

Security Enforcement in Dubai

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Recent reports from publicly listed UAE banks reflect that Dubai and the UAE are not immune from this reality with the disclosure of increased loss provisions. Where customers get into difficulty, a bank may need to protect its investment through enforcement action in local courts. Below is an overview of common issues that arise which may impede or delay the enforcement of the two most typical credit support instruments in the Dubai context: the property mortgage and personal guarantee.

Property Mortgage

1. Enforcement Challenges

The Law Concerning Mortgages in Dubai (Law No. 14 of 2008) (the 'Dubai Mortgage Law') prescribes the content of a land mortgage. Without this key information, a mortgage is unlikely to be permitted to be registered by the Dubai Land Department. However, the Dubai Land Department officials are not responsible for ensuring the correctness of all information. If a mortgage deed does not provide for any information identifying the particular facility secured (i.e. it does not identify what the mortgage secures, or more correctly, the debtor's obligations the mortgage secures), the customer may challenge the bank's enforcement of the mortgage deed on the basis that:

- the mortgage deed does not expressly refer to a certain facility, and therefore it does not secure the resulting liabilities. However, the bank can argue that all of the finance and security documents, taken as a whole, provide sufficient certainty as to the liabilities secured by the mortgage deed; and
- where applicable, the mortgage deed was provided to secure a previous facility and therefore the bank cannot enforce the mortgage deed to recover under the current facility. However, the bank's argument could be that the mortgage deed was given to secure the facilities provided to the customer as a whole and not to limit the bank's security under each facility.
- In respect of point (a), the Civil Transactions Law (Federal Law No. 5 of 1985) makes it clear that consideration for a pledge way of security must be an ascertained debt owed or promised, ascertained at the time of the pledge, or specific property which is guaranteed.

2. Enforcement Procedures in Dubai

The Dubai Mortgage Law also outlines the procedures for enforcement of a loan secured by a mortgage over land, which are:

- the Bank is required to notify the customer of the default in payment by serving a legal notice through the notary public requiring it to cure the default within thirty days; and
- in the event that the customer fails to pay in accordance with the notice served, the Bank may submit an application/petition to the execution department of the Dubai Courts seeking enforcement of the mortgage. This application/petition will include details of the loan provided to the customer, copies of the relevant documents and evidence of service of the default notice mentioned above. In accordance with the Dubai Mortgage Law, upon the failure of the customer to pay the overdue amount in response to the Bank's notice, the execution judge may order an attachment against the mortgaged property so that it can be sold by public auction in accordance with the relevant execution procedures followed by the court.

To obtain a judgment, in a simple case where no dispute is raised by the customer, at present takes approximately two to four months, excluding the public auction process.

3. Dubai Mortgage

Under the Law Concerning Real Property Registration in the Emirate of Dubai (Law No. 7 of 2006) (the 'Title Registration Law'), every document creating, transferring or extinguishing property rights has no effect unless the document is registered with the Dubai Land Department.

According to Article 4 of the Title Registration Law, UAE and other GCC nationals and companies wholly owned by such nationals have the right to own any property interest in the Emirate of Dubai, and to have such rights registered at the Dubai Land Department. All nationalities other than UAE or GCC nationals are granted the right to own a freehold interest or a long lease right in designated areas (as approved by the Ruler of Dubai). Article 26 of the Title Registration Law makes clear any disposal made in violation to the provisions of this law is null and void. Hence, any unregistered sale of land, including a purported sale to a non-UAE or non-GCC national outside of the designated areas, will not have protection of the law. As a corollary, a mortgage could not be granted by the purchaser were they to obtain finance for the acquisition (as the land would not be transferable).

Personal Guarantee

1. Specifying Guaranteed Obligations

Under the Civil Transactions Law, a guarantee (either personal or corporate) is required to clearly state the guaranteed obligation(s). This is usually achieved by mentioning a certain amount of money or referring to a certain facility so the guarantor is aware of what is guaranteed. We have seen instances where the scope of the obligations being guaranteed is unclear in the documentation — this is fertile ground for a challenge to any enforcement of the guarantee by the guarantor.

Guarantees for 'all monies' may not be enforceable in the UAE, as Article 1061 of the Civil Transactions Law requires that guarantees must be issued with respect to a specified debt or a thing certain in amount. 'All monies' guarantees are not usual practice but we have seen these in a small number of situations. While there have been judgments in the recent past where the UAE Courts have recognised and enforced all monies guarantees, the application of such judgments is limited and not binding for future situations.

Article 1061 of the Civil Transaction Law is extracted below:

"In order for the suretyship to be valid, the subject matter of the suretyship must be something for which the principal obligor is liable by way of debt or specific property ...".

In Dubai Court of Cassation appeal No. 79 of 2008 dated 16 June 2008, the Court reinforced the legal position where it stated:

'The guarantee contract shall be void unless it: determines (fixes) the guaranteed amount (debt); or includes the basis on which the amount guaranteed should be calculated; or refers to the credit facility(s) granted to the debtor'.

Consequently, there is a risk that a guarantee may be found to be unenforceable by the court if it does not refer to the facility or an amount, as it may be found to be uncertain. However, any such claim could be countered by documentary evidence showing that the guarantee secures or intended to secure the relevant facility by referring directly to the security documents listed in the facility itself.

2. Time Limitation

The general position under the Civil Transactions Law is that legal proceedings against a guarantor (either corporate or personal) must be initiated within a certain period stipulated by law from the date on which

the debt falls due, unless otherwise agreed between the parties in the guarantee contract.

The Dubai Court of Cassation characterises a contract of guarantee, whether corporate or personal, as a civil activity concluded between ordinary persons and accordingly is subject to the six-month limitation period stipulated within Article 1092 of the Civil Transactions Law.

That Article provides that a demand or claim must be originated by the bank against the guarantor within six months from the date on which the debt fell due. Such demand or claim includes a letter, regardless of whether or not it is notarised, issued by the bank to the guarantor requesting repayment of the due outstanding amount.

Dubai Courts also clearly recognise that the limitation in Article 1092 of the Civil Transactions Law can be waived by the parties. For example in Dubai Court of Cassation appeal no. 6 of 2009 dated 24 May 2009 it was found:

“The guarantor is competent to terminate the guarantee contract, if the creditor did not claim the guarantor the guaranteed amount within six months starting from the date on which the debt is due, unless otherwise agreed between the parties in the guarantee contract”.

Conclusion

While not being an exhaustive summary of every obstacle that could be faced by a lender in enforcing a land mortgage or guarantee, this article is illustrative of roadblocks that could be faced in the process. Not every obstacle will impede enforcement, and many issues have ready solutions that can be presented in argument at Court. However, obstacles and roadblocks serve to delay and lessen eventual recovery, sometimes significantly where appeals are required through multiple levels of Court. Ensuring that any uncertainty is avoided or resolved before entering into the enforcement process (which should ideally occur at origination) is the best approach.