

Can Emails Be Accepted as Evidence In Real Estate Disputes?

Taiba Alsafar - Partner - Litigation / Private Notary
t.alsafar@tamimi.com - Dubai International Financial Centre

Mohamed El Kholly - Senior Associate - Litigation
m.elkholy@tamimi.com - Dubai International Financial Centre

Ours is an age governed by speed, whether through electronic 'smart' services, a heavy dependence on smart phones or the growing dominance of online transactions. It seems we can process 90% of our daily tasks with a click online, apparently making life easier and faster.

The law has been slow to catch up with the pace of technological change. In this article we consider the attitude of the Dubai Courts to information communications technology (ICT) in disputes involving real estate. Real estate transactions are overwhelmingly conducted through electronic or digital communications, and the question must be asked: how are parties' rights protected by digital evidence in the circumstances of a dispute?

Relevant legal background

Article 17 of the UAE Law of Evidence (No.10 of 1992 amended by Federal Law No.36 of 2006) stipulates the following at Clause 4:

Electronic writings, correspondence, registers and documents have the same probative force given by this Law to formal and informal writings and correspondence, whenever it satisfies the conditions and provisions set out in the Law on Electronic Transactions and Commerce.

Article 2 of the Federal Law on Electronic Transactions and Commerce (No.1 of 2006) says:

1. Matters for which no specific provision is laid down in the Law shall be governed by the international commercial laws affecting Electronic Transactions and Commerce and the general principles of civil and commercial practice.
2. This Law applies to Electronic Records, Documents and Signatures that relate to Electronic Transactions and Commerce but does not apply to:
 - Transactions and issues relating to personal law such as marriage, divorce and wills;
 - Deeds of title to immovable property;
 - Negotiable instruments;
 - Transactions involving the sale, purchase, lease (for a term of more than 10 years) and other disposition of immovable property and the registration of other rights relating to immovable property;
 - Any document legally required to be attested before a notary public; and
 - Any other documents or transactions exempted by special provision of law.

From Article 2(2)(d) above it is clear that electronic documents have limited probative value in certain transactions relating to the sale and purchase of real estate.

Despite this limitation, there have been a number of cases where the Dubai Court of Cassation has in fact accepted electronic evidence in real estate disputes.

Case Study 1

One such case involved a dispute whereby a claimant buyer of a real estate unit filed a claim to dispute

the price of the unit. The defendant developer had sold the unit as a hotel apartment but later it was discovered that the developer did not have sufficient approvals to classify the unit as such. The buyer filed a claim disputing the price. The first instance court rejected the claim as there was no mention in the sale contract of the unit type or classification as a hotel apartment. On appeal, the Dubai Court of Cassation reversed the lower court's judgment and remanded the case back to the court to review the case again, ordering it to take into consideration an email by the developer classifying the apartment as a hotel apartment.

Case Study 2

However, in a recent judgment the Dubai Court of Cassation has applied a much stricter interpretation of the UAE Law of Evidence and Federal Law on Electronic Transactions and Commerce.

Factual background

A real estate company ('the Seller') entered into sale and purchase agreement with an individual ('the Buyer') for the purchase of several unit ('the Original SPAs'). The Buyer paid part of the purchase price under the Original SPAs and later the Buyer agreed to terminate the Original SPAs. The Buyer then entered into two separate sale and purchase agreements ('the New SPAs') for the unit in question ('the Unit') and another unit. The Buyer made some payments under the New SPAs but did not settle the balance of the purchase price despite full completion of the project. The Unit was registered under the Buyer's name on the Interim Property Register at the Land Department in Dubai.

A dispute arose between the Seller and the Buyer as to whether the amounts paid under the Original SPAs should be deemed payment of amounts due under the New SPAs based on emails between the Seller and Buyer. The Buyer believed that it had been agreed in the emails that he had settled certain amounts under the New SPAs, whereas the Seller did not and contended that the Buyer was in breach of the New SPAs for non-payment of dues.

The Seller applied to the Centre for Amicable Settlement of Disputes ('the Centre') for the appointment of an expert to examine the breaches by the Buyer. The Centre appointed an expert who reviewed the matter and concluded in his report that the Buyer had requested a statement of account reflecting in an email sent to the Seller the transfer of the amounts paid under the Original SPAs to his debts under the New SPAs. The expert therefore concluded that the Buyer had a credit balance with the Seller based on the transfer of those payments.

Findings of the Court of First Instance

The Seller filed a claim before the Dubai Courts Court of First Instance claiming the remaining amount outstanding for the Unit plus interest despite the expert report issued at the Centre. The Seller argued that the Buyer had agreed to rescind the Original SPAs and that the Seller would retain the amounts already paid as compensation for the losses suffered due to the Buyer's breach of the Original SPAs. The Seller asked that the Buyer be ordered to pay the balance owed on the Unit under the New SPAs, in addition to a late penalty with legal interest, , without regard to any payments paid under the Original SPAs.

The Buyer filed a counterclaim and sought confirmation that the sale and purchase agreement for the Unit was complete, valid and enforceable. He also sought to compel the Seller to complete the formalities for registering the Unit under the Purchaser's name in the Property's Register, and for the Seller to pay compensation for the damage caused by its denial of enjoyment of the Unit to the Buyer from the contract's signing date up to the Unit's handover date.

The Court of First Instance ruled that:

- The Buyer was liable to pay the Seller the remaining balance as stated by the Court expert with an interest rate of 3% per month in case of late payment; and

- The counterclaim was dismissed. It was premature as the full payment for the Unit had not been made.

The Court of Appeal decision

The Seller and the Buyer each appealed. After considering both appeals, the Court of Appeal decided to appoint a tripartite committee of accounting experts. The committee concluded that the Seller had not (but should have) transferred amounts paid by the Buyer under the Original SPAs to the New SPAs. The Buyer made payments to the Seller for the Unit in installments and there were no outstanding amounts owed by the Buyer to the Seller in respect of the Unit.

The Court of Appeal overturned the decision of the Court of First Instance, finding that:

- The Seller's claim had failed; and
- The Buyer's counterclaim was successful. The sale contract was declared valid and enforceable in respect of the Unit, but the Buyer's compensation claim was dismissed.

Appeal to the Court of Cassation

The Seller and the Buyer further appealed again to overturn the Court of Appeal's ruling. The Court of Cassation overturned the Court of appeal and determined that the sale contract was neither valid nor enforceable as the evidence supporting the payments was in the form of an email that did not originate with the Seller. The Court of Appeal had wrongly ignored Article 2(d) of the Federal Law on Electronic Transactions and Commerce. This section excludes transactions involving the sale, purchase, lease for a term of more than 10 years and other disposition of immoveable property and the registration of other rights relating to immoveable property. In other words, the email could not be given any relevance as far as property title was concerned.

Conclusion

In light of the huge tendency towards smart and electronic transactions and considering the importance of the property sector for the UAE economy, an amendment to UAE legislation may be necessary to include evidence based on electronic correspondence relating to property transactions. At present, UAE civil procedure struggles to cope with the smart transformation occurring not only on a national level but also internationally, making the UAE less attractive to international parties that may engage in real estate transactions. Until the law is changed, it is important for parties to real estate transactions to ensure that any important communication is made through physical letters, ideally via Notary Publics, or other non-electronic means of communication and not to rely solely on electronic correspondence which may be challenged in court.