

Oman

Graham Mouat and Ravinder Singh

Al Busaidy Mansoor Jamal & Co (Barristers and Legal Consultants)

Creating collateral security packages

1 What types of collateral are available?

Security interests under Omani law are categorised as:

- real security: security interests in and rights enforceable against property (real rights). These security interests are created by statute (royal decree), and are enforceable in priority to the claims of unsecured creditors both before and upon the debtor's bankruptcy; and
- personal security arising out of contractual arrangements between parties that give rise to contractual claims (personal rights). In these cases, the creditor will rank as an unsecured creditor in the event of the debtor's bankruptcy.

Omani law provides for three forms of real security:

- commercial mortgages;
- pledges; and
- legal mortgages.

Personal security interests in project financing are typically:

- guarantees;
- assignments; and
- direct agreements.

Commercial mortgage

All existing and identifiable tangible assets of a project company may be made subject to a commercial mortgage. The tangible assets must be identified and described in the commercial mortgage. For this reason, both a fluctuating pool of assets and after-acquired assets are not capable of being charged by way of commercial mortgage. The former case is dealt with by the project company undertaking to grant a supplemental commercial mortgage upon acquiring further assets. It is, however, common practice to include after-acquired property within the description of mortgaged property.

The Oman Commercial Law issued by Royal Decree No. 55/90 (OCL) expressly provides that certain intangible assets such as the company's trade name, right of lease, the right to contact clients and goodwill may be mortgaged by way of commercial mortgage.

It is common practice to mortgage all the project company's intangible assets such as rights under insurance policies, trade name, goodwill, consents, licences, approvals relating to the project, rights under project documents and rights under shareholder loans. It may not be possible to mortgage certain intangible assets due to their nature. Contractual rights that are not enforceable at the time of creation of a commercial mortgage, for example because enforcement is contingent upon a party performing certain obligations, are considered future assets of the project company and, as such, are not capable of being charged under the commercial mortgage.

Pledges

The OCL contains provisions relating to pledges created over a moveable asset as security for a debt that has arisen from a 'commercial activity' conducted by the debtor. Possession of the pledged asset must have been transferred to the pledgee (or to a person appointed for this purpose by the contracting parties) and such asset must remain in the possession of the pledgee (or a third-party custodian) until such time as the debt has been discharged. Under the OCL and pursuant to an agreement between the parties, a pledge may be registered over nominal instruments including negotiable instruments such as stocks, shares of joint-stock companies and other securities.

The Civil Transaction Law issued by Royal Decree No. 29/2013 (CTL) also contains specific provisions relating to creation of a pledge. The provisions of the CTL relating to the creation, effects and extinguishment of pledges apply to a pledge of a non-commercial nature and also to any matter related to pledges upon which the OCL is silent.

In project financing, security over shares is taken by way of a pledge. Oman has three types of companies that issue shares: limited liability companies (LLCs), closed joint-stock companies (SAOC) and public joint-stock companies (SAOG). As it is not possible to pledge shares of an LLC, sponsors generally incorporate project companies as SAOCs.

Legal mortgages

Legal mortgages may be created over land or interests in land. Under the Oman land law, ownership of land is restricted to Omani nationals, Omani corporate bodies fully owned by Omani nationals or Gulf Cooperation Council states citizens and Omani joint stock companies in which Omanis own not less than 30 per cent of the share capital. The Usufruct Law issued by Royal Decree No. 5/81, as amended, introduced rights for Omani and foreign companies and individuals to enjoy rights of usufruct over land for projects that assist the economic and social development of Oman. A usufruct is generally granted to a project company by the Omani government over land to be developed for a project. Usufruct rights confer real rights on the beneficiary to use and exploit the land, are registered against the title deeds of the land and may be charged by way of legal mortgage.

Guarantees

The OCL contains provisions relating to guarantees in respect of a debtor who is engaged in commercial activities.

Assignments

Omani law does not contain any statutory provisions relating to assignment of receivables or rights under a contract. Assignment of rights and receivables are therefore created and governed by the terms of the contract.

The CTL contains certain provisions regarding the assignment of debts from one debtor to another. Article 775 provides that for a transfer of a debt to be effective, the creditor has to agree to the transfer of such a debt. Article 793 provides that a guarantor of the debt assigned has to agree to the assignment of debt. Article 785 permits an assignee to raise any defence relating to the debt that the assignor could have raised.

Direct Agreements

Direct agreements are often entered into for financing of infrastructure projects implemented in Oman. The direct agreements give certainty to the lenders that the counterparty or public sector entity will not terminate a project agreement on the occurrence of an enforcement action. With the introduction of the CTL, there is now greater certainty in terms of the enforceability of the contractual provision and the award of a remedy of specific performance. Hence, if parties have agreed to a particular course of action pursuant to a direct agreement, then provided that such a course of action is not contrary to public order, the lenders would be able to obtain an enforcement of such rights.

- 2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges (eg, stamp duty) payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

The OCL provides that a written confirmation of a pledge of certified equity or debt securities should be recorded in the books of the party that issues such securities. In practice many parties will not maintain a register. Pledges over securities traded or listed on the Muscat Securities Market are required to be registered with the Muscat Clearing & Depository Company SAOC (MCDC) in the MCDC's prescribed form although execution of the pledge does not need to take place at the MCDC.

Priority is established by registration in time with the relevant regulatory authority. Charges entered on the same date have the same priority, provided they are accepted for registration at the same time. In cases where charges are registered on the same day in favour of different unrelated creditors, priority will be given according to the timing of each registration. Priority would be given to a chargee of a registered charge and not a chargee in possession of the asset who has not registered a charge.

Legal mortgages are executed and registered at the Land Registrar's office in the Ministry of Housing (MOH) in Muscat or branch of MOH in the locality where the property is situated. Both signatories for the mortgagor and mortgagee are required to attend at the execution of a legal mortgage. The MOH provides a two-page prescribed form of mortgage deed in Arabic but will accept additional agreed terms as an annex to the mortgage deed. Article 1034 of the CTL provides that if more than one mortgagee applies for registration of a mortgage against a debtor in respect of one property, then such mortgages shall be registered under the same serial number and such creditors will have equal ranking. A charge over immovable property is enforced and executed by judicial sale at public auction following enforcement proceedings.

A registration fee of 0.5 per cent of the secured amount is payable to the MOH by the borrower upon registration. In large project finance transactions, the registration fee is capped at 100,000 Omani rials.

The execution of a commercial mortgage must be notarised and signatories on behalf of both the mortgagor and mortgagee are usually required to attend the Ministry of Commerce and Industry (MOCI). A commercial mortgage contract is registered upon acceptance by the MOCI through its endorsements and notations placed on the company's computer printout. Registration must be

concluded within 30 days of the date of the contract. A fee of 30 Omani rials is payable for the registration of the commercial mortgage and an additional 100 Omani rials for attestation of the document. A registered commercial mortgage is valid for a period of five years from the date of its registration. A lender who wishes to lend for a longer term will be required to renew the mortgage for further periods of five years. As a matter of practice, the MOCI will allow a lender to renew the mortgage upon a written request and payment of the renewal fee of 30 Omani rials.

Where a security interest is registered in favour of more than one lender, the rights of the secured creditors will be governed by the terms and conditions of the security documents. If the security documents provide for a *pari passu* charge among the creditors, then such charge should be enforceable as per the terms of the security documents. Under article 7 of Ministerial Decision 5/91, priority is governed by the date of entry of a commercial charge on the charges register of the company's commercial register at the MOCI.

Assignment of contractual rights is effected by notification to the debtor, subject to the terms and conditions set out in an assignment deed or agreement. The assignor must notify the debtor. The lender, as an assignee, must obtain an acknowledgement of the assignment from the debtor. Assignment of contractual obligations, however, may only be effected with the consent of the creditor.

Assignment of rights by way of security do not provide a creditor with security capable of being enforced in preference to other creditors. A contractual assignee will rank as an unsecured creditor in the event of the assignor's bankruptcy.

To comply with the registration formalities required for perfection of a pledge or commercial mortgage, all documentation evidencing the agreement or intention to create a security interest must be in Arabic. The document is not required to be expressly governed by the law of Oman provided that if such security interest is sought to be enforced in Oman, it should not be contrary to Omani law.

Although there is no specific legislation on trusts, the concept of lenders holding collateral through a security agent is recognised in Oman. Typically an Omani licensed bank will be selected as security agent to hold assets located in Oman. This facilitates the creation and enforcement of security interests and avoids the risk that an unlicensed foreign bank acting as a security agent might be considered as conducting unauthorised business in Oman. It is unlikely that the courts in Oman would consider collateral held by a security agent to be part of that security agent's own estate in the event of the bankruptcy of the security agent.

- 3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Commercial mortgages

A computer printout may be obtained from the MOCI in respect of a company's corporate details including details of the registration of commercial mortgages. Subsequent commercial mortgages may only be registered if existing registered mortgagees provide a letter of no objection for the registration of any subsequent commercial mortgage.

Legal mortgages

A copy of the title deeds of the land may be obtained from the MOH, which will record the registration of any legal mortgages.

Pledges

There is no registry in respect of pledges. However, evidence of the existence of a pledge over shares traded or listed on the Muscat Securities Market may be obtained from the MCDC.

- 4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Enforcement of commercial mortgages, pledges and legal mortgages in Oman is by application to the primary commercial court for an order of sale of the assets by way of public auction. The practice of Omani courts in order to enforce a commercial mortgage, pledge or legal mortgage is to require a judgment in favour of the security holder. A straightforward debt recovery action typically takes six months to obtain judgment. Parties have the right to appeal a primary court judgment to the appeal court and thereafter to the Supreme Court.

Once final judgment is obtained the creditor applies to the court for enforcement. The enforcement of the most basic security will usually take up to three or four months. Where circumstances are more complex, the process may take significantly longer. During that time the mortgagor would continue to hold and control all charged assets and could continue to run its business unless the court appoints a third-party administrator or custodian to hold or to manage the chargor's assets so as to ensure that they are not depleted or their value is not eroded.

Enforcement is generally carried out by way of public auction of the charged assets. With the exception of land, there are no rules on setting a reserve price that must be reached at public auction. Secured creditors therefore have very little control over the level of the proceeds realised from the enforcement of their security.

In the case of land, the court may seek the assistance of an expert to decide a 'basic price'. If this price is not reached, the property is re-auctioned and the minimum price is reduced by 10 per cent it is sold. Creditors have the right to object to the enforcement proceedings at any time, for example, if the sale price is too low. However, the legislation does not specify the effect of raising an objection and it would not necessarily halt the enforcement proceedings. Any party is allowed to bid for assets sold under public auction and the only way secured creditors would be able to prevent the acquisition of the assets for an unacceptably low price would be to bid themselves.

Land

Legal mortgages are enforced through proceedings before the court. The mortgagee must prove the due and outstanding debt and request enforcement of the security. Rights of the mortgagee on enforcement are limited to a public sale of the mortgaged land or property or of the usufruct rights. The mortgagee is not allowed to take possession of the land other than in accordance with the Oman Banking Law Royal Decree 114/2000 (OBL), and only for the specific duration provided for by OBL (12 months from the date on which it takes possession) subject to further extensions granted by the Central Bank of Oman. The mortgagee in possession would be required to dispose of the property once the 12-month period and any extension granted has expired.

With respect to land where the mortgagor's land rights arise under an usufruct agreement, the mortgagee has the right to require a transfer or a sale of the usufruct rights subject only to the terms and duration of the usufruct agreement.

Tangible and intangible, moveable assets covered by the commercial mortgages

Upon a default and following a notice of demand an application can be made by the mortgagee for the sale of all or part of the assets covered by a commercial mortgage executed and registered by the project company. The sale of the assets secured by a commercial mortgage will be by way of public auction and it will not be possible for the mortgagee to take direct possession of the secured assets unless agreed to by the mortgagor. Any agreement that attempts to avoid this mechanism is likely to be void.

Assignments and guarantees

Enforcement proceedings with respect to assignments and guarantees may be filed against the assignees, assignors or third-party debtors to whom a notice of assignment has been given.

- 5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Upon and from the date of adjudication of bankruptcy, the bankrupt debtor relinquishes all rights and powers to the receiver or trustee-in-bankruptcy appointed by the commercial court for the management of the bankrupt entity's assets. A bankrupt entity may not dispose of any assets, nor make or receive any payment unless any such sale or receipt of payment is for a bona fide commercial purpose.

Once declared bankrupt, no proceedings may be brought against or conducted by the debtor other than in the following instances:

- actions relating to assets and transactions to which the bankrupt's impediments do not extend. Any such actions would also include actions that have been commenced by secured creditors who are in possession of a commercial or legal mortgage or pledge. Such proceedings may, however, be unnecessary if the trustee-in-bankruptcy accepts the outstanding liability as being due and payable and consents to the sale or transfer of the secured assets;
- actions permissible by law relating to the business of the bankruptcy; and
- penal actions.

As a general rule, the declaration of bankruptcy entails the stay of proceedings brought by secured and unsecured creditors. Unsecured and secured creditors may not individually undertake enforcement proceedings against the assets of the bankrupt, nor may they finalise proceedings that began before the declaration of bankruptcy. Any person may recover from the bankruptcy such specific items to which it can prove its right of ownership. The receiver may not hand over any such claimed items without the prior permission of the judge in-charge of bankruptcy. If a secured creditor had already initiated legal proceedings for recovery of its loan from a company seeking to sell the secured assets, then upon such company being adjudicated bankrupt, the proceedings initiated by the secured creditor may be stayed. Under such circumstances, the secured creditor having a first charge over a particular asset would be given preference for the repayment of its secured debt from the sale proceeds received from a sale of the assets over which such secured creditor has a charge.

Article 590 of the OCL provides the 'suspect period' to be the period commencing from the date on which the bankrupt ceased making payments. In the first instance, the Commercial Court will set a date from which it deems the bankrupt to have ceased making payments. Article 591 of the OCL further provides that the date for cessation of payments may not go back more than two years from the date on which the adjudication of bankruptcy has occurred. The suspect period cannot, in any circumstances, precede the bankruptcy order by more than two years.

Pursuant to article 609 of the OCL creditors of a bankrupt would be permitted to seek clawback of any payments made by the bankrupt entity during the suspect period preceding the date of adjudication of bankruptcy.

Any transaction undertaken by a bankrupt, other than the following, during the suspect period may be invalidated by the

Commercial Court as against the insolvent entity's creditors if any such transaction is considered to be harmful to the interest of the creditors and the creditor knew at the time of the transaction that the bankrupt ceased payment to its creditors.

The following transactions may be set aside if carried out by the bankrupt after the date that the bankrupt ceased making payments to creditors, namely:

- all contributions, except for customary small gifts;
- the settlement of debts before the expiry of their term, notwithstanding, however, such a settlement may have been made;
- the settlement of current debts other than by means agreed upon (settlements made via commercial instruments or bank transfers shall be deemed to be the same as settlements made in cash); and
- the creation of any security interest.

Any application for the nullification of a transaction that falls foul of article 609 of the OCL may be made by the receiver or trustee in bankruptcy within a period of 12 months from the date of adjudication of bankruptcy of the bankrupt. The bankrupt entity's creditors may bring an action for recovery of damages suffered by them on account of harmful transactions.

Rights of creditors

Upon the adjudication of bankruptcy, as a matter of law, a group of creditors composed of all unsecured creditors will be deemed to have come into existence on the basis of their established claims having arisen prior to the date of adjudication of the entity's bankruptcy. Secured creditors with mortgages shall not form a part of the group of creditors, until such time as they participate in the bankruptcy for the recovery of any amounts that have remained unpaid from the sale of the secured assets.

Secured debts

Upon obtaining the approval of the judge in-charge (the adjudicator) of the bankrupt entity, the receiver may discharge the debt secured by a mortgage over moveable assets and redeem the charge over the assets for the benefit of the group of creditors.

The receiver may allow a mortgagee a grace period within which to commence legal proceedings against the bankrupt entity for enforcement against the mortgaged assets. If the mortgagee fails to take such action within the given time period, the receiver may, after obtaining the approval of the adjudicator, proceed to sell the mortgaged assets directly and apply the sale proceeds towards the discharge of the secured creditors' claims (ie, principal and accrued interest). Any excess amount received from the sale of the secured asset will be retained by the receiver for the benefit of the group of creditors.

If the sale proceeds received from the sale of the mortgaged asset are less than the secured debt, the mortgagee may participate in the bankruptcy for the remaining balance of its claim as an ordinary unsecured creditor, provided that its debt has been verified by the trustee in accordance with the Code.

Ranking of government debts

The government has a general priority under Royal Decree 32/94 for sums owed to it, whether by way of taxation or otherwise. The Decree provides that monies owed to specified Omani government bodies have priority over all monies, secured or otherwise, owed by that debtor to any person and sets out specific mechanisms for precautionary attachment and execution of the debtor's assets. The Ministry of Finance has authority to approve waivers and variations to the government's priority rights under Royal Decree 32/94.

Other preference creditors

The Oman Labour Law protects the rights of employees to receive unpaid salary and other benefits upon the bankruptcy of a business

and accordingly, their dues will rank in priority to payments due to other creditors.

Effect on contracts

Article 633 of the OCL provides that a contract to which the bankrupt entity is a party will not automatically terminate on a declaration of bankruptcy unless the contract itself was based on personal consideration. Article 633 of the OCL gives the receiver in bankruptcy the right to affirm or reject contracts that are binding on the bankrupt entity and its counterparty. The law does not stipulate a time frame within which the receiver must advise the counterparty of its decision to affirm or reject the contract. If the receiver fails to perform the contract the counterparty is entitled to apply to court for its cancellation.

Foreign exchange issues

- 6** What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

There are no foreign exchange controls. As far as we are aware, the Central Bank of Oman has never made any attempt to impose such controls, although it has the power to do so under the OBL.

- 7** What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Article 52 of Royal Decree 28/2009 (effective from 1 January 2010) (the Tax Law) provides for payment of withholding tax on the following:

- royalties;
- remuneration for conducting research and development;
- remuneration for using or the right to use computer programs; and
- charges against management.

Withholding tax is payable at the rate of 10 per cent. The Tax Department to date has not held interest on principal amounts or repayment of principal amounts to overseas lenders as being subject to withholding tax.

- 8** Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no restrictions on the repatriation of foreign earnings and the Omani rial is freely convertible.

- 9** May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes.

Foreign investment issues

- 10** What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

In accordance with the Foreign Capital Investment Law Royal Decree 102/94 (FCIL), non-Omani nationals wishing to engage in trade or business in the Sultanate, or to acquire an interest in the capital of an Omani company, must obtain a licence to do so from

the MOCI (in practice, foreign investors will be granted a licence as a matter of right, without filing any specific application for the grant of a licence in the case of an acquisition of an interest of up to 70 per cent in the capital of an Omani company. GCC nationals or companies 100 per cent owned by GCC nationals are permitted to establish a business in Oman for most activities. Depending on the nature of the project to be developed or implemented, approval for 100 per cent foreign ownership may be granted by the Council of Ministers pursuant to an application filed with the minister of the MOCI, or through other sector-specific royal decrees such as the Sector Law issued by Royal Decree 78/2004. The Council of Ministers may permit, upon the recommendation of the minister of MOCI, 100 per cent foreign participation in a project if such project 'contributes to the national economy' and provided that the share capital for such company is not less than 500,000 Omani rials. Foreign companies may do business in Oman by establishing a branch, or by participating in the formation of a limited liability company or a joint-stock company. The minimum capital requirement for foreign participation in an LLC is 150,000 Omani rials and 500,000 Omani rials and 2 million Omani rials for SAOCs and SAOGs respectively. Depending on the vehicle chosen, registration is required with the MOCI, the MCDC, the Chamber of Commerce and Industry, the Muscat Securities Market and the Capital Markets Authority. Fees vary according to the entity.

The acquisition of oil-related interests by any party, foreign or local, can only be acquired by means of a royal decree granted by the Sultan of Oman.

A free trade agreement between Oman and the United States came into force on 1 January 2009, pursuant to which US-incorporated entities are permitted to set up companies with 100 per cent equity.

- 11** What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Omani insurance law requires that all insurance must be placed with Omani companies and businesses registered in Oman must place their insurance requirements with insurance companies licensed to conduct insurance business in Oman. Foreign insurance companies operating in Oman are permitted to engage in insurance-related activities in certain circumstances and they are required to obtain the participation of one or more national insurance companies for every policy they issue in Oman. Invariably, national insurance companies when participating in a particular insurance policy for large projects will generally reinsure the risk assumed by them overseas. Regulations that required that the risk had first to be offered by an Omani-licensed insurer to other Omani insurance companies in Oman have been amended and Omani-licensed insurers can now reinsure overseas directly. Lenders have entered into assignment of insurance proceeds under the insurance policies with local insurers and the reinsurance policies directly with the reinsurers.

- 12** What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

All foreign employees must hold residence visas and labour clearances, sponsored by their employers. A major 'Omanisation' drive is under way by the government of Oman to require the private sector to employ suitably qualified Omanis in preference to foreign nationals wherever possible. Statutory requirements dictate that a percentage of the workforce of all companies shall be Omani nationals. The percentage varies according to the sector in which a company operates and these are regularly revised by MOM. The requirement for strict and immediate compliance with the relevant Omanisation levels for the sector may be temporarily deferred in the case of government privatisation projects.

There have been some very recent developments announced by the Ministry of Manpower (MOM) in respect of the issuing of visas. Pursuant to article 11 of the Expatriates Residence Law, an expatriate worker will not be allowed to re-enter Oman on a new employment visa until a period of two years has elapsed since such a worker leaving Oman. This provision of law was not implemented earlier by ROP but will be implemented from 1 July 2014.

Expatriate employees are not permitted to bring their spouses or children to Oman during the first six months of employment.

- 13** What restrictions exist on the importation of project equipment?

Most imported goods attract a customs duty of 5 per cent levied on the cost, insurance and freight (CIF) value of the goods imported. The importation of equipment is subject to restrictions under the Israeli Boycott List.

- 14** What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The Basic Statute of Oman issued by Royal Decree 101/96 (the Basic Law) sets out the economic principles of the state. The Basic Law safeguards private ownership and specifies that no person may be prevented from disposing of his or her property, provided such disposition is in accordance with the law. It allows the government to expropriate land or other assets in the public interest only in cases and in the manner stipulated by law and in return for fair compensation.

Confiscation of property is forbidden. Specific confiscation as a penalty is not permitted except by judicial order and in cases specified by the law.

Fiscal treatment of foreign investment

- 15** What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Article 8 of the FCIL, the Tax Law and the Law for the Encouragement of Industry provide for tax and customs duties exemptions in accordance with the procedures set out in Ministerial Decision 45/2005 with regard to companies engaged in certain activities such as industrial, mining, exporting, tourism and public utility services. The performance of management contracts and construction contracts in tourism and public utility projects and project companies do not qualify for tax holidays. Tax holidays are granted for five years from the beginning of production or business operations. The Council of Financial Affairs and Energy Resources may grant an extension of the tax holiday for up to five years, subject to satisfying certain conditions.

Government authorities

- 16** What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Aside from the ministries referred to in the preceding paragraphs, the Directorate General of Petroleum and Mineral Resources administers the oil and gas sector under the authority of the Ministry of Oil and Gas.

The Ministry of Transport and Communication regulates the transportation sector; the Telecommunications Regulatory Authority (TRA) regulates the telecommunications sector and the AERO regulates the power and water sectors. The powers vested in each of these authorities with regard to the services regulated by them are set out

in the laws establishing these bodies and the subsidiary regulations issued pursuant thereto.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Article 11 of the Basic Law provides that all natural resources and revenues are the property of the state, which will preserve and utilise them in the best manner possible, taking into consideration the requirements of the state's security and the interests of national economy. No concession or investment in any of the public resources of the country may be granted except by virtue of a specific law (ie, a royal decree) and for a limited period.

All land is owned by the state unless it is owned by private individuals pursuant to the Land Law. While the Basic Law provides for the grant of concession or investment rights regarding expropriation of mineral resources, specific royal decrees, for example Royal Decree 8/2011 (the Oil and Gas Law) regulate oil exploration and production.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

In relation to the oil and gas sector, most of the exploration and production activities are carried out pursuant to exploration and production sharing agreements (EPSAs) and the share of revenue payable to the government is based on the terms of the EPSA. EPSAs provide that the revenue from the oil production is to be shared between the government and the concessionaire in an agreed ratio, for example 20:80 or 30:70 as the case may be, after meeting the costs involved. The concessionaire provides all funds required for and bears all costs and expenses in connection with the exploration of oil or gas, as the case may be. A formula may also be agreed between the government and the concessionaire for computation of the amount of income tax to be paid by the concessionaire and included in the EPSA. Royalties payable to the government in respect of mining activities are specified in the related concession licence.

Under the double tax treaty with the United Kingdom, no withholding tax is imposed on royalties paid to companies resident in the UK, subject to the satisfaction of certain conditions.

19 What restrictions, fees or taxes exist on the export of natural resources?

Tax is imposed by the Director of Taxation Affairs pursuant to the Tax Law. Oil companies are taxed at a rate of 55 per cent on their taxable income insofar as it relates to an income earned from the sale of oil.

Article 112 of the Tax Law provides that the annual tax rate applicable to all companies incorporated in Oman including the branches of foreign entities and permanent enterprises is 12 per cent on taxable income in excess of 30,000 Omani rials. There are no specific tax thresholds in relation to companies engaged in extraction and export of mining activities.

Special rules apply to cross-border sales or deliveries of crude oil or crude oil products. In practice, all of these deliveries are in the nature of export transactions. Such transactions are closely controlled by the shareholders of the relevant operating companies.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

This would depend on the nature of the transaction and would vary accordingly but, by way of example, approvals from the Authority

for Electricity Regulation Oman (AERO) would need to be obtained for projects in the electricity and water sectors. It would be unusual for a government body to require an approval without there being an express statutory requirement relating to that government body or the activity contemplated. Other than in the case of registration of security interests, the obtaining of approvals, permits, authorisations and other registrations would attract a standard administrative fee.

21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Only security interests capable of registration need to be filed with government authorities. Powers of attorney in support of security interests require notarisation by a notary public at the Ministry of Justice. All documents filed with any government authority must be in the Arabic language.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

International arbitration contractual provisions and awards are recognised by the Omani courts and by the Oman Arbitration Law issued by Royal Decree No. 32/84 (the Oman Arbitration Law). If a contract contains provisions for the resolution of disputes by arbitration in Oman or elsewhere, the Omani courts will not accept jurisdiction over the dispute unless both parties agree formally to waive the arbitration clause. Oman is a signatory to the New York Convention on the enforcement of foreign arbitral awards in accordance with which any arbitration awards made by a member country are directly enforceable by the Omani courts.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

English law is most often selected for both project and financing agreements in large projects.

Omani law does not impose any restriction in relation to the choice of governing law clauses in contracts.

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

A foreign jurisdiction clause should be upheld in Oman provided it is not deemed contrary to public policy. However, the presence of a foreign jurisdiction clause in a contract does not necessarily exclude the jurisdiction of the Omani courts. In such a case it would still be open for a party to institute proceedings before an Omani court, and provided such party satisfies the court that it has jurisdiction over the subject matter of the claim, it is likely that the court will assume jurisdiction. In other words, the Omani courts would not consider their jurisdiction over a matter barred as a consequence of a foreign jurisdiction clause.

Royal Decree 13/1997 provides that Oman's commercial courts have jurisdiction to entertain suits filed against government agencies. Therefore, in our opinion, the government should not be entitled to plead sovereign immunity and the courts would recognise a waiver of sovereign immunity.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Health, safety and environmental issues are addressed by a set of complex regulations issued by multiple authorities. Companies operating in the oil and gas sector and power project companies impose health, safety and environmental requirements on their contractors to ensure contractual conformity with the labour laws, social insurance laws and environmental laws. In addition, the municipalities have long taken a leading role in issuing and enforcing health, safety and environmental regulations. The Oman Labour Law and Ministerial Decision No. 19/82 set out the regulations for occupational safety and health protection of employees in the private sector.

The Ministry of Manpower (MOM) may appoint inspectors to oversee the implementation of safety standards by employers. The inspectors may recommend a range of penalties in the case of non-compliance of an employer including the issue of a warning, imposition of a fine or closure of the employer's business.

The framework law on environmental protection and the prevention of pollution in Oman is set out in Royal Decree 114/2001 (the Environmental Law). It regulates a wide range of physical, chemical and biological pollutants, and many of its provisions are directed specifically at potentially polluting workplaces, both onshore and offshore.

The Ministry of Environment and Climate Affairs (MECA) is the principal authority for environmental protection and pollution control in Oman and is responsible for implementing the national plan for the conservation of the environment and prevention of pollution. One of MECA's most important functions is the administration of the environmental permit system by the Directorate of Environmental Planning and Permits for all new projects undertaken in Oman. Under the Environmental Law and the Law for the Encouragement of Industry in Oman, project sponsors must apply to MECA for an environmental permit before setting up any operation that may be the direct or indirect source of environmental pollution.

The provisions of the Environmental Law are supplemented by other statutory requirements specifying discharge and emission standards or requiring permits to be obtained prior to the commencement of operations. These permits are subsidiary to the main environmental permit required under the Environmental Law.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

A project company may be incorporated as an LLC, SAOG or SAOC.

As mentioned in question 10, for foreign participation in an Omani company to be lawful, a foreign investor would be permitted to invest in a corporate entity up to 70 per cent without a specific licence. Should a foreign investor wish to retain 100 per cent of the equity, such foreign investment would need to obtain the approval of the Council of Ministers or otherwise be permitted by a project or sector-specific law issued by royal decree. While it is possible for up to 100 per cent foreign participation in an Omani company to be licensed, this is unusual and only in special circumstances. In practice, the level most licensed is 70 per cent foreign participation, subject to a higher level of scrutiny by the authorities and at their discretion. The nature of the proposed company's activity has a bearing on whether, and how much, foreign participation is licensed in excess of 70 per cent. The authorities have certain priority areas, such as industries using local products and raw materials, export industries and projects for tourist villages and tourism. Following Oman's joining the World Trade Organization, the authorities agreed to permit 70 per cent foreign participation, although the law has not yet been amended in this respect.

Pursuant to the free trade agreement between Oman and the United States, a wholly-owned US entity should also be able to register a branch in Oman to conduct business except in certain reserved sectors.

The principal sources of financing available to project companies are direct lending from export credit agencies and local bank funding.

Public-private partnership legislation

27 Has PPP enabling legislation been enacted and, if so, at what level of government (eg, national, provincial or state or municipal or other local government) and is the legislation industry-specific?

Royal Decree 77/2004 (the Privatisation Law) was issued with the twin objectives of encouraging foreign investment in Oman and increasing employment opportunities for Omani nationals in the private sector. The Privatisation Law applies to any project that is tendered for privatisation by the government under the Tender Law (Royal Decree 36/2008) primarily in major public infrastructure projects in the power and desalination, wastewater, electricity and telecommunications sectors.



Graham Mouat
Ravinder Singh

graham.mouat@amjoman.com
ravinder.singh@amjoman.com

Muscat International Centre
Bait Al Falaj Street, Central Business District
Muscat 112
Oman

Tel: +968 2481 4466
Fax: +968 2481 2256
mj-co@omantel.net.om
www.amjoman.com

PPP – limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

Limitations on private sector participation in projects are commonly set out in the terms of the tender for any particular project. The government will not generally be restricted from entering into contracts with private sector companies where a project has been approved by the Ministry of the National Economy for tender to the private sector.

PPP – transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

Significant privatisation projects in the last five years have taken place in the telecommunications, electricity, power and desalination and wastewater sectors.