

Musat-aha! How Development Leases can Aid Project Finance in Bahrain

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Law No. 27 of 2017 promulgating the law regulating the real estate sector ('Real Estate Law') came into effect in the Kingdom of Bahrain ('Bahrain') on 1 March 2018. This law made a number of important changes to real estate law in Bahrain, including the establishment of a Real Estate Regulatory Agency ('RERA') to regulate the Real Estate sector. The law also introduced a number of new categories of real property rights ('in rem' to lawyers)—the musataha, usufruct and long-term lease. In this article, we explain these property rights and how they could aid project financiers to projects in Bahrain.

The Musataha

The Real Estate Law defines the musataha right as a right in rem over property conferring upon the holder thereof the right to establish facilities or buildings on the land of others for a specified period. That is, it provides the lessee the right to develop the land. Accordingly, is common to describe the musataha as a development lease.

Following are the key features of musataha right under the law:

1. the musataha term may not exceed ninety-nine years;
2. the holder of the right of musataha shall own the buildings or facilities he built on the land. He/she may dispose of the same under the right of musataha, unless agreed otherwise in writing;
3. for a period of more than ten years, the holder of the right of musataha may dispose thereof, including mortgage without the owner's permission, unless otherwise agreed in writing. It is not permissible to prevent the holder of the right of musataha from exercising his/her right except for a legitimate reason;
4. an assignee can replace the holder of the right of musataha in terms of his/her rights and obligations, unless otherwise agreed in writing;
5. the landowner may mortgage his/her land if it imposes the right of musataha without the permission of the holder of the right of musataha, unless otherwise agreed in writing;
6. the right of musataha does not extinguish with the demise of the buildings or facilities before the end of the period;
7. upon expiry of the right of musataha, if the holder of the right of musataha builds buildings or facilities, the landowner, at the expiry of the right of musataha, may either require him/her to demolish such buildings or remove such facilities or own the newly-established items in consideration of the value of such demolition or removal if the same is harmful to his/her land; and
8. if such demolition or removal does not harm the land, the landowner may not keep the same without the consent of the holder of the right of musataha, all unless otherwise agreed in writing.

The Usufruct

The Real Estate Law defines usufruct right as a right in rem over property conferring upon the holder thereof the right to use and exploit the property or real estate unit in accordance with its provisions and the law.

The musataha right and the usufruct right are both property rights conferred by the Real Estate Law except that the musataha right gives the owner of the musataha right the right to build, own and use the building during the term of the musataha. Usufructs only provide the right of use.

The term of a usufruct right may be for up to fifty years in Bahrain—in contrast to the musataha, which can be ninety-nine years.

The Long-term Lease

A long-term lease right is defined as a right in rem over property of a term not less than ten years and not exceeding ninety-nine years unless it is agreed that it be renewed. The provisions in the law applicable to usufructs also apply to long-term leases unless otherwise agreed.

Unlike the musataha and usufruct, the law does not prescribe a specific purpose of the long-term lease so it can mostly be defined by what it is not; meaning, the long-term lease is not an usufruct or a musataha. Typically, it would be the long-term rental of an existing building and the land. The term of a lease right is also for a period of up to fifty years.

Projects

Historically, for power projects in Bahrain a project company would enter into a lease with the Government entity involved in the projects as the owner of the land used for the project. This is, in our experience, structured as an ordinary lease and is not registered with the Survey Land and Registration Bureau (Bahrain's land department and registry) as they do not constitute a proprietary right in the land. Consequently, no mortgage interest can be taken in the project lease in favour of the project's financiers. The Real Estate Law now provides an alternative possibility.

Long-term leases or musataha rights are registrable property rights. It is also expressly contemplated in the Real Estate Law that these rights can be mortgaged (the Real Estate Law also sets out a process for the enforcement of a mortgage also). For a large-scale project that requires construction of a fixed item of infrastructure, a musataha agreement would be a preferable option for the developer since it confers on the owner of the musataha right the right to develop the property and own the building constructed. The project financiers, as a result, can mortgage the musataha right and the buildings. In contrast, a long-term lease would provide only a mortgage interest in the lease rights.

Conclusion

The concept of long-term leases and musataha are relatively new in Bahrain. To our knowledge, they have not yet been employed in a Bahrain infrastructure project. The Real Estate Law now offers this possibility and, if used, would align Bahrain with other GCC jurisdictions such as the

UAE. However, this would be a material change from existing precedent so would need to be supported by Government procuring agencies as there could be a consequential impact on project costs (for registration) and termination rights.

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