

EGYPT



Law and Practice

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Matouk Bassiouny & Hennawy was established in 2005 and has since developed into a premier full-service business law firm in Egypt and the MENA region, with offices in Algeria, Sudan and the UAE, as well as two country desks covering our Libya and South Korea practices. Its over 200 lawyers are trained locally and internationally in common and civil law systems and are fully conversant in English, Arabic, French and

Korean. Matouk Bassiouny & Hennawy's finance and projects group – headed by regional managing partner and group head of finance and projects Mahmoud S Bassiouny – represents numerous clients in the energy sector, focusing on areas such as renewable energy, oil and gas, power (including nuclear power), gas pipelines, and transmission and distribution assets.

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1. Project Finance Panorama

1.1 Sponsors and Lenders

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 are also a typical source of financing projects.

Egyptian banks, branches of foreign banks registered with the Central Bank of Egypt (CBE), and financial institutions established by virtue of a special treaty, generally act as lenders in Egypt. As a matter of Egyptian law, to undertake banking activities in Egypt, a licence from the CBE is required. The definition of banking activities under Egyptian law is broad and includes any service provided customarily by banks in Egypt on a recurring basis. The CBE has wide discretionary powers to determine the extent of the recurrence of such activities, which would trigger licensing requirements.

Failure to obtain the required licence shall result in a penalty of imprisonment and a fine not less

than one million EGP and not exceeding ten million EGP, or either two penalties as per Article 225 of the CBE and Banking System Law No 194 of 2020 (the “Banking Law”).

1.2 Public-Private Partnership Transactions

Public-Partner Partnerships Overview

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 which 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 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, may, if required due to a material public interest, agree to conclude a PPP contract for a term longer thirty years.

Pursuant to the PPP Law, PPP projects may not be tendered for except following the approval of the Supreme Committee for Public Private Partnership Affairs, following the request of the competent authority in light of the studies prepared under the supervision of the PPP Central Unit at the Ministry of Finance. Contrary to the public procurement law which is not applicable to PPP projects, the PPP law does not envisage or provide for contracting by way of direct award.

It is worth noting that assets pertaining to the implementation of the partnership contract may not be seized or enforced upon according to Article 11 of the PPP Law.

1.3 Structuring the Deal

Egyptian law does not provide for specific restrictions in relation to the form of the company in the context of a project financing, though from a practical perspective, such borrower is typically 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 guarantor.

As noted above, 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.

1.4 Active Industries and Sectors

Increased activity in green hydrogen projects, going hand-in-hand with renewable energy projects, as well as logistics, transportation and infrastructure, is expected in Egypt within the coming period. This is particularly the case after the catalyst of Egypt hosting the UN Climate Change Conference of the Parties (COP27) and the execution of landmark framework agreements and memoranda of understanding on the margins of the conference.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

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 over receivables such as accounts receivables and rights under contracts, which take the form of a written agreement between the pledgor and the pledgee.

Perfection of Security Overview

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 Collateral Registry (ECR) has recently been established to register security interest over movable assets, including cash deposited in bank accounts and non-possessory pledges over movable assets. In case of a share pledge, the relevant security interest must be registered with the Misr for Central Clearing, Depository, and Registry (MCDR). Unregistered security

interests would carry the risk of unenforceability toward third parties.

2.2 Charges or Interest Over All Present and Future Assets of a Company

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

2.3 Registering Collateral Security Interests

The fees for registering security interests will vary according to the type of the security and, in certain instances, subject to the amount of the loan. Egyptian banks benefit from a maximum ceiling of EGP100,000 in relation to Notary Public fees payable for the registration of real estate mortgages where the value of the loan exceeds EGP30 million. With respect to fees relating to movable collateral registered under the ECR, fees are capped at EGP500.

2.4 Granting a Valid Security Interest

In order to ensure the validity of security interest, local security documents are usually drafted in a manner where each item of collateral is explicitly identified. Egyptian law does not expressly regulate floating charges over all assets of a company as is common in certain jurisdictions, but rather that security may be granted over a certain asset – eg, a bank account, the credit of which may vary from time to time. Although the Movable Collateral Law No 115 of 2015 permits the creation of movable collateral over future assets, which should therefore permit lack of specification of the same, from a practical perspective, future assets and the expected

date of their acquisition are normally set out in the security document.

2.5 Restrictions on the Grant of Security or Guarantees

In the context of an acquisition financing, 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 provide a guarantee in relation to liabilities of any of its board members, and hence the acquirer may not be represented in the board of directors of the target.

Generally, no further consents are required. Please refer to **2.3 Registering Collateral Security Interests**. 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. It is worth noting that registration of a property subject to mortgage is a prerequisite to the registration of a mortgage over such property.

2.6 Absence of Other Liens

In respect of liens, it is worth distinguishing between two types – namely, mandatory rights preferred by law and security created by the owner of the asset. In relation to the former, the source of the lien would be a legal provision and the same would not be searchable per se. In respect of the presence of other security, certain types of security interests are searchable, such as a pledge over shares deposited with MCDR, real estate mortgages, *fonds de commerce* mortgages and security over movable assets which has been registered with the ECR. Other types of security interests may not be search-

able, such as assignments by way of security and possessory mortgages. Lenders generally seek comfort through conducting their own due diligence and searches, representations from the borrower or the guarantor confirming absence of other security and negative pledge undertakings to prevent the creation of security at a later stage. In relation to assignments by way of security, lenders typically require that the counterparty to the assignment issue an acknowledgement confirming, among other things, that it has not been previously notified of an assignment over the same rights.

2.7 Releasing 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. If a security interest must be registered with a certain competent authority in order to perfect the same, the release shall be effected in accordance with instructions from the pledgee or mortgagee confirming fulfillment of the secured obligations and instructions to release the security rights.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

The general principle of enforcement of security under Egyptian law is through sale of 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 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. 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:** 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 service of a notification to the debtor of the due payment, the creditor may enforce its rights over the shares in accordance with the sale and purchase rules applicable in the Egyptian Exchange in the event that the pledgee is a bank registered with the Central Bank of Egypt.
- **Bank accounts and cash deposits:** set off is usually applied between the pledged accounts/deposits and the amounts owed by the debtor.

3.2 Foreign Law

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. Egyptian law provides for the exclusive jurisdiction of local courts in certain matters, and the exclusive application of Egyptian law – for example, in relation to the transfer of technology contracts. Additionally, we note that the application of foreign law is treated as a matter of fact and therefore must be proven by the party invoking it.

3.3 Judgments of Foreign Courts

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

- the foreign courts offer reciprocal treatment to judgements obtained in the courts of Egypt;
- the courts of Egypt are not competent to hear the dispute, and the foreign courts are competent to adjudicate the matter in accordance with the rules of international private law for the choice of jurisdiction in that country;
- the parties to the dispute were duly notified and properly represented in the proceedings;
- the judgment is final and enforceable in accordance with the law of the foreign country; and
- 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.

In relation to foreign arbitral awards, Egypt is a party to the New York Convention for the Enforcement of Arbitral Awards. Additionally, pursuant to the Egyptian Arbitration Law No 27 of 1994, international arbitral awards are enforceable in Egypt. Egyptian courts would recognise and uphold the submission by the parties to arbitration. The following documents must accompany the application for enforcement:

- the original award or a signed copy;
- a copy of the arbitral agreement;
- an Arabic translation of the award, authenticated by the competent authority if the award was not issued in Arabic;

- a copy of the minutes evidencing the deposit of the award with the competent court in the Arab Republic of Egypt; and
- a copy of the notification of the award to the party against whom the award has been made.

3.4 A Foreign Lender's Ability to Enforce

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 are in compliance with the law.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

The Banking Law defines banking activities as those that involve receiving deposits or obtaining funds, investing those monies to grant financing or credit facilities, participating in the capital of companies, and undertaking what is considered as banking activities by reference to the prevailing customs on a primary and recurrent basis. Therefore, lending into Egypt on a recurring basis requires a licence from the CBE. The Banking Law includes an explicit restriction on any entity not licensed to practice such activities and provides a penalty on those entities in accordance with Article 225 of the Banking Law as discussed in **1.1 Sponsors and Lenders**.

This restriction, although broad and explicit, is faced with the reality that many foreign commercial 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 shareholder loans without considering such transactions being 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.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Egyptian law is clear on restricting foreign lenders from taking security in relation to certain types of collateral, while in certain other types there is a disparity between theory and practice.

Limitations Imposed on Movable Security

Pursuant to Article 1 of the executive regulation of the Movable Collateral Law, as amended, creditors that may register security under the ECR are banks and entities that practice financing activity and other entities and persons granting finance or credit including, inter alia, (i) bank and financing institutions licensed to operate in Egypt, and (ii) entities licensed to engage in activities related to providing financing or credit. Nonetheless, the Financial Regulatory Authority has confirmed that the European Bank for Reconstruction and Development and the International Finance Corporation are among the authorised creditors that can take security and register the same under the ECR.

Limitations Imposed on Immovable Security

In relation to real estate mortgages, Egyptian law does not include any general restriction on foreign lenders from 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.

4.3 Foreign Investment Regime

Foreign investment is primarily regulated under the umbrella of the Egyptian Investment Law No 72 of 2017 and its executive regulations. The Egyptian legislative framework allows foreign investors to invest in Egypt either through establishing a company or branch. The Investment Law was promulgated to provide investors with legal safety, guarantees, incentives and certain tax exemptions for their investments. There are some general guarantees and incentives applicable to all companies operating under the Investment Law, while there are other specific incentives and guarantees pertaining to special zones. Examples of the guarantees and incentives set out under the Investment Law include:

- fair and equitable treatment to any investor in Egypt, whether foreign or national investor;
- foreign investors are entitled to obtain a residency in Egypt for the duration of their investment provided that the following conditions are met and sustained; and
- tax and non-tax incentives enjoyed by investment projects which are subject to the Investment Law, in which incentives are divided into general, specific and additional incentives.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

At present, there are no restrictions on foreign currency payments abroad or repatriation of capital and/or dividends by foreign investors. In practice, commercial banks may request underlying documents to substantiate the transfer.

The exportation of the Egyptian pound (EGP) offshore is not permissible.

4.5 Offshore Foreign Currency Accounts

There are no restrictions under Egyptian law for an Egyptian company to create and maintain an offshore foreign currency account.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

Subject to the nature and type of the financing and project agreements, it is generally not required for finance documents (save for certain onshore security documents) to be filed, registered or recorded with any government authority in order to ensure enforceability. Certain project documents, such as those granting an in rem right, for example, must be registered with the Notary Public in order to ensure enforceability under Egyptian law. Further, oil and gas concessions must take the form of a law approved by the House of Representatives. 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.

5.2 Licence Requirements

Generally, ownership of land must be registered with the competent Notary Public in order to ensure enforceability vis-à-vis third parties. Save to the extent of two properties which are subject to a maximum area, foreign individuals/entities may not own land in Egypt, except in the case of juridical persons, as necessary to carry out their licensed activities. However, an Egyptian real estate investment company may be fully owned by foreigners.

Natural resources are primarily governed, inter alia, by the Egyptian Constitution, Law No 61 of 1958 as amended in relation to granting of concessions relating to the investment of natural resource and public utilities, as well as the relevant law of the concession setting out regulatory and contractual terms.

5.3 Agent and Trust Concepts

The concept of trust is not recognised under Egyptian law. Agency is recognised and regulated under Egyptian law and security agency is commonly used in syndicated financing and for the purposes of holding security for foreign lenders. Whether the security agency relationship is drafted as a trusteeship or otherwise, there is a wide consensus among legal practitioners that trust agreements may be characterised as an agency agreement.

5.4 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 than any other debts. Other than lien rankings provided by the law, different lenders have the right to secure their debt and contractually subordinate their rights between themselves and/or other creditors, such as in the case of subordinating a shareholder loan to a senior creditor. The rank of each security interest is determined pursuant to its date of the registration and perfection, whereby former registration takes precedence over the later.

Any contractual subordination executed prior to bankruptcy procedures will survive. However, the borrower shall not undertake any action contradicting the reconstruction plan (eg, granting

security) prepared in light of its potential bankruptcy which will affect the lenders' interests. Accordingly, the contractual subordination concluded after the reconstruction plan may not survive, subject to the discretionary power of the competent court. In case the competent court declared the bankruptcy of the borrower, it shall not administrate or dispose its assets and hence the contractual subordination will not survive.

5.5 Local Law Requirements

Doing business in Egypt, whether commercial or non-profitable, is not permitted without having an established legal entity in Egypt. Such legal entity may take the form of a company, branch or representative office. A project must be undertaken by a local entity, whether a company or a branch of a foreign company. The regulatory framework applicable to certain industries may often necessitate the project company to take the form of an Egyptian joint stock company.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

Egyptian Law differentiates between insolvency procedures applied to non-merchant individuals and bankruptcy procedures applied to merchants, including companies. The Restructuring, Preventative Composition, and Bankruptcy Law No 11 of 2018 (the "Bankruptcy Law") provides two procedures that mitigate the financial distresses of a company and provide a first line of defense ahead of bankruptcy. These proceedings are as follows:

- **Restructuring:** the purpose of restructuring is to figure out a plan to organise the financial and administrative works of the bankrupt company. Any company may request restructuring provided that its capital is no less than

EGP1 million and has conducted business for the previous two years without committing any fraud. The company may not request restructuring in case a judgment has been issued declaring its bankruptcy or opening preventative composition 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. Pursuant to Article 18 of the Bankruptcy Law, the means by which restructuring may be achieved include, inter alia, the revaluation of assets, restructuring debts and capital increase.

- **Preventative composition:** 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 rescue from bankruptcy" in case there is a disorder in its financial conditions that may lead to cessation of its due payments, or has ceased payment (even if a bankruptcy declaration has been requested), has the right to request the rescue from bankruptcy and submit it to the competent court. Any company may request a "rescue from bankruptcy" upon the approval of the majority of partners or general assembly as the case may be; however, a company subject to liquidation procedures may not request the same. The company will remain in control of its business under the supervision of a preventative composition secretary appointed by the competent court.

6.2 Impact of Insolvency Process

Upon the issuance of a judgment declaring the bankruptcy of the debtor, the debtor shall not repay any debt of a creditor until the court proceedings. Following the judgment, 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. Payment 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. Further, pursuant to Article 87(a) of the Bankruptcy Law, the bankruptcy trustee shall annotate the declaration of bankruptcy in the ECR and the competent Notary Public office.

6.3 Priority of Creditors

The liens ranked by the law 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 or third degree). Finally, the unsecured creditors will share any remaining enforcement proceeds on a pro rata basis. To the extent that the secured creditor is not able to collect all its debt from the secured asset, such creditor shall participate with the remaining debt in the pro rata distribution alongside other unsecured creditors.

6.4 Risk Areas for Lenders

There is an 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 who enjoy priority over certain assets of the debtor.

6.5 Entities Excluded From Bankruptcy Proceedings

Unincorporated joint ventures, the public sector and public business sector entities are excluded from bankruptcy proceedings by virtue of Article (1) of the issuance articles of the Bankruptcy

Law. Further, banks registered with the CBE are also excluded from the scope of the Bankruptcy Law.

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Insurance companies may not provide insurance over project assets which are contrary to Egyptian public order.

7.2 Foreign Creditors

Egyptian law does not restrict the payment of insurance policies to foreign creditors. This is subject to any agreement between policyholders and the insurance company. Some agreements may provide for the payment of insurance policies for the purpose of the restoration of the damaged assets, while other agreements may provide for the payment of insurance policies for the purpose of the mandatory prepayment of the debt.

8. Tax

8.1 Withholding Tax

Interest payments to entities that are non-resident in Egypt by entities whom 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.

Withholding tax must be remitted to the Tax Authority during the first working day following the day on which the withholding has occurred.

8.2 Other Taxes, Duties, Charges

Pursuant to the Egyptian Stamp Duty Law No 111 of 1980, the stamp duty rate over loans is 40 basis points levied annually on the highest debt balance under the facility, loan or borrowing provided by banks during the financial year. The stamp duty is split equally between the lender and the borrower and is payable in quarterly instalments by the lender. The burden of this tax may not be shifted by contract. Pursuant to the principle of territoriality, stamp duty is not applicable to a facility, loan or borrowing provided by foreign banks that are not registered in Egypt.

8.3 Limits to the Amount of Interest Charged

Under the Egyptian Civil Code, 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 activity according to Article 88 of the Banking Law.

9. Applicable Law

9.1 Project Agreements

Egyptian law often governs project agreements, particularly in cases where project agreements are entered into between the public sector and private sector. It is worth noting that the choice of foreign law to govern project agreements is acceptable provided that it does not contradict public order and public morality.

9.2 Financing Agreements

In relation to project financing provided by one or more banks registered with the Central Bank of Egypt, finance documents would typically be governed by Egyptian law, with the Cairo Regional Centre for International Commercial Arbitration (CRCICA) as the dispute resolution forum. With respect to cross-border project finance transactions where lenders are based offshore, financing documents are commonly subject to English law.

9.3 Domestic Laws

All matters related to Egyptian public policy or public morality are governed by Egyptian law, in addition to local law security documents.