market Panorama

### 1.1 Impact of the Regulatory Environment and Economic Cycles

The banking laws in Egypt have recently been subject to material revamps that culminated in the issuance of Banking Law No 194 of 2020 (the “Banking Law”), which expanded upon the previous banking legislation, the Central Bank Law of 2003. The Banking Law decides on many unclear and controversial matters from the previous legal regime and embraces new financial technologies within the regulatory system, which help the loan market to improve, and accordingly the banks to perform better.

The legislator has also expanded on other corporate financing alternatives – such as through the recent issuance of the Microfinance Law, the Consumer Finance Law and the Factoring and Financial Leasing Law – in addition to the many other initiatives of the Central Bank of Egypt (CBE) in relation to companies operating in the tourism sector and mid-level residential units financing. This is in addition to transactions of issuing bonds and securitisation that have started to attract some corporations.

These types of financing have created different structures of lenders and alleviated the pressure on the banking sector in certain areas. They have also created competitor financiers that can offer corporate finance solutions as an alternative to traditional banking products. In relation to the loan market in Egypt, the real estate sector remains a huge player, with a lot of greenfield projects and restructuring deals resulting from the economic impact of the COVID-19 pandemic.

### 1.2 Impact of the COVID-19 Pandemic

Amid the crisis of the COVID-19 pandemic, the CBE has taken many initiatives to alleviate its implications for the banking and finance sector, and issued several circulars addressed to Egyptian banks, prompting them to exempt clients from paying all expenses and commissions related to bank transfers made in Egyptian pounds. Moreover, certain circulars have been issued that explain the rules of payment through mobile phones to eliminate cash transactions.

Certain circulars have been issued to extend some initiatives taken in 2020 for the benefit of defaulting clients, in order to help such clients to be removed from the CBE blacklist. In addition, the CBE has issued certain circulars for the benefit of employees working in the tourism sector to profit from certain facilities made available by the banks. Also, the CBE has issued circulars to exempt the banks from certain obligations. Some circulars have been issued to urge the banks to conduct activities in compliance with the new provisions mentioned under the Banking Law.

Pursuant to the aforementioned circular, the restrictions are only in place for a temporary period. The CBE is currently in the process of revoking and amending some of these circulars (eg, revoking the maximum deposit limit of transactions made by individuals and companies through banks or automated teller machines).

### 1.3 The High-Yield Market

Egyptian banks operate under regulations from the CBE to manage any default risk and undertake ongoing measures for screening the creditworthiness and financial health of borrowers. This has limited the high-yield market to foreign non-institutional lenders and other alternative forms of trade financing offered by foreign trad-

ers. Thus, the high-yield market operates in different conditions that do not interpolate with the mainstream institutional lending, whether under Egyptian or foreign institutions.

## 1.4 Alternative Credit Providers

The loan market has recently seen an increased reliance on international financial institutions and multilateral development agencies compared to previous decades and macroeconomic projects. These institutions are taking a bigger role in the local loan market as they offer convenient solutions that have a competitive edge over Egyptian commercial banks. Foreign commercial banks have also followed suit in financing mega infrastructure projects in several transactions according to syndicated loan structures.

Such lending transactions are, by convention, based on English law or the laws of the State of New York. Foreign commercial banks usually rely on the documentation of the Loan Market Association, while each international financial institution relies mostly on its own standard set of loan documentation. The reliance on standard documents is an advantage that streamlines the loan documentation process; nonetheless, the application of foreign law on lending transactions in Egypt has proved to be a burden on transaction costs in several instances.

## 1.5 Banking and Finance Techniques

There are certain techniques that firms and commercial banks are currently relying on to mitigate the risk of their portfolios. In light of the highly leveraged corporations and sovereign debt borrowers, a hedging arrangement or a sovereign guarantee is the trend to provide a safe harbour against the potential risk. There are also several mega project transactions that involved the participation of an insurance agency to mitigate any default risk.

In addition, borrowers are concerned about the interest rate risks and the volatility of interest rates. This has led to an increased reliance on selection notices to have the option to choose between variable and fixed interest rates at certain points throughout the lifetime of the loan.

## 1.6 Legal, Tax, Regulatory or Other Developments

As an indicator in the economic activity, the overnight interbank lending rate remained unchanged after cuts in September and November 2020 as a response to the steady decline in inflation rates during the second and third quarters of 2019 and the similar international trend in minimising interest rates. This development is expected to revitalise the loan market in Egypt and provide a competitive edge for Egyptian commercial banks over foreign lenders and international financial institutions.

## 1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending

The Financial Regulatory Authority (FRA) has recently issued regulations requiring companies to prepare disclosure reports on the ESG standards after obtaining the approval of the first issuance of green bonds in the Egyptian capital market with an amount of USD100 million to one of the companies listed on the Egyptian Exchange (EGX). Companies listed on the EGX and companies with non-banking financial activities have to provide ESG disclosure reports related to sustainability (ESG standards) reports. In addition, other reports related to the financial consequences of climate change shall also be provided by such companies. As of January 2022, a quarterly statement with the procedures taken, or that will be taken, by companies with respect to such disclosures shall be also provided to FRA by the companies.

## 2. Authorisation

### 2.1 Authorisation to Provide Financing to a Company

Commercial lending activities in Egypt are subject primarily to the Banking Law, which defines a banking activity that would require a licence from the CBE as any service provided customarily by banks in Egypt on a recurring basis. For a bank to operate in Egypt, it must have a licence from the CBE and comply with all the regulations of the CBE.

Other non-banking financial services are regulated under the Capital Market Law No 95 of 1992, as amended, and are regulated by the FRA. This includes types of financing such as factoring, invoice discounting, securitisation, margin trading and investment banking. Moreover, according to the Microfinance Law No 141 of 2014 as amended, companies that are licensed by the FRA can provide microfinancing to businesses with a ceiling of up to EGP200,000 for each loan.

## 3. Structuring and Documentation Considerations

### 3.1 Restrictions on Foreign Lenders Granting Loans

The Banking Law defines banking activities as those that involve accepting deposits and providing loans to companies and individuals. These are the main activities of commercial banks in Egypt and would require the entity that practices these activities to have a licence from the CBE. The Banking Law includes an explicit restriction on any entity not licensed to practise such activities.

This restriction, although broad and explicit, is faced with the reality that many foreign commer-

cial banks provide loans to companies in Egypt, including governmental and public entities, on a non-recurrent basis. It is also common practice to have intra-group and shareholders' loans without considering such transactions caught by the Banking Law restriction.

These practices have led to a development in the construction of the rule regarding the Banking Law restriction, so that the acceptable interpretation is deemed to catch lending activities by an entity which is recurrent, continuous, and offered on a non-solicited basis to potential borrowers in Egypt. The settled position, then, is that competent authorities close their eyes to foreign lenders providing loans to Egyptian entities as long as such lending is not advertised or offered to the public and is not considered a significant part of the lending activities of the foreign lender.

### 3.2 Restrictions on Foreign Lenders Granting Security

The regulatory framework around granting securities to foreign lenders may vary according to the type of collateral involved. For example, article 106 of the Banking Law gave foreign banks and foreign financial institutions the right to take real estate mortgages and commercial mortgages. This can be practically achieved through a prior authorisation from the CBE.

In relation to the Movable Collaterals Law No 15 of 2015 (the "Movable Collaterals Law"), which regulates the granting of securities such as pledges over bank accounts, future assets and movable assets, including intangible assets, the law requires the entity benefiting from the security to be licensed as an Egyptian bank, a financial leasing company, or other Egyptian companies licensed to provide credit solutions. This means that the Egyptian Collaterals Registry is limited

to Egyptian entities, which can exclusively have online accessibility to the register.

In relation to real estate mortgages, Egyptian law does not include any general restriction on a foreign lender being a mortgagee under a mortgage contract. However, there is a disparity between the legal rule and its application. The offices of the Notary Public in Egypt, being the competent authority responsible for real estate mortgage registration, do not, as a matter of practice, accept any mortgage registration with a foreign entity as a beneficiary. It is yet to be clarified whether such practice is based on internal regulations or a common practice developed throughout the years.

A pledge on shares in a joint stock company is executed in the form of an agreement that has to be registered with Misr for Central Clearing, Depository and Registry (MCDR), the authority responsible for the central depository of all shares in joint stock companies, in order to block any trading on the shares in the registers of the MCDR. One of the requirements for the MCDR to register such pledge, is that the pledgee must be coded on the EGX to be able to sell the shares in an enforcement scenario. This coding system on the EGX is available for foreign as well as Egyptian entities and individuals.

### 3.3 Restrictions and Controls on Foreign Currency Exchange

There are no specific restrictions, controls or other concerns regarding foreign currency exchange, which is permitted through banks registered with the CBE and licensed foreign exchange bureaus. The Banking Law also includes several provisions that provide for the licensing of foreign currency exchange firms, and payment facilitators and payment aggregators, although these provisions leave the details

of the licensing processes to be decided by the board of directors of the CBE.

### 3.4 Restrictions on the Borrower's Use of Proceeds

According to the Banking Law, the borrower must utilise the loan proceeds for the purposes contained in the credit approval of the bank and the bank must supervise such utilisation. The utilisation of the facility proceeds is subject to the general principles of Egyptian law regarding corruption, terrorism and money laundering. The utilisation by the borrower of the loan proceeds for any of the aforementioned purposes would be penalised under the relevant criminal provisions. Furthermore, the utilisation of the loan proceeds for a purpose other than the purpose included in the credit approval is subject to imprisonment and/or a fine not exceeding EGP1 million and not less than EGP100,000.

In Islamic finance transactions, the general rules of sharia apply and, as such, the proceeds cannot be utilised in activities such as gambling, activities relating to alcohol, or arms trading.

### 3.5 Agent and Trust Concepts

The concept of a trust is not specifically recognised under Egyptian law, although its general features can be found in the agency rules, with certain disparities. It is common in syndicated loans to have security and facility agents play an administrative role representing the interests of the syndicate lenders.

The facility agent can be appointed in the same debt instrument to act on behalf of the lenders in relation to the management of documentation and transfer of funds to and from the borrower. The security agent holds the security documents on behalf of the lenders, and in cases of default,

it is entitled to initiate enforcement procedures on behalf of the lenders.

Typically, a loan agreement includes an obligation on the borrower to pay annual fees to the agents, in consideration for the services performed by them. The agency roles as clarified can be based on the agency provisions included in the Civil and Commercial Codes.

### 3.6 Loan Transfer Mechanisms

The transfer of a loan between lenders can be made by way of an assignment that is subject to the Egyptian Civil Code (ECC). The assignment agreement is executed between the existing lender and the new lender without the necessity of having the borrower as a party. The notification to the borrower, however, is required to make the assignment effective towards the borrower. Also, in practice, the existing lender and the new lender sign an assignment certificate whereby the assignor bank is exempted from its obligations under the loan agreement.

Security interests can also be transferred by way of an ECC assignment from a theoretical perspective. However, it is recommended in many cases to cancel the security interest and create a new security interest in favour of the new lender. This is especially relevant in cases where the existing security interest does not include all favourable terms for the new lender or there are practical considerations that impede the transfer of security process.

### 3.7 Debt Buy-Back

There are no specific restrictions on debt buy-back by the borrower or sponsor.

### 3.8 Public Acquisition Finance

There are no rules regarding “certain funds” with respect to public acquisition finance transac-

tions. The usual set of documentation is commonly used in these transactions. All information on loans and other financings taken by the bidder must be disclosed in its subscription bulletin.

## 4. Tax

### 4.1 Withholding Tax

Interest payments paid overseas to entities that are non-resident in Egypt by entities which are resident or have a permanent establishment in Egypt are subject to withholding tax at a rate of 20%, whether paid directly or indirectly, without any deductions, and subject to any double taxation treaty which may provide for a lower withholding tax rate or an exemption from tax to the extent that the tenor of the loan or credit facility is less than three years. Withholding tax must be remitted to the Tax Authority on the first business day following the day on which the withholding has been deducted.

Interest payments to any offshore lender in connection with a loan or credit facility with a tenor of at least three years are exempt from withholding tax.

### 4.2 Other Taxes, Duties, Charges or Tax Considerations

Pursuant to the Egyptian Stamp Duty Law No 111 of 1980, a stamp duty tax is levied in respect of credit facilities and loans extended by banks. The rate of the stamp duty tax is ten basis points every quarter calculated on the highest debt balance throughout the quarter under the facility, loan or borrowing extended by the bank. The stamp duty tax must be borne and split equally between the lender and the borrower and should be transferred by the lender to the competent tax authority within a maximum period of seven days from the end of each quarter.



## 4.3 Usury Laws

Under the ECC, to the extent that interest payable by an Egyptian entity would exceed 7% per annum, including compounding or capitalisation of interest, or interest exceeding the principal, such excess is unenforceable.

It may be argued that the calculation and determination of interest is subject to Article 50 of the Commercial Code, which allows such rate between merchants to a contractual maximum of the rate declared by the CBE from time to time. This restriction does not apply to banks licensed and registered in Egypt to undertake banking activities, which banks are entrusted to freely set interest rates subject to the nature of the banking activities in accordance with the Banking Law.

## 5. Guarantees and Security

### 5.1 Assets and Forms of Security

Egyptian law recognises various forms of security over assets including real estate mortgage, tangible and intangible movables mortgage, pledge of bank accounts, pledge of shares, security on claims and receivables such as accounts receivable and rights under contracts. The security takes the form of an agreement between the pledgor and the pledgee.

Perfection of the security will vary subject to the nature of the same. In order to perfect a real estate mortgage, it shall be notarised with the Notary Public, while perfection of a possessory mortgage entails transferring the possession of the movables, subject of the mortgage, to the pledgee in order for the pledge to take effect. The Egyptian Collaterals Registry has been established to register security interest over movable assets. In case of a share pledge,

the relevant security interest must be registered with the MCDR. Unregistered security interests would carry the risk of unenforceability towards third parties.

The fees for registering securities will vary according to the type of the security and, in certain instances, subject to the amount of the loan.

### 5.2 Floating Charges or Other Universal or Similar Security Interests

Floating charges are not explicitly regulated under Egyptian law. However, under the Movable Collaterals Law, a pledge may be granted over future assets and registered with the Egyptian Collaterals Registry. Security interest may also be granted to secure a future debt, an overdraft, or a revolving line of credit.

### 5.3 Downstream, Upstream and Cross-Stream Guarantees

Corporate guarantees, including downstream and cross-stream, are generally permissible subject to the existence of corporate commercial interest. Upstream guarantees are permitted to the extent that the parent company is not represented on the board of directors of the guarantor. The Companies Law further prohibits any company from guaranteeing the obligations of its board members. Thus, if any subsidiary is guaranteeing the obligations of its parent company, the parties must confirm that the parent is not represented on the board of the subsidiary during the lifetime of the financing.

### 5.4 Restrictions on Target

There is no explicit legal provision restricting the target from granting security in the context of the acquisition of its own shares. In practice, the acquirer grants the shares of the target as security for the financing of its transaction. In this regard, we note that the target may not pro-

vide a guarantee in relation to liabilities of any of its board members, and hence the acquirer may not be represented on the board of directors of the target.

## 5.5 Other Restrictions

Generally, no further consents are required. Please refer to **5.1 Assets and Forms of Security**. From a practical perspective, registration of in rem security interests may trigger significant survey fees subject to the nature and size of the land, and as determined on a case-by-case basis.

## 5.6 Release of Typical Forms of Security

Security release mechanics vary depending on the type of security, but security interests are typically released upon the instructions of the pledgee following the complete repayment of the debt obligations by the pledgor.

Regarding the pledge of shares, the termination instructions by the pledgee must be notified to the MCDR to release the block placed on the shares. For other forms of registrable securities, the release will also have to be perfected in accordance with instructions from the pledgee to the authority responsible for the registration of the pledge.

## 5.7 Rules Governing the Priority of Competing Security Interests

Regarding the priority of competing security interests, certain creditors enjoy a general or specific lien created by virtue of the law over all or part of the assets of the debtor. For example, the law determines a priority ranking of a lien for judicial expenses and tax obligations over any other debts. Other than lien rankings provided by the law, different lenders have the right to secure their debt and subordinate contractually their rights between themselves and/or other

creditors, such as in the case of subordinating a shareholder loan to a creditor. If there is no subordination contractually, the rank of each security interest is determined pursuant to its date of registration and perfection, whereby earlier registration takes precedence over later.

Any contractual subordination executed prior to bankruptcy procedures will survive. However, the borrower shall not undertake any action contradicting the restructuring plan (eg, granting securities) prepared in light of its potential bankruptcy that will affect the lenders' interests. Accordingly, the contractual subordination concluded after the restructuring plan may not survive, subject to the discretionary power of the competent court. If the competent court declared the bankruptcy of the borrower, it shall not administrate or dispose of its assets and hence the contractual subordination will not survive.

## 6. Enforcement

### 6.1 Enforcement of Collateral by Secured Lenders

The enforcement of security under Egyptian law varies depending on the type of security itself. It is generally completed through selling the asset by public auction through courts. Certain laws expressly set forth simpler enforcement procedures, such as the Banking Law in relation to the enforcement of a share pledge registered in favour of Egyptian banks and the Movable Collaterals Law in relation to a pledge over bank accounts. A general overview on enforcing security in Egypt is as follows.

- Immovables (ie, lands and buildings) – an “execution order” is issued by the competent court upon the request of the creditor and annotated in the competent Notary Public

office. The creditor shall notify the debtor of the execution order and grant a period of 30 days to the debtor to make the due payment. If the debt is not paid, the property will be sold in public auction under the supervision of the enforcement judge.

- **Movables** – regarding the movable properties pledged under a fonds de commerce mortgage, should the debtor not make the payment within the following eight days from the notification to the debtor, the creditor may request that a summary judgment is rendered permitting the sale of some or all of the debtor's assets under the fonds de commerce mortgage agreement by way of public auction. However, if the movables are pledged separately (as opposed to by way of a fonds de commerce mortgage), the creditor has the right to request from the competent court the sale of the pledged property in whole or in part following the lapse of five days from the notification to the debtor with the due payment.
- **Share pledge** – following serving a notification to the debtor with the due payment, the creditor may enforce its rights over the shares in accordance with the EGX sale and purchase rules, noting that the MCDR requires that the pledgee must be coded on the EGX to be able to sell the shares under an enforcement scenario. However, upon the occurrence of the incident that requires the creditor to enforce its right over the pledged shares and following the lapse of five days from the written notification to the debtor with the due payment, the creditor may proceed with selling or acquiring the pledged shares and deduct its value from the due payment.

It is not permissible to directly acquire any securities or financial instruments unless the pledge agreement stipulates the same; and, likewise,

the method of evaluating the securities or financial instruments for the purpose of enforcement. In all cases, it is not permissible to agree to postpone the enforcement of the pledged securities or financial instruments until an administrative decision or a court judgment is issued, an auction is held, or until a certain period of time has elapsed. Also, the bankruptcy or restructuring of the debtor or the creditor shall not result in delaying the enforcement.

- **Bank accounts and cash deposits** – if the creditor is the bank holding the pledged accounts/deposits, a set-off is usually executed between the pledged accounts/deposits and the amounts owed by the debtor; and if the pledged accounts/deposits are owned by another bank, such accounts/deposits may be claimed by the creditor.

## 6.2 Foreign Law and Jurisdiction

The choice of foreign law as governing law of the contract is valid to the extent it does not contravene Egyptian public policy or public morality. The submission to a foreign jurisdiction is generally a valid and enforceable choice, subject always to private international law rules. However, it must be noted that foreign law, for evidential purposes, is treated as a matter of fact and must be proven by the concerned party. In certain matters Egyptian law provides for the exclusive jurisdiction of local courts.

Immunity from suit may be waived contractually. However, waiver of immunity from enforcement is subject to a restriction whereby real property and movables owned by the state or public juridical persons, which are allocated for public interest in fact, or pursuant to a law, regulation or decree of the competent minister, are considered to be public monies that are not subject to attachment.

## 6.3 A Judgment Given by a Foreign Court

In relation to foreign court judgments, a request for enforcement of a judgment by a foreign court must be filed in Egyptian courts, in order to review that the foreign judgment satisfies the following conditions (without reviewing the merits of the dispute):

- the courts of Egypt are not competent to hear the dispute, and the foreign courts are competent for the matter in accordance with the rules of international private law for the choice of jurisdiction in that country;
- that the parties to the dispute were duly notified and properly represented in the proceedings;
- that the judgment is final and enforceable in accordance with the law of the foreign country;
- that the judgment does not conflict with any prior judgment issued by an Egyptian court in the same case and is not contrary to public policy in Egypt; and
- the country where the court judgment is issued adopts a reciprocal treatment for the judgments of Egyptian courts.

In relation to foreign arbitral awards, Egypt is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Arbitration Convention of 1958. A foreign arbitral award obtained in a state that is a party to the New York Convention should be recognised and enforced by the competent Egyptian court under an exequatur after verifying that:

- the arbitral award does not conflict with prior judgments issued by Egyptian courts on the same subject matter of the dispute;

- the arbitral award is not contrary to public policy in Egypt; and
- the party against whom the arbitral award is rendered has been duly notified.

## 6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no specific restrictions on a foreign lender's ability to enforce its rights under a loan or security agreement to the extent that the structure of the agreements and perfection requirements comply with the law. Exceptionally, certain rules may apply for the enforcement of real estate mortgage considering the rules of foreign ownership of lands or real estate. This might also depend on the place where the property is located.

## 7. Bankruptcy and Insolvency

### 7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

Egyptian Law differentiates between insolvency procedures applied to non-merchant individuals and bankruptcy procedures applied to merchants, including companies. The Restructuring, Reconciliation, and Bankruptcy Law issued in 2018 provides two procedures that mitigate the financial distress of a company and provides a first line of defence ahead of bankruptcy.

#### Restructuring/Reorganisation

The purpose of restructuring is to figure out a plan to organise and overcome the financial and administrative turbulence of the bankrupt company. Any company may request restructuring provided that its capital is not less than EGP1 million and it has conducted business in a continuous manner for the previous two years without committing any fraud. The company may not request restructuring in the event that



a judgment has been issued declaring its bankruptcy or opening rescue/reconciliation procedures. The competent judge will approve the plan prepared by the restructuring committee. The company will remain in control of its business; nonetheless, the competent judge may appoint an assistant.

## Reconciliation/Rescue

Subject to the condition of two years of conducting business, any company who may be declared bankrupt, and did not commit fraud or gross negligence, has the right to request “a reconciliation from bankruptcy” if there is a disorder in its financial conditions that may lead to cessation of its due payments, or it has ceased payment (even if a bankruptcy declaration has been requested), and has the right to request a reconciliation from bankruptcy and submit it to the competent court.

Any debtor company may request a reconciliation from bankruptcy upon the approval of the majority of partners or general assembly subject to the type of the company; however, a company subject to liquidation procedures may not request the same. The company under reconciliation will continue managing its own monies under the supervision of a trustee appointed by the competent court. The company can also conclude all kinds of ordinary transactions necessary for its business.

## 7.2 Impact of Insolvency Processes

Upon the issuance of a judgment declaring the bankruptcy of the debtor, the debtor shall not repay any debt to a creditor unless through the court proceedings. Following the judgment, the interest on unsecured loans shall be suspended, and the interest on secured loans may not be requested unless to the extent of the amounts collected from selling any collateral assets. Pay-

ment of the principal shall take priority, followed by the interest due before the issuance of the judgment, then the interest due after the issuance of the judgment.

## 7.3 The Order Creditors Are Paid on Insolvency

The liens ranked as such and preferred by virtue of a law shall take priority (such as debts related to judicial expenses and tax dues). After satisfaction of rights mandatorily preferred by law, secured creditors shall recover outstanding debt from the assets taken as a security according to the ranking of registration (ie, first, second, third degree). Finally, the unsecured creditors will share any remaining enforcement proceedings on a pro rata basis related to the total indebtedness of the debtor. If a secured creditor did not collect all its debt, then the creditor must participate with the remaining debt in the pro rata distribution of unsecured creditors.

## 7.4 Concept of Equitable Subordination

The ranking of creditors is stated under the law and hence the court may not rearrange this order in any way that contradicts the law. However, the court shall terminate the bankruptcy process in the event that all the creditors reach a settlement with the debtor who has acted in good faith and did not commit any fraud.

## 7.5 Risk Areas for Lenders

There is the inherent risk associated with the fact that the monies of the debtor may not be sufficient to pay the debt of all creditors. In that case, the proceeds will be shared on a pro rata basis between creditors unless there are secured creditors.

## 8. Project Finance

### 8.1 Introduction to Project Finance

The main market trends are currently underlined by national financing projects, including infrastructure and real estate, in addition to small and medium-sized projects. The Egyptian Economic Development Conference (EEDC), held in March 2015, presented investment opportunities to domestic and international investors, and highlighted how well the banking sector weathered the economic turbulence that followed the 2011 revolution.

Additionally, the project finance market in Egypt witnessed:

- the issuance of a new Banking Law (replacing the previous legislation of 2003), which embraces new financial technologies within the regulatory system and expressly permits the creation of security in favour of foreign banks and international financial institutions; and
- the inauguration of the Egyptian Collateral Registry (ECR) created pursuant to the Movable Collateral Law No 115 of 2015 (MCL), which enables security to be created over bank accounts and future assets.

### 8.2 Overview of Public-Private Partnership Transactions

Egyptian law recognises public-private partnership (PPP) contracts pursuant to which a project company is entrusted with the financing, construction, equipment and operation of infrastructure projects and public utilities, and making their services available, or financing and rehabilitating such utilities with an obligation to maintain works that have been constructed or rehabilitated and to provide services and facilities necessary to enable the project to produce

or provide services regularly and progressively throughout the duration of the contract.

PPPs are primarily regulated under Law No 67 of 2010 regulating partnership with the private sector in infrastructure projects, services and public utilities (the “PPP Law”) and the executive regulations enacted thereunder. PPP contracts must be concluded for a term of no less than five years and up to 30 years from the date of completion of the construction and equipping works or completion of the rehabilitation works and with a minimum aggregate value of EGP100 million. The Cabinet of Ministers, upon the recommendation of the Supreme Committee for Public Private Partnership Affairs (“Supreme Committee for PPPA”), may, if required due to a material public interest, agree to conclude a PPP contract for a term longer than 30 years.

Pursuant to the PPP Law, PPP projects may not be tendered except following the approval of the Supreme Committee for PPPA, following a request by the competent authority in light of studies prepared under the supervision of the PPP Central Unit at the Ministry of Finance. The PPP Law provides for contracting by way of direct award if:

- the state’s need for the establishment of a project cannot be followed by contracting methods such as tender and public or limited auction, and there is an economic interest or a social necessity that requires its speedy implementation; or
- any of the project companies contracted with have finalised the implementation of a project in an efficient manner, and the Supreme Committee for PPPA estimated that re-awarding any of the works stipulated in Article (2) of the PPP Law to any of these companies to perform in the implemented project would have

an economic or social interest that will not be achieved if re-awarded to a different entity.

Contracting for these works shall be by virtue of a new contract.

### 8.3 Government Approvals, Taxes, Fees or Other Charges

Subject to the nature and type of the project, project financing to privately owned companies would not generally require governmental approvals. In relation to certain projects, such as renewable energy projects under the Feed-in Tariff programme, the regulatory authority may require project companies to obtain a certain percentage of financing from offshore lenders. Additionally, the approval of the competent authority may be required in relation to the security package to be granted to lenders subject to the nature of the project.

On the lending side, as a matter of Egyptian law, a licence from the CBE is required to undertake banking activities in Egypt. The definition of “banking activities” under Egyptian law is broad and includes any service provided customarily by banks in Egypt on a recurring basis. Accordingly, lending in Egypt on a recurring basis would require a licence from the CBE.

Subject to any arrangements with the competent authority to provide a copy or summary of the finance documents and requirements in relation to the registration of onshore security, it is generally not required for project finance documents to be registered or filed with any governmental body or authority.

In relation to project financing provided by one or more Egyptian banks, finance documents would typically be governed by Egyptian law, with the Cairo Regional Centre for International Commer-

cial Arbitration (CRCICA) as the dispute resolution forum. With respect to cross-border project finance transactions in which lenders are based offshore, financing documents are commonly subject to English law.

### 8.4 The Responsible Government Body

In 2014, Egypt witnessed the promulgation of a new Mineral Resources Law No 198 of 2014 and its executive regulation issued by virtue of the Prime Minister’s Decree No 1657 of 2015 (the “Mineral Resources Law”) governing mineral resources, ie, resources obtained from mines, quarries and salterns. Pursuant to the Mineral Resources Law, the Egyptian Mineral Resources Authority (EMRA) solely regulates and supervises the exploration for, and exploitation of, mine ores.

Exploration for, and exploitation of, oil and gas is also subject to concession agreements approved by the House of Representatives with the Egyptian General Petroleum Corporation being the primary government body competent in matters relating to exploration, production and refining.

Electricity is generally regulated under the Electricity Law No 87 of 2015, pursuant to which the Egyptian Electricity Transmission Company is established as the sole grid operator. The Egyptian Electric Utility and Consumer Protection Agency (EgyptERA) is the electricity market regulator.

Furthermore, and in addition to the above-mentioned laws, the oil and gas, power and mining sectors shall also be subject to the internal regulations issued by each relevant regulatory authority.

## 8.5 The Main Issues When Structuring Deals

### Legal Form of the Project Company

Egyptian law does not provide for specific restrictions in relation to the form of the project company in the context of a project financing as this shall be subject to the type of each project and its relevant agreement executed between its parties (eg, project companies established in relation to energy projects under the Feed-in Tariff programme must be a joint stock company). One point to note when structuring the security package is that an upstream corporate guarantee by an Egyptian entity is only permissible to the extent that the guaranteed entity is not represented on the board of directors of the Egyptian company.

### Laws Relevant to Project Companies

Companies established in Egypt are generally subject to the Egyptian Companies Law. However, the laws relevant to the project company shall depend on the type of the project itself.

### Restrictions on Foreign Investment

Generally, Investment Law No 72 of 2017 grants all investments (whether Egyptian or foreign investments) an equal and fair treatment and guarantees to foreign investors a treatment similar to that granted to national investors. Although there are no restrictions on foreign ownership as the company may be wholly owned by foreigners, there are legal restrictions on foreigner participation in certain activities, such as:

- commercial agency, which is required to be wholly owned by Egyptians or persons who have held Egyptian nationality for at least ten years;
- importation activities for trading purposes, whereby 51% of the shareholders must be Egyptians; and

- acquiring lands and/or real estates in the Sinai Peninsula (excluding the cities of Sharm El-Sheikh and Dahab, as per Presidential Decree No 28 of 2021), whereby the company is required to be wholly owned by Egyptians. Additionally, a company operating in the Sinai Peninsula (implementing investment and integrated development projects) must be established in the form of a joint stock company and 55% of its shareholders must be Egyptian. Certain approvals are required and restrictions are imposed on the foreign ownership. By way of exception to the aforementioned threshold, the requirement to have 55% Egyptian shareholders in companies that conduct the implementation of integrated development projects in the Sinai Peninsula may be exempted by virtue of a presidential decree issued in this regard and upon obtaining the required Cabinet and competent authorities' approvals allowing for such.

## 8.6 Typical Financing Sources and Structures for Project Financings

Projects are typically financed by a combination of both debt and equity and subject to a gearing ratio agreed between the lender and the borrower. Shareholders' loans are typically extended and may be subject to capitalisation throughout the tenor of the debt financing in order to maintain the agreed gearing ratio. Financing backed by export credit agencies is also a typical source of financing for projects.

## 8.7 The Acquisition and Export of Natural Resources

Natural resources are generally governed by the Egyptian Constitution, Law No 61 of 1958 as amended, in relation to the granting of concessions relating to the investment of natural resources and public utilities, as well as the rel-



evant law of the concession setting out regulatory and contractual terms.

The Egyptian Constitution prohibits disposing of natural resources as being a state public property. Granting the right to exploit natural resources or a concession to a public utility shall take place by law for a period not exceeding 30 years, while granting the right to exploit quarries, small mines and salterns (or granting a concession in this regard) shall be for a period not exceeding 15 years by law as well.

Noting that, the relevant law of the concession usually sets the licences and permits required to be obtained for the exploitation of the natural resources and the requirements that must be met by companies that are granted the right of exploitation or concession.

## **8.8 Environmental, Health and Safety Laws**

Law No 4 of 1994 and its executive regulations issued by virtue of Prime Minister's Decree No 338 of 1995 (the "Environmental Law") is the general framework governing the environmental, health and safety matters in relation to existing projects/upcoming projects in Egypt. Pursuant to the aforementioned law, the Egyptian Environmental Affairs Agency is the competent authority to issue environmental permits/approvals. Labour Law No 12 of 2003 has also provided for the provisions and regulations required to preserve occupational health, safety and security in worksites.

Additionally, there are other regulatory frameworks governing specific environmental, health and safety measures: for example, Law No 55 of 1977 and its executive regulations governing the establishment/operation of thermal equipment and steam boilers, along with obtaining the required management and operating permits, and Law No 119 of 2008 governing the specifications, obligations and requirement for establishing a new building or modifying an existing building.

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## Trends and Developments

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### **Banking and Finance in Egypt: an Introduction**

The banking sector has gone through a phase of legislative remodelling and modernisation in Egypt over the past few years. This aligns with the government's plan to vitalise the economy, keep up with technological trends and boost inflows of foreign direct investments as one of the major sources of foreign currency in Egypt.

Banking Law No 194 of 2020 was promulgated in September 2020. Its seven chapters cover many topics that had already been covered in the now-defunct law of 2003, such as the regulation of the Central Bank of Egypt, the banking sector, supervision and oversight rules, and rules regarding banks' extension of credit.

Certain new topics have been introduced as well, such as the regulation of fintech companies and cryptocurrency trading, alongside new provisions on existing topics, such as Article 106 concerning banks and financial institutions taking securities as a guarantee for their credit facilities (more on that later). The new topics of fintech and payment facilitation activities have been previously covered through regular circulars and regulations issued by the Central Bank of Egypt.

### **Importance of Taking Securities in Egyptian Debt Finance**

It is specifically relevant to highlight the importance of taking securities in debt finance transactions in Egypt. There are generally limited options for a creditor in cases of a borrower defaulting on its debt. The lender may conduct

negotiations to reach a settlement or rescheduling of the loan; if the borrower does not respond to these amicable solutions, the lender will resort to judicial or dispute settlement mechanisms.

The judicial proceedings will mainly seek to declare the bankruptcy of the borrower or to foreclose and enforce on the securities guaranteeing the loan. However, there has been a trend in the Egyptian courts to economise on the issuing of bankruptcy judgments, as they can have micro-economic drawbacks for the borrower, and macro-economic drawbacks in general.

A bankruptcy court order would serve to protect the interests of the suppliers of the company, its employees, its customers, etc. Macro-economically, the number of bankruptcy court orders may give an adverse indication of the Egyptian economy. For that reason, an exceptionally low number of bankruptcy judgments have been issued throughout the past two decades, and hardly any lenders have succeeded in liquidating a company through bankruptcy proceedings to reclaim their debt.

The Egyptian Parliament issued Bankruptcy and Restructuring Law No 11 of 2018 to tackle these issues specifically. The law included several measures and pre-emptive actions that can be taken by the court to prevent the bankruptcy of a company. Many schemes have been introduced in the law, such as restructuring of the borrower and preventative conciliation. In light of these facts, the enforcement of securities has been always the fruitful alternative in a contentious



atmosphere for a bank or a lender to reclaim its debt after a borrower's default.

## Privileges for Banks in Taking Securities

The Banking Law and several other relevant laws have always included incentives and privileges for the banks in terms of taking securities for the credit facilities granted to their customers. These privileges varied between reduced registration fees, streamlined registration processes (including having dedicated notary offices for banking transactions only) and simplified processes for the enforcement of mortgaged assets.

The privileges have been transposed, to replace the default rules for all other creditors regarding the full spectrum of asset types taken as security for credit facilities. These privileges include the following.

- The fees on real estate and commercial mortgages are reduced by half for a bank, a foreign bank or an international financial institution, with ceilings that vary depending on the amount of the loan.
- The cancellation of real estate and commercial mortgages is exempted from any fees.
- Banks, foreign banks and international financial institutions can benefit from a streamlined process for the registration of a real estate mortgage.
- Banks, foreign banks and international financial institutions can benefit from a streamlined process of enforcement of the real estate mortgage in accordance with Mortgage Law No 148 of 2001.
- Banks have always benefited from enforcing share pledges through a self-service process of foreclosure or direct sale to third parties in the stock market without the need to obtain a prior court order allowing such sale.

## Foreign Financial Institutions and Foreign Banks

A large volume of loans are extended to Egyptian borrowers by foreign banks (ie, banks that are established in foreign jurisdiction and have no presence in Egypt) and international financial institutions, including renowned entities such as HSBC, Deutsche Bank, the EBRD and the IFC. Many of these entities have secured governmental approvals to enjoy certain privileges given to Egyptian banks in taking securities. However, the general rule of practice remains that foreign banks are restricted from taking securities in the first place, and are not permitted to benefit from the privileges given to Egyptian banks.

Article 106 of the Banking Law has introduced a method for foreign banks and international financial institutions to benefit from the privileges given to Egyptian banks in taking securities. It provides that "Foreign banks and international financial institutions are allowed to take commercial mortgages for the financing and credit facilities transactions that are utilised in Egypt. The Central Bank of Egypt may give licences for foreign banks and international financial institutions for taking commercial mortgages."

To provide perspective on that, foreign lenders can benefit from each security asset as follows.

- Real estate mortgage: real estate assets (whether land or buildings) can be mortgaged by virtue of an official contract signed before a Notary Public. Establishing a real estate mortgage is a very lengthy and time-consuming process, although Egyptian banks and licensed foreign institutions can benefit from the streamlined process in registration and enforcement processes. A foreign lender can be a mortgagee in a real estate mortgage, but will not benefit from the cap on registration

fees unless it is licensed by the Central Bank of Egypt.

- Registered mortgage on movables: mortgages can be taken on all tangible and intangible movable assets. Intangible assets are trade names, goodwill, clientele, patents, industrial designs, etc. The perfection may take place in accordance with either of the following laws.

(a) Commercial Mortgage Law: a commercial mortgage agreement must be signed and registered with a Notary Public. The agreement must include a detailed list of the tangible movable assets that are the subject of the mortgage. Foreign institutions may not take out commercial mortgage unless they are licensed according to Article 106 of the Banking Law.

(b) Movable Collaterals Law: a movable collaterals agreement shall be signed between the parties and registered digitally by way of an upload to the online Electronic Collaterals Register. The agreement must include a detailed list of the tangible movable assets that are the subject of the mortgage. The benefit of this security is given exclusively to Egyptian banks and certain other non-banking financial institutions, according to the Movable Collaterals Law. The lender must be registered with the Financial Regulatory Authority in order to register such security. Some international institutions have succeeded in registering themselves with the Financial Regulatory Authority based on their prior approval from the Central Bank of Egypt for commercial mortgages. Other than that, foreign institutions would not be able to register movable collateral agreements.

- Securities cannot be taken by foreign lenders or international financial institutions unless certain approvals are obtained from the Central Bank of Egypt or the Financial Regulatory

Authority. The alternative for foreign lenders is to enter into a security agency agreement with a local security agent to hold the security for its benefit.

- Bank accounts: bank accounts can be pledged as part of a Movable Collaterals Law security, as clarified above. They can be included in the movable collaterals agreement, which is registered online in the Electronic Collaterals Register.
- Receivables: receivables can be pledged as part of a Movable Collaterals Law security as clarified above, or by way of an assignment of rights subject to the provisions of the Civil Code. The assignment of rights must be notified to the third-party obligor through a court bailiff, or acknowledged with a date attestation on such acknowledgment. An assignment of rights can be taken by a foreign lender or an international financial institution without the need for a local security agent.
- Pledge of shares: a pledge of shares is applicable to shares of joint stock companies exclusively. It is made through a shares pledge agreement that needs to be registered with the central depository “Misr for Central Clearing, Depository and Registry” (MCDR). Foreign lenders can take a shares pledge as a pledgee, provided that they are coded in the Egyptian Stock Exchange. No other approvals are needed in order for foreign lenders to take such security.

## The Role of a Security Agent

Where foreign lenders cannot take certain types of securities, it is common for them to enter into a contractual relationship with an Egyptian financial institution to function as a local security agent.

The realities have shown that not all foreign financial institutions benefit from Article 106, as

the Central Bank of Egypt has always requested international financial institutions to be organisations made by a treaty between sovereign countries; a foreign bank has to be defined as such under its charter and law of jurisdiction. Furthermore, the Central Bank of Egypt requests that the foreign bank is supervised by a regulator – namely, a central bank.

This leaves out many other types of foreign financial institutions that in fact provide, or intend to provide, loans to Egyptian borrowers, but cannot be licensed by the Central Bank of Egypt according to Article 106. These institutions, such as export agencies and foreign funds, would therefore seek the assistance of a local security agent. Nonetheless, the use of local security agents has always been a process with many impediments and considerations.

First, in many cases the security agent prefers to enter into the transaction as a lender, to maximise its benefits. Second, the fees requested by security agents may be high, adding a burden on the foreign lender that devalues the amount of its investment. Thirdly, the security agent may try to include certain provisions in the security agency agreement that would be cumbersome and a hurdle in negotiations. In fact, several local financial institutions refuse to function as a security agent if the security is taken on specific assets.

## **Recommendations for Expanding and Regulating the Role of a Security Agent**

The reasoning given by the Central Bank of Egypt for not allowing all types of foreign lenders to be licensed under Article 106 is not convincing. It has given verbal guidance that it cannot let any foreign entity have existence solely through the ownership of assets in Egypt. This might not be the best answer for the issue, as it has many

counterarguments. First, not all securities result in the lender owning the asset. The borrower has to default in the first place, then the lender may own the asset in a foreclosure or sell it to a third party. Second, there is a question of what would be the disadvantages of having a foreign institution owning assets in Egypt without a physical existence or proper incorporation; Egyptian laws already provide for the ownership of real estate assets and movables by foreign persons, with certain limitations.

Prohibition is probably not the optimal solution for these matters. The government may well regulate the ownership of assets in Egypt by foreign lenders if there is an enforcement scenario. For example, it may provide a grace period for the entity to dispose of the asset.

On the other hand, regulating foreign lending transactions in Egypt uplifts the economy and encourages foreign direct investment, as well as providing an alternative source of funding for Egyptian businesses. It will be prudent for the Egyptian government to legislate the establishment of security agencies and loan management institution, and make them part of the economy. It can give these institutions all the privileges given to banks in taking securities.

Regulating such activities would benefit the Egyptian economy as it would provide a cheaper source of debt finance for Egyptian companies, with fewer restrictions compared to the domestic equivalents. As a matter of fact, there are many foreign lending transactions in the Egyptian market to companies, governmental authorities and public sector companies. Building on this given fact would be a much-recommended course of action for the government, providing solvency for companies specifically in the availability of foreign currencies.

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Once again, these concerns can be viewed as an opportunity to regulate and reap the benefits of given situations rather than applying the policies of prohibition. It is crucial for Egypt to have an open mind in tackling the most pressuring of questions in order to provide for a better future in a struggling global economy.



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