Changes to the DIFC Real Property Laws

Jeremy Scott - Partner - Real Estate
- Dubai International Financial Centre

Sebastian Roberts - Senior Associate - Real Estate
- Dubai International Financial Centre

The Dubai International Financial Centre ('DIFC') was launched in 2004 and unlike other areas in Dubai, including the free zones, the DIFC is an independent jurisdiction within the UAE, with the laws being modelled on the English common law system as opposed to the Civil Law system in place for the UAE. The application of the common law system to the DIFC, coupled with English being the default language, makes investment in the DIFC an attractive option for investors and has been a driving factor in establishing the DIFC as a major international financial hub.

The first substantive set of laws regarding Real Estate in the DIFC was introduced in 2007. In late 2018, the DIFC announced the following set of new real estate laws and regulations representing the first significant overhaul of the DIFC's real estate framework since 2007:

- the Real Property Law (DIFC Law No. 10 of 2018) which repeals and replaces the Real Property 2007 Law (DIFC Law No. 4 of 2007) (the 'RP Law');
- the Real Property Regulations (the 'RP Regulations');
- the Strata Title Law Amendment Law (DIFC Law No. 11 of 2018) amending certain provisions of the Strata Title Law (DIFC Law no. 5 of 2007) (the 'ST Law'); and
- the Strata Title Regulations (the 'ST Regulations'),

with the introduction of these new laws intended to "*enhance the current regime… to bring the regime in line with international best practice and to address certain areas that require further clarification*" (DIFC Consultation Paper).

What follows is an high level overview of the key changes to the laws. It is important to note that this article is only intended to give readers an high level overview and should not be construed as a comprehensive summary of the laws.

1. Real Property Law and Real Property Regulations

Real Property Law

a. Leases

A lease with a term equal to or greater than six months (including any option(s) to renew) is now required to be registered with the Registrar of Real Properties (the 'Registrar'), which moves away from the position under the previous law (i.e. a term of 12 months or more). In amending the registration requirements, the DIFC has also extended the required timeframe for a lessor to register a lease from seven days to 20 days from the date that the lease is entered into. A penalty of USD1,000 may be imposed by the Registrar if a lessor fails to register a lease in accordance with the RP Law.

Article 48 of the RP Law alludes to the leasing of real property being subject to the provisions of the RP Law and the 'Leasing Law'. The DIFC Leasing Law is yet to be introduced, however on 31 March 2019 the DIFC released the first draft of the Leasing Law and associated regulations for a 30 day period of public consultation. In issuing the Leasing Law and Regulations for public consultation, the DIFC stated in its Consultation Paper that the new law and associated regulations were being introduced "to enhance the current real property regime in the DIFC in an attempt to introduce areas of protection and assurance to Lessors and Lessees entering into leases of DIFC properties and further align the DIFC with international best practice…"

We will continue to actively follow the progress of the new Leasing Law and Regulations and will provide readers with further updates in due course.

b. Master Community Declaration

The RP Law now formally recognises the Master Community Declaration (including the right to collect service charges) as a statutory covenant that is enforceable and binding on all owners, which shall be registered as a 'Covenant in Gross' on each title.

c. Treatment of Minors

The treatment of minors (i.e. under 18 years of age) under the law has been clarified.

Rather than the status of the minor being registered as a 'disability' on title, the title will now be registered in the name of the minor's appointed guardian and a caveat registered on title noting the minor's beneficial ownership in the property. In addition, a guardian cannot register an instrument in relation to the property unless approved by the court, however the minor (once he or she attains the age of 18) is now provided with the right to provide his or her consent to registration of such instrument.

There is also now a clear obligation on the Registrar to transfer title to the property to the minor once they attain the age of 18 upon the Registrar being provided with the required transfer instrument.

d. Off-Plan Sales

The law includes a clear regime regarding off-plan sales, with the general principles aligning with the position adopted in relation to off-plan developments in mainland Dubai. In simple terms,

1. the Registrar now has a greater degree of control over the sale lots off-plan, with a developer unable to enter into off sale and agreements ('SPA') until:
    1. the Registrar has approved and recorded the development in the 'Off-Plan Register', with the Registrar given a wide discretionary power with respect to the approval of an off-plan development;
    2. the Registrar has approved the form of the Disclosure Statement to be given to prospective buyers at the time of entry into the SPA; and

    3. the Developer has established an escrow account with an escrow agent that has been approved by the Registrar;
2. purchasers of off-plan lots are now afforded a greater level of protection, whereby:
    1. developers are required to provide the purchasers with a Disclosure Statement containing the information prescribed in Article 161 of the RP Law and any directives issued by the Registrar;
    2. purchasers are now provided with a right of termination should a developer fail to provide the Disclosure Statement prior to entering into the SPA and fail to rectify such non-disclosure prior to handover of the completed lot. It is important to note purchasers will still have a right to terminate the SPA within a specified timeframe if a Disclosure Statement is provided after signing of the SPA, however the Disclosure Statement does not reflect the off-plan development;
    3. developers will be required to deposit all amounts paid under the SPA into the escrow account, with restrictions put in place with respect to the developer's ability to draw on the funds in the escrow account;
    4. an amount will be retained in the escrow account for a period of 12 months following completion of the building as security for the developer's obligation to rectify any defects in accordance with the RP Law;
    5. the introduction of an one year warranty in respect of non-structural defects and a 10 year warranty in relation to structural defects; and
    6. the introduction of a right for the purchaser to make a claim against the developer should the completed development be substantially different to what was disclosed.

e. Registrar's Power to make Orders

The Registrar is now provided with a greater ability to make orders in relation to a party's contravention or failure to comply with the requirements of the RP Law and RP Regulations, with the Registrar now able to make an order requiring a party to:

- take, or refrain from taking, any specified action;
- pay any prescribed fee (as per the RP Regulations) or any penalties levied under the RP Law; or
- pay compensation to the Registrar or a third party.

Real Property Regulations

The changes to the RP Regulations focus on the payment of transfer fees and the timing for payment of such fees.

a. Payment of Transfer Fees

A transfer of any interest, including the transfer of shares in an entity that holds assets in the DIFC, will typically trigger the payment of transfer fees to the Registrar, which are currently equivalent to five percent of the greater of:

1. the consideration paid for the transfer of the interest; or
2. the market value of the interest.

(the 'Transfer Fee')

While the obligation to pay the Transfer Fee remains unchanged and is still non-refundable, the newly introduced RP Regulations now provide for a number of circumstances where no, or a nominal transfer fee (USD273), is payable to transfer a real property interest, in such circumstances including:

- transfer of shares or real property from one person to an entity where the interest held by the person in the entity is in the same proportion as the ownership stake held by the person prior to the transfer;

- an intergroup transfer where the ultimate beneficial owner ('UBO') remains the same and each UBO continues to hold the same proportion of interest for a minimum period of one year following the transfer;
- a transfer between entities where the parent entity of the current owner and the target entity is the same and the UBOs remain the same and continue to do so for a minimum period of one year following transfer;
- the purchase of property by Real Estate Investment Trusts that are domiciled in the DIFC; and
  the buying and selling of shares in a company that is publicly listed on a regulated stock market, with a full list of the circumstances contained in Article 1 of the RP Regulations.

Provided the UBOs of the subject property remain unchanged, these changes to the RP Regulations provide a degree of flexibility for owners to undertake corporate restructuring for its assets held within the DIFC, without having to pay substantial registration fees. It is worthwhile noting that this exemption only applies to property(ies) owned in the DIFC. Should an entity also own assets outside of the DIFC, the Dubai Land Department will also need to be notified of the change in shareholding, with the applicable transfer fees payable to give effect to a change in shareholding.

b. Payment of Transfer Fee

The timing for payment of the Transfer Fee has been extended from 30 days to 50 days in relation to the transfer of a property that is subject to a registered mortgage, with the timing for payment calculated from the date of the agreement. The timing for payment of the Transfer Fee for all other transfers remains unchanged (i.e. 30 days from the date of agreement or effective date of the transfer).

The penalty for failure to pay the Transfer Fees on time remains unchanged at USD1,000 plus interest on the overdue Transfer Fee calculated at a rate of five percent per annum.

2. Strata Title Law and Strata Title Regulations

Rather than repeal the existing laws in place, the DIFC has introduced a law that amends the existing ST Law.

a. Strata Management Statements

There is now a clear obligation on a developer to lodge a Strata Management Statement, which relates to the administration and management of the body corporate and usually includes the by-laws that govern owners and occupiers use and enjoyment of the strata development, at the time of lodging the strata plan with the Registrar for registration.
The registered Strata Management Statement will be binding on the body corporate and all owners and occupiers of the strata development.

b. Lodgement of Strata Plan

Unless approved otherwise by the Registrar, a developer is now required to lodge the strata plan for registration within one month from building completion.

c. Exclusive Use Rights

Prior to the amendment of the ST Law, the grant of any exclusive use rights would automatically lapse after five years of the right being initially granted, however the grant of any such right is now considered to be perpetual in nature and will not lapse provided that the owner complies with its obligations under the relevant by-law.

d. Appointment and Approval of Body Corporate Manager

The discretionary right for a body corporate to appoint a body corporate manager has been deleted and replaced with a clear obligation on the body corporate to appoint a body corporate manager that is duly licensed and approved by the Registrar.

Given the introduction of this mandatory requirement, additional provisions have been inserted into the ST Law with respect to the functions, powers and duties of the appointed body corporate manager, with the Registrar also now provided with the power to order the termination and replacement of a body corporate manager in various circumstances.

e. Voting Rights at General Assembly

The ST Law seeks to limit the level of control that a developer can retain over a strata development upon the creation of the body corporate for the strata development (i.e. upon registration of the Strata Plan). If the developer (or a party related to or under the control of the developer) retains ownership of more than fifty percent of the lots and/or the lot entitlements, the developer's vote shall only be equal to fifty percent of the lot entitlements of the developer's lots. The introduction of this restriction will ensure that the developer cannot arbitrarily pass motions that may be detrimental to the balance of the owners in the development.

Additionally, the voting members for lots in a principal scheme will now be considered equal notwithstanding their respective lot entitlements. Depending on the nature of the Principal Strata Scheme (i.e. size of the principal plots and each plot's intended use), equal voting rights may not be appropriate in the circumstances, with the ST Law confirming the Registrar can provide its approval to unequal voting rights.

f. Lien – Unpaid Service Charges

While it is not uncommon for the constitutional documents for the strata development or the contractual documents signed by a purchaser to provide the body corporate with a right to register a lien over a unit in relation to unpaid service charges, the ST Law now provides the body corporate with an express right to apply to the Registrar to record a lien over the unit in such circumstances by way of a registered caveat.

Conclusion

The introduction of these new laws is a reflection of the DIFC's commitment to continually improve the laws that govern this unique part of Dubai. As is the case in any jurisdiction, buyers, sellers, developers, landlords and tenants should always seek legal advice with respect to their rights and obligations under the law and the current practices adopted by the Registrar.

Al Tamimi & Company's Real Estate team provides a comprehensive range of legal services across the Middle East including Dubai, covering all areas relevant to the property industry including real estate ownership advisory and transactional work assistance. For further information please contact Jeremy Scott (j.scott@tamimi.com) or Sebastian Roberts (s.roberts@tamimi.com).