



"Commercial Law Strengthening (CLS)" project

Draft Report on "Legal Framework of the Real Estate Sector in the Emirate of Dubai- United Arab Emirates (UAE)"



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Introduction:

The Emirate of Dubai has experienced its largest ever property and construction boom, with property development projects being fuelled by the government and leading companies, whether private, governmental or semi-governmental. Billions of dollars has been injected into the real estate and construction sector in Dubai within the past years.

Due to this boom, however, speculations have arisen regarding some aspects of Dubai's youthful laws governing the real estate industry and/or sector. The boom has arisen and then an un-precedent crisis has arrived, and yet the implementation of a proper and exhaustive legal frame regulating the real estate sector in Dubai is not complete. Steps were taken in the past, new recent legislative developments intervened to regulate the future and current situations, and others are expected to improve the situation in the future; but meanwhile, what are the legal principles governing the real estate sector and to which extent the ownership of a real property is guaranteed? Are investors, purchasers and developers covered or legally protected? Are new laws with immediate effect or not? Are laws that sophisticated to resolve the market's current problems? Many questions are raised; confusing answers are given! Hopefully a full legal framework is to appear.

In light of the above, and in order to highlight the development of the legal framework of the real estate sector in Dubai and the difficulties faced, especially in relation to the ownership of properties, we shall endeavor to present a synopsis on the UAE and Dubai legal system, the laws and legal principles as regards the real estate sector, the assessment of the legal situation from a practical view and recommendation on remedies to be adopted.

The following analysis is neither academic nor exhaustive. It was our judgment that in a young jurisdiction alike Dubai where the majority of the laws in the



real estate sector were very recently enacted and where the public has no easy access to information and data, to follow a practical non-pretentious approach; we shall therefore address this vast project while focusing on the three components a legal case study requires: the law, the facts and the solution.

Section 1: The Legal System

The UAE constitutes a civil law jurisdiction. Historically speaking, the UAE legal system has been strongly influenced by the Egyptian legal system, which, in turn, is based on concepts and traditions of French and Roman law. As all jurisdictions of civil law origin, the UAE is governed by a collection of statutory codes, which regulate, *inter alia*, civil and commercial relationships between natural and corporate/juridical persons across the UAE¹. The UAE Civil Code governs civil transactions and is codified in the UAE Federal Law of Civil Transactions². The UAE Commercial Code governs commercial transactions and is codified in the UAE Federal Commercial Transactions Law³. Both the Civil and the Commercial Codes are supplemented by the application of the Islamic Shari'a in matters which are not specifically addressed in either of the codes. The Islamic Shari'a has its origin in the Islamic Law of the Shari'a, which is the custom-based body of law based on the Koran and the religion of Islam.⁴

Section 2: The Legal Framework of the Real Estate Sector

The United Arab Emirates (UAE) are a federation of seven Emirates.⁵ As a federation, the UAE is governed by a federal constitution, the UAE Federal

¹ Note that there is also a UAE Criminal Code, based on the UAE Federal Criminal Law (No. 3 of 1987), which governs criminal matters and may be of importance to the business community on questions of fraud and illicit dealings.

² No. 5 of 1985, as amended by Federal Law No. 1 of 1987.

³ No. 18 of 1993.

⁴ Pursuant to Art. 1 of the UAE Civil Code, there is a hierarchy of Islamic doctrines according to which the courts have to rule; essentially, they have to apply the most appropriate solutions from the doctrines of Imam Malik and Imam Ahmad Bin Hanbal; in the event that these doctrines do not offer a suitable solution, courts will invoke the doctrines of Imam Shafa'ee and Imam Abee Hanifa (such as serves best the public interest) by default.

⁵ The seven Emirates being Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al Khaimah, which were founded on 2nd December 1971.



Constitution⁶, which provides for a certain distribution of legislative powers between the federation and the individual Emirates. According to Articles 120, 121 and 122 of the Constitution, there are certain matters that are vested exclusively with the federation as regards their enactment and implementation, while there are others in which the federation has exclusive powers to legislate, with their implementation being left to the individual Emirates.

The federal laws have supremacy over the laws of the individual Emirates. However, the individual Emirates are permitted to enact their own legislation in matters that are not exclusive to the federation as well as in those matters in relation to which – albeit exclusive to the federation – the federation has not exercised its legislative powers.

In the real estate sector prevailing in the Emirate of Dubai, the laws that potentially apply are of two natures: the federal laws and the Dubai laws per se. By coincidence, if we follow another dichotomy for the characterization of laws, such as laws of general application vs. laws of specific application, we will end up with the same two natures; the laws of general application are of federal nature and the laws of specific application are those enacted by the Emirate of Dubai.

Finally, the texts can be regrouped in another two folders: laws vs. regulations.

However for the ease of reference, we shall enumerate them as follows:

A- Federal Laws:

Those are the laws enacted by the UAE Federation. Two laws are of particular importance:

- the Civil Code; and
- the Commercial Code

B- The Laws of the Emirate of Dubai:

⁶ Provisional Constitution of 18 July 1971, finalised with minor amendments by the Constitutional Amendment Law No. 1 of 1996.



Those are the laws enacted by Dubai as an individual Emirate. They are without limitation as follows:

- Law No. (3) of 2003 concerning the Real Estate Activities in the Emirate of Dubai;
- Law No. (7) of 2006 concerning the Real Estate Registration in the Emirate of Dubai (“**Law no. 7**”);
- Law No. (27) of 2007 Concerning Ownership of Jointly Owned Properties in the Emirate of Dubai (“**the Strata Law**”);
- Law No. (8) of 2007 concerning Guarantee Accounts of Real Estate Developments in the Emirate of Dubai (“**the Escrow Law**”);
- Law no. 26 of 2007 regulating the relationship between the lessor and the lessee as amended by Law No. (33) of 2008;
- Law No. (13) of 2008 regulating the Interim Real Estate Register in the Emirate of Dubai as amended by Law No. (9) of 2009 (“**Law No. 13**”); and
- Law No. (14) of 2008 Concerning Mortgages in the Emirate of Dubai (“**the Mortgage Law**”).

C- Regulations issued by the Emirate of Dubai:

‘Regulations’ is meant to be the corpus of texts, in vigor in Dubai, but are not laws per se. They are without limitations as follows:

- Decree no. 9 of 2009 amending certain provisions of Decree no. 1 of 2009 regarding property rental in the Emirate of Dubai;
- Decree no. 1 of 2009 regarding property rental in the Emirate of Dubai;
- Decision n. 27 of 2007 concerning real estate in the Emirate of Dubai;
- Decree no. 42 of 2006 in respect of property rents in the emirate of Dubai).



- Dubai Ruler's Order issued on December 20, 1994 (“**1994 Order**”) in respect of Lands Granted to UAE Nationals in the Emirate of Dubai as amended by the Ruler's Order issued on May 14, 1996 and its regulations (“**1996 Order**”); and
- Regulation of Real Estate Broker's Register in Dubai, by-law no. 85 of 2006 (“**Broker's Regulation**”);

Section 3: The Legal Principles:

The UAE and Dubai legal system makes a distinction between rights in rem (or realty) and personal rights (or personality). UAE law follows also the natural division between immovable (i.e. Land) and movables. In general all interests in land are real property, except leaseholds or leases, which are classified as personality. This matter arose from the fact that originally leases are treated as personal business arrangements under which one party allowed the other the right of use of the land against a sum of money being the rent; such personal contracts did not create rights in the land itself.

A- Rights in Rem

One of the main discussions within the real estate laws prevailing in the Emirate of Dubai, are the different rights *in rem* that are, whether distinctly or cumulatively, in relation to a Real property. In fact, different rights exist and the right of ownership⁷ is the most notorious one; however, one should not neglect the other ancillary rights *in rem* such as the usufruct, them mortgage or the

⁷ The ownership/ right of proprietorship is defined under Article 1133 of the Civil Code as “... the authority of the owner to dispose of his property in an absolute, real, beneficial and useful manner”.



musataha⁸; we shall examine hereunder in summary the characteristics of each of them.

1- Property Ownership or the right of proprietorship

As we have already mentioned, the UAE and Dubai legal system has adopted similar legal concepts to those found in similar civil law systems. The major components of the ownership are the same:

A full right of ownership:

The purchase of a real property on “freehold” basis, (whether to UAE and GCC nationals or to non-UAE nationals in the designated areas) means that the property is put in the owner's name for life and will be thereafter, upon his death, transferred to his heirs.

In addition, the owner has the right to sell, dispose of, bequeath through will, gift, lease or rent his/her Property at his own discretion.

No time constraints:

The owner of a real property enjoys the most superior form of private property ownership not limited by time. The duration is perpetual.

The scope of ownership:

The owner of a real property is considered to be the absolute owner of the land⁹ and buildings comprised in his title.

Opposability to third parties:

⁸ Although they are rights in rem as well, however rights of way or rights of water ... shall not be addressed in this report.

⁹ Unlike the legal frame organizing the real estate sector in the Emirate of Abu Dhabi, the Emirate of Dubai legislation admits the foreign ownership of the land. In the Emirate of Abu Dhabi the foreign ownership extends only to what is called in the French system “*Droit de Superficie*”.



The right of ownership should be registered with the Dubai DLD, (DLD). Such registration grants an absolute right on the owner's estate, opposable “*erga omnes*”.

Restriction over non-GCC nationals ownership (the foreign ownership):

The local order no. 3 of year 2006¹⁰ has designated the areas where a foreigner can own a real property on a freehold basis in the Emirate of Dubai.

Additionally it has listed as well some areas where the foreigners can “*own*” properties on a leasehold basis for a period not exceeding 99 years.

2- Musataha Right

The definition:

The Civil Code defines the musataha, as a right in rem which entitles its beneficiary to erect a building or grow a plantation on the land of a third party.

Time constraints:

The period of the right of Musataha must not exceed fifty years and in the event that the agreement with the parties is silent in relation to the period of the musataha any of the contracting parties may terminate the agreement anytime by notifying the other party two years ahead the date of termination of the agreement.

The scope of the Musataha right:

¹⁰ This local order has been issued by HH the Ruler of the Emirate of Dubai in compliance with the provisions of Law No. 7 which has, unlike for UAE and GCC nationals, restricted foreign ownership of Real Property in the Emirate of Dubai to designated areas within the territory of Dubai. Those designated areas comprise, without limitation, Dubailand, Burj Dubai, Business Bay, Media City, Internet City, the Palm, the World, the Springs, the Meadows, the Lakes, Emirates Hills, Arabian Ranches, Dubai Marina ... areas. In a total of 23 areas.



The owner of the musataha right shall acquire the ownership of any buildings or plants erected by him on the land of a third party throughout the period of the musataha. The owner of the musataha right shall be free to dispose of such buildings or plants erected by him on the land and such assignment shall comprise as well of the musataha agreement entered with the owner of the land on which the musataha is taking place.

The musataha right shall be passed on by inheritance or by will. The right of musataha can be assigned or mortgaged.

Opposability to third parties:

The musataha right must be registered with the DLD.

3- Mortgage

A Mortgage is defined by the Mortgage Law as being “*A contract whereby a creditor acquires security over Property or a Property Unit for the repayment of his debt, ahead of ordinary creditors and lower ranking creditors, from the value of the Property wherever located and by whomsoever held*”

According to the Mortgage Law, all mortgages should be registered with the DLD, specifying the size of the loan, the repayment period and the value of the property to which the loan is linked. It also requires that mortgages taken out on properties in Dubai should be sold by registered financial institutions, and should be insured. In addition, the law requires borrower and lender to present full financial documents when the mortgage is registered.



A full right of ownership...

It is common in Dubai to see lands granted from H.H. the Ruler to third parties, (mainly UAE nationals or governmental/ semi governmental entities), without any consideration.

It is a special right of ownership; the granted land is owned by the owner, registered in his name at the DLD and opposable to third parties.

...with restrictions

However, this right of ownership is restricted and heavily regulated. In fact, H.H. the Ruler of Dubai issued the 1994 Order in respect of Lands Granted to UAE Nationals in the Emirate of Dubai; such order is explicit in prohibiting any disposition of a granted land including dispositions like sale, mortgage, long-term lease ...etc, unless a special permission is given by H.H. the Ruler of Dubai. The only exception over this general rule derives from the 1996 Order; such order had allowed the mortgage of granted land, whether commercial or residential, for which a title deed is issued by the DLD provided that the loan against which the land is mortgaged is to be utilized for the development of the Land *per se*.

The 1996 Order prohibits the DLD from registering any mortgage over a granted land for any other purpose other than the aforesaid excepted purpose. Moreover, the 1994 Order prohibits the Notary Public from notarizing any contract of disposition of a granted land (including mortgage) unless the DLD approval is obtained.

In this spirit, Dubai Courts showed an extremely conservative approach¹¹.

¹¹ Dubai Court of Cassation No. 20 for year 2001: The Court ruled for cancellation of a transfer of a granted property from a UAE national to a non-UAE national as of the date of the Order 1994 although that at the time the contract took place this transfer was legal. (ii) In the same spirit and in relation to same subject, decision of *Dubai Court*



B- Personality Rights

Although they are personality rights, we shall address in this section as well leaseholds and tenancy/rental rights. This matter arose from the fact that originally leases are treated as personal business arrangements under which one party allowed the other the right of use of the land against a sum of money being the rent; such personal contracts did not create rights in the land itself

1- Leasehold:

Definition:

“Leasehold” title is created from the right of proprietorship, in the sense that an owner of right of proprietorship “carves out” the leasehold interest from his freehold estate, (i.e. the right to “occupy” and “enjoy” without the right to “exploit”/dispose), and transfers the leasehold interest to a third party by way of a lease for a certain period of time against a compensation in money, who becomes the leaseholder.

Differences with rights in rem:

The main difference between the right of proprietorship and a leasehold title is that the former is perpetual, whereas the latter is restricted to a term of years (for example, we speak of a “long term lease” or a “99-year lease” whereby at the end of such period the leasehold interest will be transferred back to the lessor, owner of the freehold estate). The second major difference is that a leasehold title is subject to a superior title, namely the right of proprietorship comprising in addition to the right to “occupy” and “enjoy”, the right to “exploit” (dispose). It is “less than a freehold”. The third major difference is that the leaseholder is not entitled to a title deed; his right in the estate is registered in the DLD as a “long term lease limited to a maximum of ninety nine years”.

of Cassation no. 84 for year 2007 and decision of Dubai Court of Cassation no. 56 for year 2009 canceling the transfer of granted lands.



And above all, leasehold is not a realty, it is a personality. In fact, Article 110 of the Civil Code, which lists the rights in rem, does not include the leasehold as a right in rem.

Confusion:

However, and although it is crystal clear from a legal stance that leasehold is a personality right not a realty, a confusion subsists.

The reasons for this confusion remain historically in the fact that in Dubai, foreign ownership of a right *in rem* was not valid; leasehold was the only legal institution permitting for a foreigner to protect his interests in a real property and to circumvent the applicable laws at that time. Other sources for this confusion find their way in some recent legal provisions; for instance, the Mortgage Law provides in its Article 22 that “*the holder of usufruct or long term lease for a term between 10 and 99 years may mortgage his interest in the Property or Property Unit for the term of the usufruct or long term lease*”.

2- Rental (or Tenancy):

As for the *rental*, i.e. the “common known lease” concept as defined in the Civil Code and as familiar worldwide, it is defined as the temporary transfer of the right to use a real property (land or premises) from a landlord to a tenant in exchange for rent. Rental contracts are contracts between landlords and tenants, the landlord being the owner of a the real property. The rental is a personality right not a realty one.¹² The contract is usually for a short term to be predetermined by the parties. The rent is governed, in addition to the Civil Code, by special laws and regulations issued from time to time in the Emirate of Dubai.

Finally, the main difference between a leasehold title and a rental/ lease is that

¹² See footnote no. 7.



the former is for a long period of term and up to 99 years, whereas the latter is restricted to a short term. Additionally the remuneration of the owner of the real property in the leasehold contract is usually determined in advance and is not subject to revision during the entire period. Moreover, the leaseholder can assign his rights and obligations as per the leasehold contract; as for the rental, the assignment is subject to the pre-approval of the landlord and failure to abide by such condition can be a valid reason for early termination of the lease/ rental agreement.

Section 4: Major Public Authorities involved in the Real Estate Sector¹³

A- Dubai Municipality

The Dubai Municipality was formed in 1960 to provide municipal services to the population of Dubai. Its work includes urban planning and supervision of construction, environmental protection and improvement, conservation of public parks, regulating and ensuring international quality standards in construction and building materials, food & consumable items, professional services in laboratory certification and accreditation.

It played a major driving force behind the development process of the Emirate of Dubai in the real estate sector.

The Dubai Municipality provides planning and building services, such as advertising permits services; allocation of industrial lands; no objection

certificates; planning; Building permits, engineer supervision and inspection services etc....¹⁴

¹³ This section is limited to the authorities that are competent in the Emirate of Dubai mainland. In some areas, known as free zones, some other authorities might intervene in the real estate sector.



B- Dubai Land Department (DLD)

The DLD was formed in 1960 to oversee affairs related to real properties in Dubai. All matters of legalization, sale, and purchase of real properties are entrusted to the department and it serves to regulate the registration process and protect property from misappropriation.

DLD provides various services like addition or separation service, Amendment of owner, Land Compensation, Ownership transfer, Sales, Partners Division, Amalgamation, Mortgage, Community Services, etc...

C- Dubai Real Estate Corporation (DREC)

Dubai Real Estate Corporation (DREC) was established in June 2007 through Law No. 14 of 2007 (as amended). DREC is a governmental corporation that has inherited the prerogatives of former Dubai Government departments¹⁵. DREC's activities encompass owning and managing its land bank which includes a sizable amount of properties registered under the name of the Dubai Government, as well as others. Its mandate extends to building, investing in and utilization of commercial and industrial lands and properties.

D- Real Estate Regulatory Authority (RERA)

¹⁴ The powers and authorities listed in this paragraph are exercised by Dubai Airport Free Zone Authority (DAFZA) for the Airport Free Zone, by Jebel Ali Free Zone Authority (JAFZA) for the Jebel Ali Free Zone and other front sea projects such as The Palm, The World, by TECOM for the development projects of Media City, Studio City, Internet City, Knowledge Village, and by Dubai Multi-Commodities Center (DMCC) for the Multi-Commodities Center

¹⁵ Being the Council for Development and the Real Estate Department.



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The Real Estate Regulatory Authority, part of the DLD, is a nodal agency that formulates, regulates, manages and licenses various real estates related activities in Dubai. RERA has been established by law no. 16 of 2007; it is a public agency attached to the DLD.

RERA provides support and advice to third parties regarding the fundamentals of real estate assessment of facilities pursuant to the up to date standards followed in this field. RERA provides third parties entitled to request for specific data, with information and reports in the real estate project subject to dispute, (such as the buyer of a property requesting RERA information on the status of the project and on the seller).

RERA plays, as well, a major role in the cancellation process of projects, or suspension, and contracts and in providing the courts with official information and supporting documents in relation to any real estate dispute.

Section 5: Major Private Players involved in the Development of Real Estate Projects

The development of real estate projects in the Emirate of Dubai imposes the interaction and the interconnectivity of several players, whom, in addition to the purchaser and the contractor, are the developer, the broker and the unit owners association.



A- The Developer¹⁶

Generally, the development of real estate projects in Dubai can only take place via a development company duly licensed to exercise such activity. Each developer who wants to develop a project must acquire all the necessary licenses and approvals for such project from the Dubai Municipality (**DM**) and/or other authorities depending on the location of the project such as JAFZA, TECOM, DMCC or DAFZA¹⁷. Once the project is approved, he must register the same before RERA and open an escrow/ guarantee account for that specific project enabling it to initiate off plan sales. It is worth mentioning that the development and sale of off plan projects in Dubai, (although common in Dubai since a certain period of time), is recently regulated as of year 2007, in special laws such as law no. 9, law no. 13 and law no. 8 (i.e. the Escrow Law), complementary to the Civil Code.

B- The Broker

The Developer can use the services of a third party to market, promote and sell his project in Dubai; hence the services of a broker. The Regulation of Real Estate Broker's Register in Dubai, bylaw no. 85 of 2006, defines broker as the person who carries on the brokerage activities, i.e. the contract by which the broker undertakes to another person to look for a second party to enter into a certain contract through mediation in the contracting negotiations in consideration of a fee.¹⁸

¹⁶ The following paragraphs shall apply to both, the Developer and the Master Developer although the latter is mainly and practically occupied by handling the infrastructure works. The Master Developer being licensed to carry on the business of the real estate development in the Emirate of Dubai and the sale of real estate units to third parties; whereas the Developer is whoever develops a part of the development belonging to a Master Developer under an agreement between them.

¹⁷ Please see footnote 19.

¹⁸ *Dubai Court of Cassation decision no. 222 for year 2004 ruled that the obligations of the broker are restricted to introducing a potential buyer to a seller and hence is entitled to the agreed fees regardless of the procedure of a successful registration.*



A person may not carry on the brokerage activity in Dubai unless he is licensed by the competent authorities, i.e. DED, and registered in the Electronic Register of the Real Estate Brokers in the DLD. Bylaw no. 85 of 2006 lists the penalties to be imposed on the broker.

C- The Unit Owner Association

The Strata Law regulates the common use facilities in a joint property, condominium. The joint property is the whole building or a part thereof or the land or both that is divided into units for separate ownership; parts of such building or land are specified as joint/ common parts. The common parts of the property are allocated for common utilization by the owners and occupants of the units as per the site plan.

The Strata Law has created and organized a new body named the Unit Owner Association. Such Unit Owner Association will be established upon the registration of the first sale of a unit within a joint property, condominium, in the Register in the DLD. Such Association shall consist of the joint property owners including the main developer or sub developer for the unsold units. The Association is a non profit organization and has a legal personality independent from that of its members. It shall be in charge of administrating, managing, maintaining and repairing the joint parts and shall for such purpose obtain the necessary licenses from the DLD; it may delegate some of the powers vested therein to any person or company in return for fixed fees and according to specific conditions to be agreed upon. Each unit owner shall pay the association his fixed share of annual service fees to cover all expenses and charges incurred by the Association in undertaking its duties¹⁹.

Section 6: Real Estate Dispute Resolution

¹⁹ Practically, in major developments in the Emirate of Dubai, there are two kinds of charges, (i) the building charges to be paid to the association, (ii) the master community charges to be paid to the Master Developer.



A- Amicable Settlement

Recently and due to the economical crisis, RERA is playing a major role in mediating between the investors and the developers to try to settle the dispute amicably.

Interestingly, Law No. 13 sets out that a Developer has no right to terminate a property transaction unless a legal notice to remedy within a 30-day period is sent previously to the purchaser through the DLD / RERA. This provision has proved to be a serious tool for the DLD / RERA to provide for amicable settlements between the purchaser and the developer over a dispute or to hear, although unofficially, some of the purchasers' complaints as regards some developments. It has proved as well to be an instrument for them to request developers to alter the purchase price payment schedules and linked to effective and actual construction milestones.

RERA recommends to the parties who have failed to agree on a settlement before it to resolve their dispute before the Dubai Property Courts. Additionally RERA has been issuing administrative circulars instructing the developers to reschedule the payment plans even for previous contracts in line with the construction phases, however on specific basis.

However, and with effect from 28 June 2009, the Amicable Settlement of Dispute Center which has been established pursuant to Law No. 16 of 2009 and which is attached to the Dubai Courts, has been competent to hear disputes to promote their amicable settlement before referral to the Dubai Court of First Instance. Settlement shall be achieved within one month of appearance of the parties before the Center, subject to extension of the period of settlement to the extent justified on a case-by-case basis. In the event that a settlement is achieved, the parties shall enter a settlement agreement reflecting the terms and conditions of their settlement. Cases may only be referred to the Dubai



Court of First Instance following a resolution by the Center to that effect. Due to the enactment of this new law and at the time of drafting, it came to our knowledge that RERA is not willing anymore to continue any amicable settlement for disputes.

B- Dubai Property Court²⁰

A new specialist Dubai Property Court was established in 2008, solely to adjudicate over property disputes. This Property Court is actually one of the Dubai Courts chambers. Real estate cases are those related to disputes emerging from acts or transactions related to property or brokerage, except for rent cases that are exclusively handled by Dubai Municipality's Rent Committee.

The Dubai Property Court hears various types of property cases, in Dubai and where the real property is located in Dubai such as those related to demands of contract termination, contract validation, writing and handover of contracts, in addition to brokerage cases.

The Dubai Property Court is likely to reduce the workload of RERA, which since its formation, has been swamped by property cases, including many for

²⁰

As mentioned previously, being a federation, the UAE legal system is governed by the UAE Federal Constitution. Under the Constitution, each Emirate is allowed either to establish its own legislature and judiciary or to merge with the federal court system. As a result, there is a combination of federal and local (or Emirate) courts in the UAE with parallel jurisdictions, depending on which system the individual Emirate has opted for. The judicial systems of most of the Emirates - except for Dubai, Ras Al Khaimah and Abu Dhabi, which have retained their own distinct and autonomous local judicial systems - have merged into the UAE Federal Judicial Authority. Dubai Courts are competent to apply the UAE federal laws as well as laws and regulations promulgated by the HH the Ruler of Dubai, provided they properly govern the underlying property transaction.



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developer project delays and non compliance with the property developer's original description

C- Arbitration

Arbitration is a form of alternative dispute resolution; it is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "*arbitrators*", "*arbiters*" or "*arbitral tribunal*"), by whose decision (the "*award*") they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides.

Arbitration is a frequently used form of dispute resolution as an alternative to litigation before the UAE courts.

The Emirate of Dubai counts a number of arbitration centers. The Dubai International Arbitration Centre (**DIAC**), which is operated under the auspices of the Dubai Chamber of Industry and Commerce, which has recently been re-branded as the Dubai Chamber. DIAC has its own set of arbitration rules, the DIAC Arbitration Rules, which are, by and large, modeled on the Arbitration Rules of the International Chamber of Commerce (ICC) International Court of Arbitration in Paris. Additionally, the Dubai International Financial Centre (**DIFC**) has founded its own arbitration centre in co-operation with the London Court of International Arbitration (LCIA), the DIFC-LCIA, which promotes a set of rules, which is closely modeled on the Rules of Arbitration of the LCIA. Arbitration in the DIFC is governed by the DIFC Arbitration Law. This law makes detailed provision for the conduct of arbitration proceedings in the DIFC, from the constitution of the arbitration tribunal to the recognition and enforcement as well as the annulment of awards. It is largely modeled on the UNCITRAL Model Law. There has been some serious doctrinal criticism with regard to the enforceability of arbitration awards rendered by the DIFC- LCIA.



The Dubai market is nowadays seeing an exhaustive number of arbitration in respect of real estate dispute resolutions as the contracting parties have and are still agreeing on the arbitration instead of the local courts.

It is of particular relevance to note that if one of the contractual parties in an arbitration agreement is a Dubai governmental body, the applicable laws to such arbitration should be the UAE laws and the Dubai laws and the arbitration can only take place in an arbitration centre in the Emirate of Dubai even if the contract between the contracting parties states otherwise. (Local order dated February 6, 1988).

Section 7: Assessment of the Real Estate Sector from a Legal Perspective

A- Strength

The Emirate of Dubai has adopted a state-controlled ownership protection for the Real property. The registration of any transaction as regards Real property proved to be *ad validitatem* as opposed to *as solemnitatem*. In addition, the real estate sector proved to be controlled by the government through number of registration requirements. In other word ‘registration’ became the equivalent of valid protection.

Registration of the Real property and the Transactions over Real property:

The DLD maintains a real estate register where all real estate transactions are recorded, (lease, mortgage, musataha, ownership of completed properties). Such register guarantees the contracting parties’ rights towards themselves and third parties and the validity of the transaction as regards the Real property^{21, 22}

²¹ Under the Dubai law, the registration is a requirement for the validity of the transaction otherwise such transaction is nil and void. In fact, the Dubai system sets out the registration as an *ad validitatem* condition as opposed to the *ad solemnitatem* requirement. It is not only a requirement for opposability to third parties.

²² Dubai Court of Cassation no. 224 of year 2007, sale of properties via a contract not registered in the DLD does not transfer the ownership from the seller to the buyer. In



It is worth noting that any real property transaction undertaken on off plan units is not subject to registration in such Real Estate Registry. Therefore the Dubai Government has established the Interim Real Estate Registrar as detailed below.

Law No. 13 requires all off-plan units to be registered with DLD in the Interim Real Estate Register which should make the Dubai real estate market a safer place for property purchasers and investors and responds to past complaints from investors especially off-plan investors.

Law No. 13 also established a mandatory procedure applicable to any developer seeking to terminate a sale and purchase contract. Certain provisions of that law have been amended by law no. 9 of 2009 especially in relation to the termination scenario linked to construction phases and to the ratios of refund of payments to the investors and its mode of refund.

Law No. 13 requires that the sale of all off-plan properties be fully registered with the DLD before they can be resold. This will have a natural slowing effect on the rate at which any property can be subject to speculation and be flipped and resold.

The registration information must include, (i) the name of the purchaser and the vendor; (ii) the value of the property; (iii) the location of the property; (iv) any relevant mortgage or payment plan details; (v) the payment history and fees paid and chargeable.

the same spirit, (i) Dubai Court of Cassation decision no 203 for 2008; (ii) Dubai Court of Cassation decision no. 194 for year 2008).



Any sale or other disposition that transfer or restricts title or any rights shall be void if not recorded in that register and therefore unenforceable in any court of law.²³

Upon registration, all registered sales are then officially recorded in the DLD Interim Register and hence the rights on the property of the buyer of off plan units are then fully protected not only towards the contracting parties but also towards third parties.

Sale transactions executed before law No. 13 came into effect are not exempted and must be registered within 60 days of the law's enactment as per the said law.

Fees for Registration

The registration of any of the above-mentioned transactions is subject to a variable fee imposed by the DLD.

Law no. 13 has prevented unscrupulous developers and agents charging transfer fees; the only registration fees due are those paid to the DLD.

However, Developers will still be able to charge administration fees which will be capped.

Registration of Private Players involved in the Development of Real Estate Developers

First the Developer should be registered in the “*Register of Developers*”. Article 4 of the Escrow Law provides for a special “*Register of Developers*” to be prepared

²³ It has come to our knowledge that the Dubai Property Court is currently ruling for cancellation of sale and purchase agreements of off-plan units if such sale is not registered with Dubai DLD in the Interim Real Estate Register.



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by the DLD for all “Developers” (as defined hereinafter) to be licensed to carry out the activity of real estate development in Dubai.

Developers should not conduct any property development activities (including advertising) unless they are registered in the register of property developers in the DLD.

Additionally, Article 5 of the Escrow Law provides that the Developer should obtain a written permit from the DLD prior to launching a project in the local or foreign media or participating in local or foreign exhibitions for the purpose of promoting the sale of off-plan units. It is worth mentioning that obtaining such permit is an additional requirement to being registered with the DLD and is a further guarantee for the purchasers of off-plan property that their investment is channeled just for the construction of a viable project.

Law no. 13 clearly states that no developer shall commence a project or sell its units off plan before taking possession of the land on which the project is to be built and obtaining the necessary approvals from the competent authorities in the emirate, i.e. JAFZA or TECOM or Dubai Municipality.²⁴ This condition imposed by the Law no. 13 came as a preventive matter for the sale of other’s property as it was the case for some of the sales of off plan real property in Dubai prior to the issuance of such law, where a developer was starting to sell off plan real property prior to taking possession of the land on which the project is to be erected from the Master Developer or the seller of such land.

Second, and after a Developer has been registered in the Register of Developers, the Developer wishing to sell off plan units should register the project and apply

²⁴ *It has come to our knowledge that Dubai Property Court has rendered a first instance judgment, (not yet published), whereby it has ruled that a sale and purchase agreement is null and void due to the fact that the plot is not registered in the name of the developer/ seller.*



to open an Escrow Account²⁵. He should enclose a list of documents as advised by the DLD to ensure compliance with all relevant conditions, laws and regulations for the sale of off plan property and mainly ownership of the land on which the project will be constructed. Hence and as per the Escrow Law, “*a special account is to be opened in the name of the real estate project with the Account Trustee whereby the amounts paid by the buyers of off plan units or by financiers shall be deposited in a special account to be opened with the escrow account trustee in the name of the property project.*”

This means that a Developer must be registered with RERA to carry out his day to day activities, he must open an escrow account in the name of each project he is developing to hold in trust any monies from potential purchasers from the sale of off plan units with a trustee, being a financial or a banking institution approved by the DLD to operate the escrow account; this is a guarantee that the monies paid by the purchaser of off plan units in a particular project is channeled only to the construction and development of that particular project. No attachment can be imposed on the amounts deposited in the escrow account in favor of the creditors of the developer as per the Escrow Law²⁶; this restriction is imposed by the law as a guarantee for the investor of that particular off plan project to maintain his right as to ensure completion of the construction of the project or refund of the amounts paid by him/ or part of it in the event of breach by the developer.

²⁵ This application should include the following documents: the developer’s DED trade license and certificate of registration with the Dubai Chamber of Commerce and Industry; the title of the plot or land to be developed; a copy of the sale and purchase agreement of the plot or land entered into between the developer and the master developer; initial design plans and drawings approved by the master developer and the competent authorities (in Dubai, being the Municipality); a financial statement, duly certified by an accountant, laying down the developer’s costs and projected revenues of the development; and an undertaking by the developer to commence construction after obtaining the master developer’s approval to sell units off-plan.

²⁶ Please see Articles 7, 9, 10, 11, 13, 14 and 15 of the Escrow Law.



Finally, no broker shall conduct any brokerage activities unless registered with the DLD.

B- **Weaknesses:**

In the presence of a newly established real estate system governed by laws and regulations in most of its segments, (i.e. lease, mortgage, freehold, off plan sales, escrow, agent ...), one cannot disregard the impact that the credit crunch had on an immature real estate market that was at that date not yet duly organized in part of its segments. We shall cite here-below, some lacunas and major concern the real estate market is facing nowadays.

First, and although the organizational texts are helpful and needful to stabilize the off-plan market, however, pressurized by the events, the DLD, RERA and later on the Government of Dubai have been taking some unique measures in order to protect the Dubai real estate market and consequently the economy of Dubai. Some of these measures are being criticized as being in a way or another (i) unfair, as being in favor of the developers, (ii) in contradiction with the essence of the juridical system in the UAE when some governmental bodies such as RERA and the DLD are playing the role of the judge in predetermining the ratio of calculation of the refund to the investors, the compensation due to the developer and the mode of such refund, (iii) or in breach of the Civil Code as Law no. 13 and later on Law no. 9 restricted the events of possible termination of a real property sale or transaction to the exclusive right of the developers in the event of non payment of the investors of any of their installments when practically, and in most scenarios, such payment plan was on predetermined dates and practically construction of the project on site is either in its early stages or delayed or non existent. This has been seen as in contradiction with the *exceptio non adimplenti contractus* concept embodied in articles 246 and 272 of the Civil Code where any of the contracting party may refrain from executing its obligations in the event that the other contracting party is failing



to perform its contractual obligations and the judge will whether rule for specific performance of for cancellation. It is also a clear infringement to Articles 289 and 290 of the Civil Code providing that the damages shall either be assessed by the parties and in presence of no agreement by the judge.

Second, Law no. 13, in its Article 4 provides that “*the Main Developer or the Sub-developer may not start the implementation of the project or the sale of its units on the map before receiving the land where the project will be implemented and obtaining the required approvals of the competent authorities in the Emirate*”.

However, nothing in this Law no. 13 provides that the Master Developer in charge of a Master Development cannot start selling plots to Developer before performing infrastructure or at least part of the master development infrastructure. In practice, some of the Developers are constructing the projects, the purchasers are paying and the infrastructure is suspended! This is an anomaly as purchasers should enjoy the unit for the purpose they bought it for.

Third, how practically, a bank can enforce the mortgage of a Granted Land? There appears from the applicable law that a bank may be at risk as mortgaging a Granted Land seems not to be a good mechanism to tackle the risks. In other terms, and for the following reasons, this is not a sufficient security or surety; the approval of the Dubai Ruler’s Court for selling the property in the market through auction is required; and additionally, there are two restrictions: if it is not a freehold area, only UAE or GCC nationals can buy; and if the Granted Land is used as a principal residency (domicile) the land cannot be seized and auctioned (Article 247 of the Civil Procedure Code).

Those restrictions must either be clarified or simply be waived when a Granted Land is mortgaged.

Fourth, and despite the plethora of regulation in respect of rents, none of those special texts had the benefit of bringing legal stability to rentals in Dubai; there



are no minimum period (three or four years) during which the landlord is prohibited from canceling the rentals in case the rent is paid; rents are still linked to market value and may be increased drastically from a year to another although the RERA Rent template is in place – the first two templates has shown that proposed rents are above the market value; disputes are still deferred to non-judicial committee as the rent committee is composed of non-legal practitioners.

Fifth, the legal costs of the judiciary are high. Although they are capped to AED -/30,000/ per case (7.5% of the claim amount), courts are denying to purchaser the consolidation of his claims. For instance, where the transaction is the purchase of a floor in a tower, the purchaser is compelled by law and for compliance reasons to sign with the same developer a sale agreement for each unit composing the floor; in case of dispute, courts are registering several claims and recovering court charges for each claim while we are in the presence of one transaction, identical terms and conditions, same parties, same subject matter and same dispute. Adding to this oddness, those claims are normally distributed to the different chambers of the court which might end up by ruling differently!

Sixth, as the on-going real property transactions have taken place few years back at the time when the legal framework of the real estate sector in Dubai was not yet fully implemented and organized, new legislation has resulted in a certain confusion as regards the time when new laws and regulations are being implemented. Therefore, it is crucial to point out the *principle of conflict of laws in time* under UAE laws to explain how recent laws and regulations should apply to previous transactions whose effects are still ongoing. In other words and due to the plethoric enactment of laws lately in the Emirate of Dubai regarding property and the real estate sector, what might be the laws that are to govern previous transactions/ agreements and their future effects?



As a general principle, what apply are laws at the time that an agreement was executed between the contracting parties or when a transaction took place. This general principle in the UAE is contained under Article 112 of the UAE Constitution which states as follows:

“No laws may be applied except on what occurs as from the date they become in force and no retroactive effect shall result in such laws. The law may, however, stipulate the contrary in matters other than criminal, if necessity so requires.”

This means that the general principle is that when an agreement is signed or the transaction took place the relevant laws at the date of the signature of the agreement should be applied to the agreement. This said, one may always argue that this general principle suffers an exception, i.e. the immediate applicability and effect of laws enacted after the execution of a contract on the future legal implications of those current contracts. There seems to be two cases where such exception might prevail, i.e. in criminal cases and public order cases.

Public order is defined in Article 3 of the Civil Code as:

“Public order shall be viewed as including such provisions relating to private status such as marriage, inheritance, and lineage, as well as provisions, relating to the government regimes, free trade, distribution of wealth, rules of private ownership”

Real estate matters might be classified within “*private ownership*” and therefore it may be considered as of public order.

The Dubai Courts have elaborated on the principle that public order matters will be the exception of Article 112 of the UAE Constitution in several cases²⁷.

²⁷ We will be listing some additional cases: (i) Dubai Court of Cassation No. 20 for year 2001: This case concerned the transfer of a property from a UAE national to a non-UAE national; such property was originally granted from the government to the UAE national. At the time the contract took place, this transfer was legal but later the 1994 Order came



Seven, the Real Estate Development activity is reserved to UAE or GCC Nationals or to companies wholly-owned by them. This mandatory rule has led to confusion: an off-shore company whether registered in Dubai or outside Dubai can own a plot of land in the designated areas where foreign ownership of a real property is allowed. However, they cannot develop it as they cannot be licensed by the competent authorities to conduct a development activity. To circumvent the law, they have to enter into a Development Agreement with a licensed UAE Real Estate Developer. But the escrow account will be opened in their name. This has led to a major confusion!

Eighth, some of the developers ‘sold’ leases to purchasers and the latter consider themselves as ‘owners’. This situation is at odds with the legal reality and nothing has been implemented to remedy such situation.

into effect and UAE nationals were forbidden to transfer, sublease or sell properties granted to them by the government. The Dubai Court of Cassation held that, as this regulation concerned a public order, the new regulation applies with immediate effect on the future legal implications of those current contracts despite the fact that when the contract was signed the 1994 Order did not exist. (ii) In the same spirit and in relation to the same subject, the *Dubai Court of Cassation rendered a decision no. 84 for year 2007* considering as well real estate matters of public policy and hence is ruling for the application of the aforementioned 1994 Order with immediate effect on the future legal implications of those current contracts despite the fact that when the contract was signed and the granted land was sold to a non UAE national this regulation did not exist. (iii) *Dubai Court of Cassation no. 56 for year 2009*: This case ruled for the immediate effect on the future legal implications of those current contracts transferring properties to non-UAE nationals in the dedicated areas of the Emirate of Dubai and hence the obligation of registration of those transfers in the DLD despite the fact that when the contract was signed this regulation did not exist.



Ninth, in some developments, projects or towers, the purchased Real property has faced a change in the floor location, in size, shape and/or place. This is resulting in purchasers While arguing that the sold property is not defined and not known to them, which may result in the termination of the sale agreements.

Tenth, there are no definitions for approximate gross area, gross areas, net areas or lease areas. In practice, if a purchaser acquires a real property having an area of 1000 sq/ft, at completion, the same purchaser expects to receive the same area less 25% being his part of the common areas. However, in some development they ended up with a surface of 500 sq/ft, without prior indication or explanation from the developer. A related matter is as follows: who is responsible for dividing the floor into units, the purchasers or the developers? There is no definition for shell and core as well. Taqem (DLD/RERA) is vested with the calculation of the areas, however no legal framework is organizing this issue.

Section 8: Recommendation

It is of no doubt that the Dubai Government endeavored to cope with the credit crunch and its effect on one of the major sectors in Dubai, the real estate and construction sector by issuing the aforementioned recent laws and regulations to remedy the fallout between sellers, developers, contractors, purchasers and end users bearing in mind that the speed that Dubai experienced for that boom could not be reasonably covered by issuance of all relevant laws and regulations at that time.

However, we recommend, *first*, for the legislative body to cope any new legislation with the Civil Code which actually sets out a general legal framework for contracts including property contracts. Notions like property, rights in rem, contracts, good faith, penalty clauses, damages, compensation, termination, specific performance, invalidation, nullification... are regulated and well tested

before Dubai courts. Investors and developers may benefit from that rich experience. Regulators as well; for example, they may stop valuating the



damages in special laws, and then try to explain it, which only adds to the confusion. Leave it to the contractual parties to arrange their situation and by default to the judge to assess it. From the same law we may also draw on the exception *non adimplenti contractus* concept if a developer is not performing; by this concept embodied in article 246/ 272 of the Civil Code an investor may stop paying where there has been no construction or even delays in construction. These are small examples from existing and consistent laws.

Second, and if possible, Dubai still needs the enactment of new regulations to cover areas where no laws exist yet. But that should be done properly as has been the case at the federal level for civil transactions, commercial transactions, companies, employment For property in Dubai, one properly structured real estate code should suffice, rather than creating a multitude of regulations aimed at regulating future activities. It is highly recommendable to stop issuing regulations for each specific situation like investor's payments default; this will end up with regulations for each developer, investor or project! The real estate code should encompass, consolidate and rectify already regulated issues such as property ownership, registration, property rights, mortgages, escrow accounts ... and regulate issues such as property development, condominiums, timeshare, property surveys, leasehold...

Third, we recommend a full and complete coordination and cooperation between the major players in the Emirate of Dubai, i.e. the Ruler's Court, the Dubai Property Court, the DLD and RERA. Moreover, we believe that the best way of survival for that sector is a smooth, reasonable and on going relationship between all parties especially between developers and end users with a concession from both parties mainly from the developer in amending the terms and conditions of the previous sale and purchase agreement to cope with the credit situation affecting everyone. This will help in the survival policy that the Dubai government is adopting and in maintaining the real estate sector



especially that it is of no doubt that the Emirate of Dubai has all the essential components granting it, once again, a leading role, especially in the real estate sector, in the region.

Fourth, expropriation of lands should as well be regulated.

Fifth, we would like to recommend that all real estate investors should, before buying a property, make sure that the developer, broker and the project where an investor intends to buy, are registered with the DLD; an investor should not accept to pay any amount unless it is deposited in an escrow account that is opened especially for the project where he intends to buy which guarantees his rights in case of any dispute; an investor should be aware of the laws and regulations that regulate the real estate sector; finally, an investor should read and understand the terms of the agreement he is signing on, as from what we are currently experiencing, most of the real estate agreements especially those related to the sale of properties are one sided agreements and are not properly understood by the contracting parties especially, the investors.

Sixth, Dubai laws and regulations proved to be generic and with no details; they comprise an average of thirty (30) articles. For instance, although Law No. (7) concerns the Real Estate Registration in the Emirate of Dubai, however such law still lacks a general organizational system for registration:

- There is no general system for registration comparable to other civil law countries in the region such as Egypt and Lebanon where each land or property is divided into 2400 parts or 24 parts. This issue is complicating the division amongst co-owners, heirs ...
- There is no general system for registration of the usufruct as well.

In the same vein, although the Mortgage Law is generally speaking in compliance with the Civil and Commercial Codes prevalent in the UAE, the



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Mortgage Law should be amended to comply with best practices. The amendments should encompass the following points:

- The Mortgage Law restricts the capacity of the Mortgagee to banks and financial institutions duly licensed and registered with the UAE Central Bank to provide finance for property in the UAE. This is a clear infringement to the principle of free trade.
- The Mortgage Law permits the mortgage of leasehold, musataha rights and off-plan units without organizing the manner such mortgage is applied or in practice how this issue is tackled.
- Furthermore, the Mortgage Law, alike Article 1419 of the Civil Code provides that a lender may satisfy its debt out of the mortgaged asset on maturity date in accordance with the rank it holds, after following the procedures provided for in the code of civil procedures and particular procedures. The obligation for the lender to have recourse to the courts to satisfy its debt and not to reach out of courts settlement on the security registered on a mortgaged property is called “prohibition de la clause de voie parée”. The reason of the prohibition of direct-seizure of the property by banks became nowadays obsolete²⁸. In March 2006, French legislators amended the country’s civil code to allow lenders to acquire mortgaged real-estate properties (except for the

²⁸

They derive from the French law that influences both Egyptian and UAE laws. The prominent Egyptian scholar Al Sanhoury -- and the overwhelming majority of French scholars -- reason that such prohibitions are in the public interest because borrowers are in much weaker positions than are lenders. The reasoning for the protection is that lenders may impose any conditions they choose on borrowers and as such may unduly deprive them of all their assets. In addition to these prohibitions protecting borrowers, these scholars explain that entitling the lenders to own mortgaged assets would be contrary to the purpose of the mortgage itself, which is to grant the lender a right over the value of the asset and not over the asset itself. Are such prohibitions still valid? No, because banks and lending institutions are tightly controlled by bodies such as the central bank and other regulatory agencies, so that borrowers are protected and are not anymore in the weak position they were when the prohibition was initially enacted.



borrowers' main residence and with some other exceptions). This move was designed to encourage consumption by encouraging banks to lend more easily. All legal systems derived from French law should follow suit and adopt a similar position, especially in these times of extremely tight credit. Doing so will restore bank confidence, assuring them that their rights are fully protected. Since the prohibitions date back to a historic period when there was no adequate protection for borrowers, they are no longer justifiable. Changing the position would require amending both the Civil Code, the Mortgage Law and the Civil Procedures Code to allow the direct acquisition by lenders of distressed assets.

Seventh, there should be (i) a clear definition for the leasehold as a personality; and most importantly (ii) institutions alike the “Vente a remere” or “Vente temporaire” should be introduced in the UAE legal system. These institutions will have the effect of minimizing the application of the leasehold in the areas of Dubai where freehold ownership is not permitted, as the right of ownership resulting from them is not perpetual but limited in time

Finally, the construction completion dates, master community charges and payment installments linked to construction milestones should be regulated. Those concepts in practice proved to be of a total opacity!

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