Enforcement Update

Jody Glenn Waugh
j.waugh@tamimi.com

Saleh Al Obeidli
s.alobeidli@tamimi.com

However in relation to immovable property (land) in the UAE, there is a divergence between how ownership, and the transfer of ownership, is dealt with under Shari'a principles and UAE law. This issue is further compounded by the different approaches in each Emirate to registration of Islamic finance contracts such as Ijara, including whether financial institutions with foreign ownership can own (under an Ijara) property in certain areas.

So what happens when a finance party does not take legal ownership and instead relies on contractual ownership of immovable property (commonly referred to as Shari'a title) with a mortgage?

In previous articles we have highlighted the numerous positive Court judgments which have been obtained for our clients in relation to termination of Ijara to confirm the ownership of the finance party, including compensation in some cases, and enforcement of the purchase undertaking. All of these cases involved the finance party as legal owner of the property.

Recently Al Tamimi filed proceedings to enforce a mortgage held by a finance party under an Ijara, where the legal ownership of the property was left in the name of the customer. In this case:

1. Pursuant to Article 25 of Law No.14 of 2008 (the "Mortgage Law"), notice was served on the customer through the notary public giving the 30 days cure period. The default in payment was evidenced by bounced cheques of the customer.
2. Consequently, an execution case was filed directly before the execution judge on the basis of the mortgage deed, the finance application submitted by the customer, the offer letter and the bounced cheques.
3. The Court ordered to enforce the mortgage and to sell the mortgaged property by auction through the Dubai Lands Department, and ordered for the finance party to receive all the outstanding (the claim amount) and all related expenses.

In addition to the structural differences with this case as a result of the ownership of the property and security, one of the fundamental differences to previous cases was the way the debt claim was approached. In order to work within the requirements of the Mortgage Law, and to have an actual amount due and secured by the mortgage, proceedings were lodged on the basis the finance party had provided finance to the customer which had defaulted in payment (as opposed to utilising the customary remedies provided for in the Ijara documents).

While issues still surround the enforcement of Ijara with mortgage (such issues warranting their own article), and while it is a structure we would not necessarily recommend, the judgment is a positive result for finance parties in Dubai with this existing structure.

Speedy execution of share pledge

Al Tamimi recently obtained a judgment for our client in relation to the enforcement of a pledge of shares listed on the Abu Dhabi Securities Exchange. In a case involving a debt of AED170 Million the Abu Dhabi summary Court of First Instance ruled to sell the pledged shares as a result of the default in payment by the customer on the due date.

In this case, the bank had registered a pledge on the shares owned by the customer as security of the facility given by the bank. As a result of the customer (debtor) failing to pay back the facility, the bank served notice as per Article 172 of the Commercial Code. After the 7 days stipulated in the above mentioned article passed, the bank submitted an application to the Summary Court of Abu Dhabi requesting the Court to make an order to sell the shares in order to cover the loan and its interests and all related expenses.

The Court agreed to hear the case on an urgent basis and ruled to sell the pledged shares through one of the broker companies authorized by the ADX, and to pay the debt owed to the bank plus interests and expenses.

This judgment represents a positive outcome for banks and security holders, in particular where registered security over listed shares is held, in that:

1. the case was heard on a urgent basis. Although the Court requested that the customer be formally notified, it was for all other purposes completed on a summary proceedings basis;
2. the process was completed very quickly – judgment was issued within 6 months, with sale of the shares on the market taking another 4 months; and
3. rather than selling the shares by public auction, the Court followed past precedent to allow the listed shares to be sold on market.