

Kingdom of Saudi Arabia – Greenfields projects create opportunities

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Regulatory Overview

Dealings with KSA real estate are principally carried out according to a well established and traditional process involving private negotiations followed by the participation of a regional government employee of Shari'ite qualifications (Notary Public) to complete the change of ownership.

Such a system of ownership could be compared with a 'deeds system' whereby ownership is traced through the various contractual arrangements between buyer and seller. The Notary Public performs the valuable function of authenticating the identities of the parties and may record the transaction in a register but the register does not purport to be the definitive record of all interests in relation to the real estate unit.

However, as is the case with many aspects of the KSA regulatory regime, the government has in recent years significantly modernised the legislative framework through the introduction of The Realty in Kind Registration Law, issued by Royal Decree No. 6 on 9/21423H, corresponding to 24/2/2004 (RKR Law) and other laws designed to facilitate a comprehensive real estate titles framework. The RKR Law creates an efficient and transparent land identification, ownership and registration system which will ultimately cover all real estate in the Kingdom. This law is also supported by the following laws relating to surveying of land and the sale of units in a building:

- The Law of General Survey Authority; and
- The System of Ownership of Units, Estates, units, apartments and their Sorting, issued by Royal Decree No. 5 on 11/2/1423H, corresponding to 24/4/2002.

The above laws are in cases supplemented with Executive Regulations

The swathe of new 'Green Fields' projects being implemented in the KSA by the government or related special purpose vehicles create both the need for such projects to be brought within the framework established by the RKR Law as well as the opportunity.

The principal difficulty with implementing a real estate titles regime, where 'ownership' has not previously been linked to surveyed parcels of land and a centralised register, has been the issue of competing interests in the estate. Such interests could be disputes as to ownership, easements, covenants, financial liens, and leasehold interests.

A Greenfield project, by its nature has none of these competing interests as the developer will (other than in exceptional cases) have a clear right to create the individual estates within the master community.

Many projects currently being developed or in the planning stages will have elaborate communal facilities, the costs of maintaining and repairing of which will have to be met by the stakeholders in the master community.

Bringing these 'Greenfields' developments within a land titles regime will create the ability to ensure that purchasers who acquire title are bound to make such contributions to the communal facilities. This can be achieved by ensuring that documentation, generally called a 'master community declaration' is registered as a restriction against the title to the property. Purchasers wishing to purchase a particular real estate unit will have the ability to search the title and any interest recorded on this and accordingly will have knowledge of the relevant restrictions when they acquire title.

A centralized register also creates the ability to ensure that liens, mortgages and other Shari'ah compliant financing arrangements can be recorded on the title thereby protecting the interests of the financiers, owners and third party purchasers.

Survey and identification of the Real Estate Unit

The RKR Law establishes a decentralised system of land registration and transfer which reflects the approach and methodology of similar systems throughout the world. The register will describe each land parcel in the designated area, its location, legal status, ownership rights and obligations, all in the context of indefeasibility of title (in the absence of a breach of Shari'ah principles or forgery). Each land parcel will have a unique serial number. The focus is on the identity of the land parcel, with proprietary interests established by reference to registered dealings.

There will be two phases to the roll out of the new registration system:

First Registration Phase. The Ministry of Municipal and Rural Affairs will prepare cadastral maps of each property in a designated area. The Ministry of Justice will then document the rights relating to each identified property and that information will be placed in the register according to the status quo under the supervision of a competent local court judge. During this phase, only the person with the right to dispose of particular rights will be able to request a change to recorded information. Persons concerned by the first registration process have rights of objection with specified time limits. One could expect that this aspect could be simplified significantly with a Greenfields Project as the number of parcels at the outset are likely to be limited as would the interest of any third party.

Subsequent Registries Phase, where dealings subsequent to the first registration will be detailed and recorded in the register. These dealing include transfers, variation of rights, long term leases and mortgages. Registration fees will apply. In the case of a Greenfields Project the sub-division and sale of real estate units would be with the developer and the developer would have the opportunity of completing its own comprehensive records of estates to be created as part of its master planning. As each estate is created and sold the relevant plans and additional interests can be recorded in the real estate register.

Implementation

One could be forgiven for thinking that given that the laws are in place that the hard work was done. In fact, it is only the beginning of the project. Implementation presents the real challenge. In addition KSA covers a vast area with differing administrative bodies and districts. Whilst it would not be necessary for each district to follow exactly the same methodology, this would be desirable.

Below we have set out some of the issues that may need to be considered in settling a collective vision for the real estate registration and outline and potential challenges:

Surveying and standards

An important feature of a real estate titles regime is the clear identification of the real estate unit in question. Surveying is a process whereby a specialist surveyor (generally using global positioning technology, satellite imagery and other similar technology) will create an accurate two or three dimensional drawing of the unit.

This unit however has to be allotted within a larger unit, plot or block in order that this can be identified in relation to other plans making up the survey area. In order to such tasks to be undertaken there will need to be specific practice guidelines as to how measurements are done and the ancillary information required upon the plans. This data then needs to be recorded in the surveying authority's records.

Titles

Titles need to contain a range of information. Firstly the title must identify the real estate unit and preferably include a copy of the plan referred to above. Other information to be recorded includes:

- Ownership details;
- Liens, mortgages and other similar rights
- Easements, for example the right to use a certain area within the unit of another party on certain terms and conditions;
- Covenants for example the obligation to maintain a boundary wall or the obligation to comply with the master community declaration;
- Registered leases.

Utility and functionality

Completing the various functions, set out above, adds value in that the relevant interests will be clearly defined and stored in a secure register. The registry must however be dynamic and capable of facilitating changes in the data and performing various other functions as follows:

- Establishing Priorities. Commercially it is possible for an owner to create one or more competing (unregistered) interests to their unit. An example would be where the owner sells or mortgages their unit to more than one person. In addition it may be that a financier agrees to lend money against the unit knowing that his interest may be inferior to that of another financier. The registry should therefore have a system for recognising which interest has priority. Generally the interest having priority will be that interest registered first in time though exceptions are sometime made in cases of fraud or where a party had knowledge of the other competing interest and this competing interest was made first in time.
- Having Search capability. The ability to search a register enables a party wishing to acquire an interest in the real estate unit to check to see what other interests may already exist. This reduces greatly the potential for disputes and frauds. In addition surveyors and other parties may require information such as plans and title details to allow them to perform their legitimate functions.
- Transferability and the ability to prevent transfers. Obviously any registry needs to be able to transfer a party's ownership interests in the register. Other interests may also benefit from being able to be transferred or have sub interests created from them. The ability to transfer mortgages (or other forms of financial encumbrances) and lease as well as the ability to sub-lease may add value to any registration system. In addition it may be beneficial to allow some interests to be transferred subject to an interest. For example parties to a contract for the freehold interest in land would normally be prepared to transfer ownership subject to a lease. In contrast specific no objections may be required prior to allowing a party to transfer, for example no objections certificates from the master developer or owners association to ensure that the owner has cleared all outstanding estate or service charges.

- Caveats or other blocking procedures. In many circumstances a contract for sale or creating an interest in the unit may be created well in advance of registration taking place. In such circumstances a procedure to enable a party to register its 'pending' interest adds value. This procedure is commonly referred to as the ability to 'caveat' the title. A 'caveat' ensures that dealings that are inconsistent with the rights of the caveator are prevented. It may also be prudent for the system to allow for a procedure allowing a registered party to force the caveator to sustain its interest through the courts to prevent abuses of this process.
- Subdivisions, strata titling and amalgamations. Large parcels of land and buildings may be subdivided into smaller units. In addition plots may need to be amalgamated for example where a proposed development is constructed over plots previously in two titles. The registry will need to be able to cancel and reissue plans and titles to reflect such changes.

Financing of projects

Projects can be financed or partially financed in a number of ways as follows:

- From the resources of the developer;
- Through delayed payments under the sale and purchase agreement for the plot and other financing arrangements;
- Through funding by a financial institution;
- Through 'off plan' sales.