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Real Estate

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United Arab Emirates

Jimmy Haoula, Rima Mrad and Natasha Bowcott

Bin Shabib & Associates (BSA) LLP

Transfer of real estate

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

The United Arab Emirates (UAE) is a federation established in 1971 between seven emirates, namely, Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaima, Sharjah and Umm Al Quwain; it adopts a free market economy.

The UAE legal system is essentially a civil law jurisdiction influenced by Islamic, Roman and French law, and lately by the principles of Egyptian law.

There is a presence of common law principles in commercial contracts; however, such principles are not recognised in the UAE legal system.

In the UAE major consideration is given to federal law; however, if the issue at hand is not covered by federal law, then a reference is made to the provisions of the local laws issued on the scale of each emirate; if no solution is found, then Islamic shariah law is applied. However, usually only inheritance, family and some financial issues are subject to Islamic shariah law.

The constitutional federation of the UAE calls for the establishment of a high court modelled on the French highest court. It also calls for the establishment of two other layers of judiciary: the courts of first instance and the Courts of Appeal. This structure will ensure that a case can be reviewed by three different panels of judges, a major factor in securing the equitable establishment of the judiciary system in the UAE.

The UAE Civil Procedure Code provides for a summary judgment procedure for precautionary measures. This procedure usually applies when:

- a creditor's entitlement to payment is confirmed in writing;
- the claim is for a specific or liquidated sum (provided that the claim is based on a commercial document, such as a cheque, promissory note or bill of exchange); and
- the claim is against the drawer or guarantor.

Injunctive relief and interim remedies are not generally available.

The courts have jurisdiction to make provisional orders, such as a provisional attachment of assets, to secure a claimant's claim (attachment orders). On receiving an application for an attachment order, the court must be satisfied that there is both:

- a prima facie case against the defendant; and
- a risk that if the order is not granted, the claimant may not be able to enforce any judgment that is subsequently obtained.

Attachment orders are awarded entirely at the judge's discretion and the claimant must prove the need for attachment. Evidence must be provided establishing that there is an imminent danger of assets being removed in a way that would negate the effect of any judgment subsequently obtained.

Under the UAE Civil Procedure Code, the UAE courts have jurisdiction to grant provisional orders (such as an attachment order) even if they do not have jurisdiction over the substantive dispute.

If an attachment order is granted, a substantive civil claim must be filed within eight days of the order. If the attachment order secures claims made in proceedings abroad, the substantive claim normally seeks only an order validating the attachment and does not seek a judgment on the merits.

The application for an attachment order must specify the assets sought to be attached. The UAE courts do not normally grant a general attachment order over unspecified assets that have not been identified. The UAE courts may require a bank guarantee, or a letter of indemnity or other counter-security to be produced by the applicant before an attachment order is made. The UAE courts do not usually grant mandatory or prohibitory orders.

2 Conveyance documentation

What are the legal requirements for documents recording conveyance?

Historically, many foreign nationals were reluctant to invest in the real estate sector in the UAE due to the uncertainty as to what type of real estate interest a person could actually hold in the UAE. A freehold estate is one in which a person has an absolute ownership interest in a real estate property and can convey that property to any other person or entity without any encumbrances.

The UAE currently does not have a federal law defining freehold. Once the freehold property law is in effect, it will mean that the property purchased by a foreigner will be registered under his or her name for life, which allows him or her to register the property in the Land Department of the emirate. The owner will then have full rights to the property.

Non-GCC (Gulf Cooperation Council) expatriates living in the UAE were previously permitted to rent property, or own property on a leasehold basis for a period of 99 years. In 2002, the Dubai government permitted the ownership of freehold property by expatriates, which has changed the real estate industry in the Middle East and Gulf regions.

On 14 March 2006, Dubai's government issued its long-awaited Law No. 7 of 2006, legalising foreign ownership of properties in designated areas of Dubai but does not give property owners permanent residence visas or an automatic right to work in Dubai.

Law No. 7 of 2006 stipulates that freehold is limited to UAE and GCC citizens and companies wholly owned by them, as well as public shareholding companies. Non-UAE nationals may be given the right to own properties in some parts of Dubai as prescribed by the law. They may be given the right to acquire a freehold property, or a 99-year lease property, in areas designated by the ruler of Dubai.

Pursuant to the above developments in Dubai most of the other emirates (Ras Al Khaimah, Ajman, Fujairah (which has very limited freehold areas) and Umm Al Quwain) followed Dubai's path and announced the development of several freehold real estate projects.

On 14 August 2005, Abu Dhabi released its property law in which it permitted foreigners to hold 99-year lease rights and renewable 50-year surface ownership in specified investment areas in Abu Dhabi. However, this does not include the right to a share in ownership of the land that the building is on. Sharjah offers property for foreign ownership but this is limited to leasehold.

In light of the above, there is no standard set of conveyance documents to date and the conveyance is executed with the developers (or the seller) and not before a centralised property register.

In an effort to regulate the real estate market, the emirate of Dubai established the Real Estate Regulatory Agency in July 2007 and, as a result, new laws, regulations and procedures are in place to govern property development and property transactions.

In Dubai, the Dubai Land Department has set up a Real Estate Register to record ownership of property and disposals of completed property. Pursuant to Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai, the Dubai Land Department set up an Interim Real Estate Register to record all disposals of off-plan units and any deposition that transfers or restricts title or any ancillary rights is void if it is not recorded on that register.

Developers had 60 days from the date the law came into force (31 August 2008) to register the dispositions either in the Interim Real Estate Register or the Real Estate Register, but this deadline was later extended to October 2009.

Once the unit is completed, it may be transferred from the Interim Register into the purchaser's name on the Real Estate Register and the purchaser can obtain title as long as it has fulfilled its obligations. Any transfers or disposals thereafter will be recorded on the Real Estate Register. The Interim Real Estate Register is managed by developers and the Land Department via a system called 'Oqood'. The developer executes a licensing agreement with the Land Department and is given login details. The developer is permitted to pass on the Oqood charges of 1,000 dirhams per unit registration.

The Dubai Land Department is permitted to charge transfer fees when transferring off-plan and completed units. These amount to 2 per cent of the purchase price with 1 per cent payable by the seller and 1 per cent payable by the purchaser.

Neither the master developer nor the developer are permitted to charge transfer fees; instead they may charge an administration fee that must be approved by the Land Department and although the fee has not been stipulated by law, current practice is that the permitted amount is up to a maximum of 5,000 dirhams.

The standard set of requirements for registering a transfer of ownership of a real property, as per the requirements of the Dubai Land Department, includes the following:

- the original title deed (or sale and purchase agreement);
- a photocopy of the passport with file number or the unified number for UAE nationals;
- a passport copy, including the permit, for expatriates;
- a copy of nationality card including pages 26 and 27 for UAE nationals;
- the original site map from the Land Department and Dubai Municipality;
- the original power of attorney attested by the court or the Ministry of Foreign Affairs, if empowerment has been given for a specific property;
- a copy of general power of attorney attested by the court or Ministry of Foreign Affairs;
- the purchase price; and
- the fee charged by the Land Department.

To date, only the emirate of Dubai has issued a law regulating the registration of title deeds for expatriates in designated areas.

The standard fee prescribed by the Land Department for obtaining a title deed once the property is complete is currently 250 dirhams.

3 Foreign investors

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Expatriates considering an investment in the UAE should understand the legal framework that will govern their investment in light of the laws applicable in the relevant emirate.

Expatriates should consider the area in which they will own a property and the laws applicable therein. Investors should conduct due diligence on the project they will have shares in so that they can highlight their legal standing, liabilities and foresee any prospective obstacles.

Before investing, a foreigner should consider, inter alia, the following issues:

- whether it is permitted to make such an investment (for example, non-GCC nationals are not allowed to hold shares in real estate brokerage companies in the UAE);
- the appropriate structure that can be used for the investment; and
- the restrictions imposed by UAE laws on the type of investment.

For example, in regards to owning a property in the UAE and depending on the emirate, foreign investors should know whether or not:

- the property can be owned by a foreigner;
- the property can be registered with the local authorities;
- the investor can issue a title deed for the property;
- the parties he or she will enter into contracts with are eligible to enter into such arrangements;
- the project fulfils all local requirements and all the necessary approvals related to the construction of the project have been issued; and
- there are any complications that might hinder the successful closure of the transaction.

4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about repatriation of capital?

There are no exchange control restrictions in the UAE and its currency, the UAE dirham, is freely convertible.

5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

There are no special liabilities imposed on real estate owners other than their contractual obligations and the common liabilities applicable pursuant to the UAE Civil Code.

Investors will have to abide by the rules and regulations of the real estate development in which they own a property, including the service charges, the owner's association, if applicable, by-laws and all the local rules issued in regards to registration and ownership of properties in the UAE (which differ from one emirate to another).

Furthermore, article 292 of the UAE Civil Code regulates the tortious liability which arises when a party causes damages to another party by either committing a wrongdoing, a direct violation of a party's rights or a transgression of a public obligation. In all cases, the compensation will be evaluated in light of the damage suffered by the victim, which may include estimated loss of profits provided it is a natural effect of the harmful act.

Local laws issued at emirate level further regulate rights, obligations and liabilities of real estate owners.

6 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

In order to protect itself from liabilities, an owner can conduct a risk assessment to evaluate the risks associated with the property it owns and subsequently arrange for the appropriate coverage including having the relevant insurance to minimise its damages and losses. Such insurance may include third-party liability cover.

7 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction?

In general, for the UAE courts to have jurisdiction in a civil action, either the defendant has to be domiciled in the UAE or the transaction has to be executed, completed or intended to be executed in the UAE. If this is fulfilled, then the UAE courts will have jurisdiction. In other words, if the contract is signed in Dubai or intended to be signed in Dubai, part of the contract was executed in Dubai or the defendant is domiciled in Dubai, the Dubai courts will have jurisdiction on the matter. Otherwise Dubai courts will not have jurisdiction in the subject-matter proceedings.

In regard to real estate properties, article 18 of the UAE Civil Code states that possession, ownership and other rights over property shall be governed by the *lex situs*.

8 Jurisdiction

Which courts have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Currently, only Dubai and Ras Al Khaima maintain their own judicial systems; the other emirates have joined the federal system.

There are three principal divisions to the courts in the UAE: civil, criminal and shariah (Islamic).

The shariah division has jurisdiction over matters of personal status (marriage, divorce and inheritance) and has been recently given, in certain emirates, jurisdiction over specific criminal matters, including drug offences and offences involving minors.

The criminal division handles criminal cases while the civil division handles all other matters, including commercial disputes, real estate disputes and labour law disputes. In Dubai, there is a Property Court that handles all property disputes. There is also a Court Committee yet to be set up under Law No. 16 of 2009, which will attempt to settle disputes before they reach the Property Court.

An out-of-jurisdiction service is available in the UAE by diplomatic ways through the embassy of the relevant party in the UAE.

It is not required that a party has a business in the UAE to be able to enforce remedies in the UAE.

9 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them and what entities best shield ultimate owners from liability?

The Federal Law defines seven categories of business organisations that can be established in the UAE. It also sets out the requirements in terms of shareholders, directors, minimum capital levels and incorporation procedures. The seven categories of business organisations defined by the law are:

- general partnership company;
- partnership-in-commendam;

- joint venture company;
- public shareholding company;
- private shareholding company;
- limited liability company; and
- share partnership company.

The UAE Commercial Companies Law further stipulates a total local equity of not less than 51 per cent in limited liability, public and private joint-stock companies.

In addition to the above, the following commercial business organisations and arrangements exist in the UAE:

- branch of a company;
- representative office;
- service and professional companies;
- free zone establishments and companies;
- defence companies; and
- other types of representations, such as a commercial agency relation pursuant to the Commercial Agency Law.

There are no taxes levied on companies or individuals in the UAE. The only exceptions to this are oil-producing companies and branches of foreign banks. Foreign companies may opt for incorporating offshore companies or free zone companies for the purpose of avoiding paying taxes in their home countries.

Companies established in free zones (for example, Tecom) in Dubai are only permitted to operate in the free zone or outside the UAE. Offshore companies such as those established under the rules and regulations of Jebel Ali Free Zone are not permitted to operate in the UAE except using the structures as prescribed by UAE federal law.

Foreign-registered companies such as those registered in the British Virgin Islands (BVI), for example, are only permitted to operate in the UAE through one of the permitted structures prescribed by UAE federal law. For a brief period of time, such offshore companies were permitted to register themselves as developers in the emirate of Dubai. The Dubai Real Estate Regulatory Authority (RERA) has now confirmed that such foreign offshore companies will not be permitted to develop in Dubai; RERA will no longer register these companies as developers. Development companies have to be based in Dubai. However, offshore companies may be established such as those set up under the Jebel Ali Freezone Authority (JAFZA) in Dubai and permitted activities will be all those permitted under the rules and regulations of JAFZA. JAFZA companies can be set up with a BVI company (for example) as shareholder (and the BVI company appoints JAFZA to develop on its behalf) or with the JAFZA company having the same shareholders as the BVI company. This is to ensure that all developers can be governed by the Dubai authorities.

10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

US investors do not have a wide choice for operating their businesses in the UAE, and in most cases they enter into partnership with UAE companies for the purpose of incorporating a limited liability company (LLC).

An LLC is the most common corporation for operating a business in the UAE. The liability of the shareholders in an LLC is restricted to the share capital of the company that is paid on incorporation.

The advantages of an LLC are obvious as the liability of the shareholders is restricted to the paid-up share capital. In addition, the foreign shareholders (if individuals) will be issued an investor's visa and not an employment visa. The advantage of this is that the foreign investor will be seen as an entrepreneur to whom the labour laws and regulations will not apply.

The major disadvantage of an LLC is the necessity of a UAE citizen or UAE entity partner (owned 100 per cent by UAE citizens), who will hold 51 per cent of the share capital in the LLC. To mitigate

the above disadvantage the parties will enter into side agreements to the LLC, which will protect the interests of the foreign shareholder against the 51 per cent UAE citizen or entity shareholder.

In addition to the above, US investors consider the following alternative legal forms:

- branches of a foreign entity (previously only certain types of companies were allowed to open branches in the UAE, and thus there were a limited number of foreign branches – lately the UAE Ministry of Economy amended the conditions pertaining to the application for establishing a branch of a foreign entity so that they can be more flexible); and
- free zone entities, bearing in mind that such entities may not generally operate on the mainland without first obtaining a licence from the relevant authorities.

11 Organisational formalities

What are the organisational formalities for creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The basic requirement for all business activity in UAE is one of the following three licences:

- commercial licences cover all kinds of trading activities;
- professional licences cover professions, services, craftsmen and artisans; and
- industrial licences cover establishing industrial or manufacturing activities.

Some categories of businesses require approval from different ministries and authorities: for example, banks and financial institutions from the Central Bank of the UAE; manufacturing from the Ministry of Finance and Industry; pharmaceutical and medical products from the Ministry of Health; and branches of foreign companies from the ministry of Economy and Commerce. More detailed procedures apply to businesses engaged in oil or gas production and related industries.

The general requirement for all UAE established companies is 51 per cent participation by UAE nationals is, except:

- where the law requires 100 per cent local ownership;
- in the free trade zones where 100 per cent foreign ownership is permitted;
- in activities open to 100 per cent AGCC ownership;
- where wholly owned AGCC companies enter into partnership with UAE nationals;
- in respect of foreign companies registering branches or a representative office in Dubai; and
- in professional or artisan companies where 100 per cent foreign ownership is permitted.

Local laws issued at emirate level further regulate this area. For example, in Dubai, development companies require approval from the Real Estate Regulatory Agency (and require the company to give a bank guarantee for 5 million dirhams to be held by the Department of Economic Development).

12 Documentation

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

Non-binding forms of agreements exist in the UAE such as a memorandum of understanding (MOU) or memorandum of agreement (MOA). It is common for the parties to enter into these types of

agreement prior to finalising the terms of the transaction in a binding agreement. In property matters, parties frequently enter into reservation agreements where the seller may terminate the sale for any reason. Investors are usually required to sign these agreements and make an initial payment of 5 per cent of the purchase price.

As long as all parties have signed the MOU or MOA, the courts will enforce the elements of the MOU or MOA that are capable of being enforced, but the courts cannot enforce the terms of the contract or transaction that the MOU or MOA envisages. In terms of a reservation agreement, even if the developer has not signed it the courts may uphold it if there is other evidence that the developer accepted the terms, for example, if he accepted the reservation deposit and provided a receipt for it to the purchaser.

It is usual for the property to remain on the market even if the parties are still in negotiation unless specifically agreed otherwise.

13 Contract of sale

What are typical provisions in a contract of sale?

Typical property sale and purchase contracts include the following terms:

- identification of the property and parties;
- purchase price and payment terms;
- obligations, rights, representations, warranties and covenants of the parties;
- registration and transfer of title;
- rules of the owner's association (in case of more than one owner) and the master community declaration;
- assignment terms; and
- governing law.

The typical down payment starts with 5 per cent of the purchase price. Such amount is paid to the seller or to its agents against a receipt after which the parties will prepare the relevant documentations and agree on the instalments. The initial payment will not be deposited in an escrow account. Once the parties agree on all the terms of the transactions, the parties will enter into a sale and purchase agreement whereby they define their agreement including their warranties such as:

- the seller owns the property; and
- the seller will not carry out any actions related to the property except for those done to implement the agreement.

It is very common to see investors paying the instalments of the property purchase price without entering into any kind of agreement with the seller.

In Dubai, the new Law No. 13 of 2008 Concerning the Interim Real Estate Register in the emirate of Dubai requires the developer to register the site plan and each unit of the project with the Land Department. The details of the units are held on the Interim Register, which will be updated each time a sale is made. Only once the project is complete is it possible for the purchaser to apply to the Land Department in order to obtain title to the property. Once a project is complete, each transfer must be registered with the Land Department so that the property is registered in the name of the purchaser.

In the UAE in general, evidence of title is the personal contract between the seller and the buyer, although in Abu Dhabi law, Laws No. 3 and No. 19 of 2005 set out a legal framework to manage real estate registration and property ownership in order to regulate real property rights on a similar basis to Dubai.

The representations and warranties the purchaser may expect to see regarding title vary from developer to developer.

Typically, the seller warrants that it is the sole and beneficial owner of the property or that he holds the rights to the property.

There are no searches as such in the UAE; the purchaser is expected to carry out its own research on the property before committing to the purchase. In Dubai, the purchaser may check with RERA

to see if both the developer, the project and the units are registered with RERA. Only once the developer and the project are registered does RERA permit the developer to open an escrow account for the project and RERA holds a register of approved escrow providers. The developer must have an escrow account agreement with the provider that sets out the terms and conditions of the account and governs (in line with the law and RERA stipulations and practice) what monies can be paid out to whom and at what point in the project.

The provider will therefore review, *inter alia*, the financial statements of the project to ensure that the project is feasible. Once the provider is satisfied with the project proposals and agrees to open an escrow account, the provider informs RERA, who give their written permission for the developer to sell and market the property. These registrations are mandatory and the developer is not permitted to sell or market the project until these requirements have been met. Payments to the project must be paid in the escrow account.

In Ajman, the developer must be registered with the Ajman Real-estate Regulatory Agency (ARRA) and have an escrow account in place before he or she may accept purchase monies.

In the UAE, research may also be carried out by the purchaser on the master developer to ascertain the details of the master community that their property will be part of. Again, there are no searches in the traditional sense and it is up to the purchaser to carry out due diligence in as much detail as possible.

Typically in the UAE, risks and benefits pass to the purchaser when possession of the property is given to the purchaser on completion date and possession is only given once the purchaser has met his obligations in the sale and purchase agreement with the developer. In Dubai, the constitution of the owners' association and the master community declaration may be entered as a restriction against the registered title.

Any liabilities for taxes and utilities are set out in the documentation provided to purchasers of property with each project setting out the liability of the parties relevant to that particular project. Typically, once the project is complete, the purchaser can expect to pay master community service charges for the maintenance of the common use facilities of the master community (as set out in the master community declaration) and building service charges for the maintenance of the building and its common areas. These charges are managed by the owners' association in accordance with its constitution.

The purchaser's share of building service charges is usually calculated using the purchaser's proportionate share of the building and common property. The purchaser may also be required to pay any municipality or local government taxes. The purchaser is responsible for all utility connection and consumption charges, such as electricity, water, sewage removal and air conditioning, that its property incurs. Implementing regulations for the existing strata law regarding common property in Dubai should come into effect shortly with Abu Dhabi expecting to implement strata regulations in the near future on a similar basis to Dubai.

14 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

There are no direct obligations regulating environmental clean-up in the UAE. The environmental standards are mostly applied in oil or industrial entities in relation to the disposal of waste.

On a federal level, the UAE created the Federal Environmental Authority (FEA) in 1993 to protect and conserve the environment and to supervise the implementation of the following laws:

- Federal Law No. 1 of 2002 on the regulation of use of radiation sources and protection against their hazards;
- Federal Law No. 23 of 1999 on the protection and development of marine resources;

- Federal Law No. 24 of 1999 in regards to the protection and development of the environment;
- Federal Law No. 11 of 2002 regulating the international trade in endangered species of wild fauna and flora;
- Federal Law No. 22 of 2003 on the Executive By-Law of Federal Law No. 11 of 2002;
- Federal Law No. 39 of 1992 on the production, import and circulation of fertilisers and agricultural conditioners; and
- Federal Law No. 41 of 1992 on pesticides.

Clauses regarding long-term environmental liability and indemnity that survive the term of a contract are not common.

Lately, major efforts have been carried out, on a local level, to enhance the environmental legal framework and to launch an environmental clean-up campaign.

15 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after the property sale is completed?

Representations vary and there are not necessarily typical representations in sale and purchase agreements where there is an existing tenant in the property and it will depend very much on the deal agreed between the seller and buyer. There will be general representations, such as stating that the rent has been paid up to the current date by the tenant and that the seller has paid the service charges and any and all other payments up to the date of the transfer. The agreement will not necessarily state that the tenant will vacate the property at the expiry of the tenancy – this will depend on the lease terms; the seller cannot state that the tenant will move out at the expiry of the tenancy if the lease is renewable. The buyer pays the agent's fees; therefore there will not be representations by the seller in that respect.

Typically the covenants made between the contract and transfer date will be that no alterations will be made to the property; no new lease will be executed; the tenant will not assign the lease or sublet the property without the consent of the buyer; and the current lease will not be terminated or amended without the consent of the buyer. The covenants will generally just ensure the status quo is maintained and usually do not cover brokerage arrangements. The covenants survive as long as the agreement remains valid and are on a personal contractual basis between the seller and the buyer.

16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

A mortgage is only put into effect pursuant to an authenticated deed, attested by the notary public and entered in the Commercial Register.

A mortgagor has a priority right over all the other creditors for collecting its right from the cost of the goods after deduction of the following amounts:

- taxes and duties due on the goods;
- judicial expenses incurred for the joint interest of the creditors; and
- expenses incurred for the safekeeping, storage and sale of the goods.

A lease can be superior in priority to a mortgage in the following instances:

- if the lender and the borrower agreed in writing to consider the lease superior in priority to any other right, including the mortgage; or

- if the mortgage is not registered in the relevant registry and subsequently is not considered as a secured preferred mortgage.

In Dubai, Law No. 14 of 2008 Concerning Mortgages in the Emirate of Dubai permits the holder of usufruct or long-term lease between 10 and 99 years to mortgage its interest in the property for the term of the usufruct or long-term lease. A mortgage in these circumstances (and also a mortgage over the right of *musataha* (legal right to build on and retain the building on another person's land for a fixed term of years)) shall terminate and be deleted from the register upon repayment of the debt or upon expiry of the term of the usufruct or long-term lease. The new law stipulates that the borrower has the right to administer its mortgaged property and collect its yield and revenue until it is foreclosed and sold at public auction upon default of paying the debt.

17 Delivery of security deposits

What steps are taken to ensure delivery of security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets?

Security deposits are usually given in advance in the form of a cheque. On very rare occasions these deposits exceed two cheques.

Landlords do require deposit cheques as a pre-estimated amount of the cost involved for fixing the damages caused to the property by the tenant.

This security deposit is refundable at the end of the tenancy agreement in accordance with the terms and conditions of the tenancy contract.

18 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Does your jurisdiction provide statutory priority for recorded instruments?

In most purchases, foreign investors involve their lawyers to carry out due diligence on the property prior to concluding the purchase to cover the following issues:

- review the sale documents;
- carry out research on the property;
- carry out research on the developer or seller; and
- propose amendments to the agreements at hand or get further covenants from the landlord.

Sale of property will be recognised if registered with the Land Department of the emirate in which the property exists. But there is no official system of title searching and most enquiries will be made to the Land Department (or regulatory agency) in the emirate in which the investor is purchasing. Unless the property is completed, that is, not off-plan, the Land Department will not issue a title deed or certificate. No guarantees or protection periods are given with the title deed and accordingly obtaining insurance against bad title is not typical.

19 Structural and environmental reviews

Is it customary to arrange an engineering or an environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

It is not a customary procedure to conduct an engineering or environmental review in the UAE. In rare situations, (mostly US) entities operating in the oil industry willing to enter the UAE market carry out limited environmental reviews.

20 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

There is a one-page draft of a template tenancy contract widely used in the market. Lawyers can be engaged to draft appropriate agreements in circumstances where diligent legal care should be given to regulate the relationships between the parties or the conditions of the lease.

If the client is a tenant it must be ascertained that:

- the landlord will be responsible for the maintenance of the property;
- the agreement is subject to renewal;
- the deposit paid by the tenant is refundable; and
- the landlord will pay all taxes pertaining to the property.

If the client is a landlord it must be ascertained that:

- we will be able to vacate the property at the end of the tenancy period;
- the tenant will be responsible for returning the property in the same conditions as when it was delivered;
- the tenant will not assign the tenancy contract; and
- the tenant will only use the property for the purpose mentioned in the agreement.

21 Other agreements

What other agreements does a lawyer customarily review?

Lawyers are usually involved in the preparation and review of the following types of agreements:

- real estate agency or brokerage agreements;
- escrow agreements;
- management agreements; and
- sale and purchase agreements.

22 Closing of transaction

How does a lawyer customarily prepare for a closing?

At closure, lawyers should arrange for the original sets of documents – the agreements that will be signed by the parties, the price, the necessary arrangements and requirements of the authorities before which the registration of the transaction will be required. Prorations do not exist in the UAE.

Financing

23 Form of lien

What is the method of creating and perfecting liens?

In the UAE, the official authorities credit mortgages for both individuals and various bodies. The mortgage is registered for the benefit of certified banks, government departments or local individuals and a mortgage contract is issued once the conditions are met and all necessary documents have been submitted.

24 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

A lender is required to register the loan in the UAE and for that purpose the lender will be required to submit the agreement he or she signed with the borrower with regard to the loan (attested up to the UAE Ministry of Foreign Affairs and translated into Arabic). This will guarantee for the lender the possibility to seize the property if the borrower fails to make agreed payments on the loan.

The standard set of documents required to register a mortgage on a property in the UAE is:

- passport copies of the parties;
- title deed for the land and land map; and
- mortgage contract signed by both parties.

Mortgages can be assigned in the UAE subject to the terms of agreements, including in the mortgage contract. The fees vary from one emirate to another can be approximately assessed as follows:

- mortgage registration fees – 0.25 per cent of the debt amount up to the maximum of 1.5 million dirhams;
- mortgage transfer fees – 0.25 per cent of the debt amount up to the maximum of 1.5 million dirhams; and
- mortgage release fees – 1,000 dirhams.

On a general note concerning mortgages in Dubai, Law No. 14 of 2008 Concerning Mortgages in the Emirate of Dubai governs the relationship between the lender and the borrower. All mortgage contracts must be registered using the standard form with the Dubai Land Department otherwise it is void. Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai permits real estate units that are marked as sold off-plan and registered in the Interim Register to be mortgaged and the mortgage law adds that the registration of the unit in the Interim Register is a condition for permitting the unit to be mortgaged.

The law applies to debt secured by a mortgage over the whole of the property, over an undivided interest therein or by right-in-rem or personal right over a property sold off-plan. The lender is permitted to assign its rights subject to the consent of the borrower and as long as the assignment deed is registered at the Land Department. The lender can, up to the value of its debt, assign the rank of its mortgage to another creditor having a security interest in the same property.

The mortgagee must be licensed and registered with the UAE Central Bank in order for it to provide finance for property in the UAE. The UAE Civil Code (as amended) and the Civil Procedure Code shall apply to any matter in Dubai for which there are no provisions made in Law No. 14 of 2008.

25 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

The interest rates can be charged on a spread over LIBOR or EIBOR. Generally the interest rates are very competitive and will reflect the market conditions.

Most real estate developments in Dubai that have relied on third-party funding have borrowed under conventional loan facilities from banks. Often these transactions are not public and banks will lend to developers with whom they have an existing relationship on a bilateral basis using the bank's own in-house documentation. These documents may or may not include any fees for calculation of interest.

Any rate of interest over 12 per cent could be deemed as excessive resulting in unenforceability of the same by the courts. However, the courts, depending on, inter alia, the bargaining position of the parties, may allow a party to recover rate of interest beyond 12 per cent in some circumstances.

26 Default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding?

The main remedy available in commercial disputes is compensatory damages through the courts. The courts can also make an order con-

firmed a right (for example, they can order the return of property). One action is sufficient to realise all types of collateral.

A lender typically brings a foreclosure proceeding in accordance with the agreement if the debtor is in default of his obligations.

If an attachment order has been granted earlier in the proceedings, the court will, in its final judgment, also make an order confirming or discharging the attachment order.

Enforcement is sought before an execution judge, who is assisted by court officials to enforce the court order. If this is not honoured then the other options are:

- attachment and sale of the debtor's property (moveables);
- attachment of stocks, bonds and shares;
- attachment and sale of real estate;
- bankruptcy proceedings (this is unusual); and
- in exceptional circumstances, incarceration of the delinquent debtor.

27 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

There are no statutory rights of enforcement or foreclosure remedies available under UAE law, which means that any enforcement must be undertaken through the courts (a mortgagee cannot exercise self-help remedies and be a mortgagee in possession).

If the court orders enforcement of the mortgage, it will organise the sale of the land by public auction. The sale proceeds will be distributed among the creditors in accordance with the order of priority set out under UAE law: preferential debts, secured creditors (such as mortgages) followed by unsecured creditors (such as judgment creditors). Preferential debts include the following: judicial costs of preserving and selling the property, government taxes, employees' salaries, lessor's rental payments and amounts due to contractors.

In Dubai, Law No. 14 of 2008 Concerning Mortgages in the Emirate of Dubai states that any clause in the mortgage contract giving the lender title to the mortgaged property when the borrower fails to pay the mortgage debt within the specified period or provides for the sale of the mortgaged property without taking the statutory steps is void, although the mortgage shall still be considered valid.

Where loss or damage occurs to the mortgage property, the mortgage shall attach to substitute assets and the lender may recover its claim from those assets in the order of its priority. Although it is not clear, 'substitute assets' are likely to include insurance proceeds thus giving lenders a security interest in those proceeds.

If the borrower defaults on payment the lender must provide the borrower (or person in possession) with 30 days' notice through the notary public before commencing execution proceedings. If the borrower fails to pay the money due within the specified time period then the execution judge shall, upon the request of the lender, order an attachment against the mortgaged property so that it can be sold by public auction in accordance with the procedures of the Land Department.

The judge may postpone the sale for up to 60 days (upon the request of the lender) if the borrower will be able to pay the debt if given this period or if the sale of the mortgaged property will cause the borrower substantial damage. If the debt is not paid then the property may be sold by public auction, in accordance with the Land Department's procedures, within 30 days after the end of the relevant time periods. It has been clarified that property in 'designated' areas may be sold to non-UAE nationals at auction; previously this was unclear.

28 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy filing?

If the collateral is insufficient to satisfy the debt, the mortgagee may have recourse for the balance against the borrower's other assets.

Update and trends

There are continued efforts being made by the UAE authorities to further regulate the real estate market, particularly in light of the current economic climate, which has demonstrated the areas of law that require enhancement. The most notable developments are in Dubai. The recent Law No. 16 of 2009 provides for the set up of a 'Court Committee' which is a forum where purchasers and developers may attempt to resolve property disputes prior to the matter being filed with the Property Court. Furthermore, the real estate register (interim and proper) is now well-established and provides some comfort to purchasers looking to secure their property interests.

Ajman is following the lead of Dubai and has enacted laws

requiring developers and projects to be registered with the Ajman Real-estate Regulatory Agency and developers must have escrow (or trust) accounts before they may accept purchasers' money as payment towards off-plan properties.

Although the frenzied rush for purchasing properties in the UAE has slowed, there is still demand for both off-plan and completed units, although prices have stabilised and premiums have decreased as has market rent value. Purchasers in the UAE are now much more cautious and are more willing to carry out due diligence before purchasing. Tenants in Dubai now have access to the rental index to help ensure they only pay the market value for renting properties.

In this case, the mortgagee will lose its priority as a creditor and be ranked as an ordinary creditor in relation to such a balance.

In Dubai, under Law No. 14 of 2008 Concerning Mortgages in the Emirate of Dubai, the ranking of a mortgage is determined by the date it is registered with the Dubai Land Department. If several mortgages are registered against the same property and debtor at the same time, the mortgages will be registered under the same number and those creditors will rank equally in the distribution of auction proceeds.

The lender may follow the mortgaged property into the hands of any person in possession in order to obtain payment of its claim when due according to rank. A person shall be deemed in possession of the property if he or she acquires title to the property after it has been mortgaged or acquires any other right in rem or personal right over the property. Claims of lenders will be paid out of the proceeds of sale (or substitute assets) in order of priority and if the sale proceeds are not sufficient then the creditor may claim the difference from the debtor and will rank with all unsecured creditors.

29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

Cash management systems are not widely applied in the UAE. It is left to the discretion of the relevant parties to create their systems depending on their needs and the type of business.

30 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Credit enhancement is not commonly applicable in the UAE. Lenders in very limited cases require mortgage insurance. In most instances, certain internal precautions are applied, such as the requirements for post-dated cheques from borrowers equal to the amount of the loan.

31 Loan covenants

What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?

The commonly used covenants in loan documents are listed below. The borrower will not:

- incur or assume any debt that is not due and payable in the ordinary course of its business;
- incur or assume any mortgage, pledge or other encumbrance of any kind upon any assets whether now owned or hereafter acquired;
- enter into any agreement, arrangement, commitment or understanding to, or actually acquire all or part of the substantial assets of any third party;
- enter into any agreement, arrangement, commitment or understanding to, or actually sell, lease, or otherwise dispose of any assets in the ordinary course of business;

- enter into any agreement, arrangement, commitment or understanding to, or actually, make loans or advances to any third party; or
- enter into any agreement, arrangement, commitment or understanding to, or actually, assume, guarantee, endorse or otherwise become liable for the obligation of any third party or other entity.

32 Financial covenants

What are typical financial covenants required by lenders?

Generally financial covenants would be transaction specific. However, more often than not, the lenders would base the same on loan-to-value ratio. The lenders would require financial reporting on at least a quarterly basis. Ongoing appraisals are not required if the financial reporting requirements are met and the borrower has been punctual in meeting its payments.

Some of the financial covenants customarily included in financing agreements are:

- debt-service coverage ratio: the borrower has to ensure that its debt-service coverage ratio (defined as ratio of EBID to net interest expenses and scheduled repayments of long-term debt) should not be less than a specific amount (generally 1.08:1) until the termination date;
- tangible net worth: the borrower has to ensure that its tangible net worth is not less than a certain amount until the termination date;
- current ratio: this measures a company's liquidity, by comparing its current assets to its current liabilities;
- pre-compensation fixed-charge coverage ratio: this measures a company's cash flow cushion and ability to pay its debt service and other fixed expenses, by comparing its pre-compensation cash flow; and
- post-compensation fixed-charge coverage ratio: this is similar to pre-compensation fixed-charge coverage ratio, but measures a company's cash flow cushion and ability to pay its debt service and other fixed expenses by comparing its post-compensation cash flow to its fixed charges.

33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction.

Federal Law No. 18 of 1992 (the Commercial Transactions Law) regulates bankruptcies. Upon declaration of a debtor as bankrupt and appointment of a trustee in bankruptcy, notice is given to all creditors to register their claims.

Local creditors are required to register their claims within 10 days of publication and creditors outside the UAE are required to register their claims within one month. The trustee in bankruptcy would verify the documents submitted by the creditors and prepare a schedule along with a statement of the amounts that the trustee intends to accept as debt owed will be sent to every creditor and the bankrupt. The creditors may file objection to the amounts in the

schedules which would be considered by the judge supervising the bankrupt's estate before preparing a final schedule of debts with the amounts that have been accepted.

The judge will then designate the manner in which the assets are to be sold. The sale proceeds will be deposited with the court cashier or in a bank account designated by the judge. Fees and expenses incurred towards administration of the bankrupt's estate will be deducted from the sale proceeds. Thereafter, the amounts due to preferred creditors will be paid and the remainder will be distributed to the unsecured creditors in proportion to the debts owed to them.

34 Secured assets

What are the requirements for creation and perfection of a security interest in non-real property assets? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

There is no federal security law regulating the creation and perfection of security interests in the UAE.

Securities in the UAE are governed by the Federal Commercial Transaction Law No. 18 of 1993, the Federal Civil Code No. 5 of 1985 and the Commercial Companies Law No. 8 of 1984.

In general, owners are able to provide a mortgage by way of a security interest over their land while the lender is required to have a valid trade licence, therefore, it is not possible for a non-licensed

lender to register a mortgage in the UAE. Also, it is only the interest of UAE-licensed financial institutions that can be noted in the relevant register.

35 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy filing, has the concept been upheld?

The preference among local banks is to lend on a corporate basis (rather than to a special purpose company through which a developer may be developing a project) or otherwise lend to the special purpose company with the benefit of a parent company guarantee. In this way, the real credit is that of the corporate parent and repayment of the loan is not entirely dependent on the success of the project.

Parent company credit is not always acceptable to developers given the need for disclosure in their financial statements and the impact that such loans or guarantees may have on borrowing restrictions imposed on their other banking facilities. Sometimes a compromise is reached whereby a parent company will give a guarantee or other support until the relevant development is completed.



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