

New Dubai Property Law a Key Cornerstone II (April 2006)

We still believe that a UAE Federal Property Law is essential to set a unified model and guidelines for the emirates to follow in enacting their own local real estate legislation. We believe that certain matters of ownership and enforcement of real estate rights should and could only be dealt with on the Federal level, under the umbrella of such Federal Law.

In fact, the rules of conflict of laws between the federal and local legislation prescribe that federal laws supersede local laws.

One area, of special concern for lenders, thus affecting the development of a competitive mortgage market, is the enforceability of mortgages.

A large part of real estate transactions, particularly the purchase of residential properties, is financed by banks and financial institutions in consideration of a mortgage over such properties as a security for the loan.

The enforceability of such securities affects underwriting of real estate lending by banks. Under prevailing Federal UAE laws, the place of residence of a debtor may not be ceased and sold in public auction towards recovery of the debt out of the proceeds of such sale.

In this regard, Article [274] of the UAE Federal Law No. 11 of 1992 in respect of Civil Procedures provides in part that “... *may not be ceased ... The place of residence of the debtor or judgment debtor, and whoever was living with him of his relatives, whom he is legally bound to support, in the event of his death...*”

Hence, pursuant to Article [247] of the Civil Procedures Law, the place of residence of the debtor may not be ceased and sold in public auction towards recovery of the debt out of the proceeds of such sale.

The provisions of Article [247] of the UAE Civil Procedures Law conflict with the provisions of Articles [1419] and [1479] of the Civil Transactions Law. In fact Articles [1419] and [1479] of the Civil Transactions Law clearly provide that in the event that the obligor liable to pay the secured debt fails to settle such debt when it falls due, the pledgee may satisfy his debt out of the real property pledged, by way of execution over the pledged property and sale by public auction, whilst Article [247] of the Civil Procedures Law precludes any execution over the real property which is a place of residence of the obligor.

It is our opinion, that Article [247] of the Civil Procedures Law is a special text related to execution matters and sale by public auction, precluding any execution over the real property which is a place of residence of the obligor, for special considerations pertaining to preserving basic requirements for living for a debtor. Whilst Articles [1419] and [1479] of the Civil Transactions Law are general in nature, pertaining to recovery of debts out of the proceeds of pledged real property, by way of execution over such property and sale by public auction.

Hence Article [247] supersedes in application Articles [1419] and [1479], in respect of execution related matters. Furthermore, considering that Article [247] of the Civil Procedures Law is subsequent in time to Articles [1419] and [1479] of the Civil Transactions Law (The Civil Procedures Law was enacted in 1992 whilst the Civil Transactions Law was enacted in 1985), we may conclude that Article [247] has amended the conflicting provisions of Articles [1419] and [1479] on execution over pledged real property with regard to preclusion of execution over such property in the event that it serves as a place of residence for the debtor.

Moreover, it is our opinion that the text of Article [247] of the Civil Procedures Law, is of public policy related to the protection of the weak party in financial dealings, namely the debtor, for special considerations pertaining to preserving basic requirements for living for such debtor. Hence an agreement to the contrary may be considered by a court of law as null and void.

Another area, of special concern to foreigners, who are residents in the UAE, is the issue of applicable law on inheritance matters of foreigners owning free hold real estate in the UAE.

Under UAE Federal laws in effect, matters relating to real estate are excluded from the application of the law of nationality of the decedent in inheritance issues. Rather, the law of the place where the property is situated, *lex loci*, applies to matters relating to real estate. In this regard Article 18 of the Civil Code provides that “*Possession, ownership and other rights over property shall be governed by the lex situs in the case of real property...*”. Furthermore, Article 17(5) of the Civil Code provides that “*The law of the United Arab Emirates shall apply to wills made by foreigners disposing of their real property located in the State.*”

The above articles have been the subject of controversial interpretations. Some say it can be inferred from the application of the above articles that the law which applies to the immovable properties, forming part of the

estate of a foreigner who is resident in the UAE, is the law of the UAE, including matters relating to ownership rights in immovable property and the distribution of respective shares in the ownership. Such interpretation may lead to the application of Sharia law to immovable properties forming part of the estate of a non-Muslim foreigner who is resident in the UAE. Concerns of such possible interpretation and application of UAE laws, has convinced non-Muslim UAE residents dealing in or owning real estate property in the UAE, to transfer their ownership to offshore vehicles. Henceforth the demise of the foreigner would not affect or alter the ownership rather held by the special purpose vehicle, and the distribution of such immovable properties between the heirs would become an issue of distribution of stakes in the vehicle itself, which falls under the laws of the jurisdiction where the vehicle was established.

Others say that one has to distinguish between matters relating to ownership rights in immovable property, which of the heirs may be entitled to be a legitimate owner and his respective share in the ownership, and matters relating to rights and obligations of the owners per se. Issues which relate to the core of the inheritance and do not, in reality, touch the property itself, such as ownership rights in immovable property and distribution of the estate amongst the heirs, should be governed by the law of the nation from which the foreigner is a citizen. However, matters relating to the rights and obligations of the owners of the property and any rights *in rem* shall be subject to UAE law as these are matters which are deeply related to the property itself, even if they arise incidentally in an inheritance issue.

We strongly believe that solutions for such controversial issues affecting behavioural trends in the real estate market should be at the core of a federal national legislation, to avoid any possible conflicts between federal and local regulation of the market.

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