Taking your project to Market

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Once registration requirements have been satisfied, the next concern for developers is taking the project to market. On the back of an apparently recovering property market, many developers in Dubai are forging ahead with the marketing and sale of their new projects. Other developers are looking to revive and re-launch existing or stalled projects.

In this article, we consider the legal requirements and documents required to take a project to market in Dubai and highlight some of the potential issues arising. These requirements and issues will be discussed under the following headings:

1. Requirements and issues regarding Sale and Purchase Agreements ("SPAs");
2. Developer's disclosure obligations;
3. Jointly Owned Property considerations; and
4. Additional matters for off plan sales.

1. Requirements and issues regarding SPAs

There has been a great deal of legislative change since the property boom of 2007-2008, and developers should think twice before recycling old sale and purchase documentation.

In general terms, SPAs need to be up-to-date and in line with the current legislation. Relying on out of date documentation can create confusion or, in the worst case, result in the validity of the SPA being challenged. Below we highlight some aspects of the SPA in relation to which there has been legislative developments and where issues may arise.

1.1 Description of unit areas

Prior to 2008 there were no particular provisions regarding how unit areas had to be shown or described in SPAs and developers employed a range of different standards and practices. Since 2008, however, there have been a number of legislative developments in this regard, the latest of which is Executive Council Resolution No. 6 of 2010 ("ECR 6").

Article 13 (1) of ECR 6 states that the "net area" of the unit is the effective area for the purposes of registration and that such area is calculated as determined by the Dubai Land Department ("Land Department"). Article 13 (2) further states any increase in net unit area shall not be taken into account and, unless agreed otherwise, the developer may not claim the value of any such extra areas. Finally, Article 13 (3) provides "developers must compensate purchasers for any shortfall in the area of the real estate unit if such shortfall exceeds 5% of the net area of the unit."
The overall effect of Article 13 is that developers must ensure net unit areas are calculated in accordance with requirements of the Land Department and that net unit areas are accurately stated in the SPAs. Pursuant to Article 13 (2), it appears that developers are not permitted to sell areas outside of the net unit area, though this could arguably be possible if there is express agreement to acquire such areas and pay for the same. Developers looking to include areas other than net unit areas in their SPAs should seek professional advice in this regard before proceeding.

1.2 Termination

ECR 6 confirmed the processes established in Law 9 of 2009, allowing developers to terminate off plan SPAs in the event of purchaser payment default. Furthermore, the measure of compensation available to developers in the event of such termination was linked to the stage of construction reached on the relevant project.

Article 20 of ECR 6 established grounds upon which purchasers could seek termination of SPAs due to the developer's breach. The specified grounds for termination in Article 20 are:

(i) if the developer refuses, without a justifiable reason accepted by the Land Department, to deliver the SPA to the purchaser;

(ii) if the developer has not linked the payments to be made with the construction milestones approved by the Real Estate Regulatory Authority ("RERA");

(iii) if the developer significantly changes the specifications agreed upon in the SPA;

(iv) if the real estate unit is proved to be unusable due to major construction defects; or

(v) for any other reason which entitles cancellation of the SPA in accordance with the general legal rules.

As a result, developers should ensure payment schedules included in SPAs for off plan sales are properly linked to construction milestone as approved by RERA.

It is unclear what would constitute a significant change in "specifications" and allow the Purchaser to terminate the SPA under Article 20 (iii), however it does highlight the need to be careful that matters disclosed in the SPA are as accurate as possible. The developer's disclosure obligations are further considered below.

2. Developer's disclosure obligations

In 2010, the implementing regulations of Law 27 of 2007 Concerning Ownership of Jointly Owned Properties in the Emirate of Dubai ("JOP Law") were published and collectively known as the "Directions".

The Direction for General Regulation Concerning Jointly Owned Properties ("General Direction") established a new disclosure regime for developers selling jointly owned units in a project under construction or in a completed project for which titles are not yet available.

Article 4 of the General Regulation stipulates that before the SPA is signed, the developer must give to the purchaser a signed Disclosure Statement setting out certain information about the unit and project, including:

- a description of the building or project of which the unit will be part;
- the intended uses within the project (e.g. residential, hotel apartments, retail, offices, mixed use);
- a description of the features pertaining to ecological sustainability;
- any special use that applies to the unit (e.g. furnished or hotel apartment);
- facilities on the proposed Common Areas that will be available for use by owners as of right;
- facilities within the project available for use on a user- pays basis;
- a draft unit plan prepared in accordance with the (Survey) Directions;
- a schedule of materials and finishes for both the proposed Common Areas and the unit;
- items of furniture and furnishings (if any) for the project Common Areas and/or the unit that the developer commits to make available without

additional charge;

- Arrangements for the supply of Utility Services to the unit and Common Areas;
- whether construction has commenced and, if not, specifying the estimated date for completion of construction;
- the estimated date on which the property will be handed over to the purchaser;
- a statement directing the purchaser's attention to their obligation to register the contract in the interim or permanent real estate register, as applicable, in accordance with the related laws.

In addition, a developer must disclose information and documents relating to the jointly owned property scheme of the project. These include:

- a copy of the proposed Jointly Owned Property Declaration;
- a copy of any proposed Building Management Statement;
- a copy of any Supply Agreement to be entered into by the proposed Owners Association;
- a budget prepared on a reasonable basis having regard to the Directions for both the general fund and reserve fund for the first two financial years of operation of the proposed Owners Association;
- an estimate, based on that budget, of the service charges payable in respect of the Proposed Unit to each of those funds during those two financial years.

The consequence of not providing a Disclosure Statement is that the SPA, in relation to which the Disclosure Statement should have been given, may be deemed void and of no effect (Article 5, General Direction).

Article 5 further provides that the developer warrants the information in the Disclosure Statement for a period of two years, from the date the unit is transferred from the developer. If within this warranty period any information in the Disclosure Statement is found to be inaccurate or incomplete in a material way, the developer is liable to the purchaser (and any subsequent purchasers) for damages.

A common misconception is that Disclosure Statements are only required in relation to under construction projects. Developers should be mindful, however, that Article 4 of the General Direction applies to sale of units in any completed jointly owned property project for which titles are not yet available – irrespective of when the project was completed.

Another challenging area is the nature and scope information that must be provided in a Disclosure Statement to comply with Article 4 of the General Direction. For example, it may be difficult to provide comprehensive information in relation to the jointly owned property scheme because these matters have not been finalised. In other cases, a draft Jointly Owned Property Declaration may have been prepared but could be subject to amendment after consultation with the interim Owners Association Board or as may be required by RERA.

As at the date of this article, we are not aware of any court cases or decisions dealing with the issues around accuracy and completeness of Disclosure Statements. It should be noted however that the Disclosure Statement must be found incomplete or inaccurate "in a material way", and accordingly this may exclude minor or inconsequential missing information and inaccuracies. Moreover, pursuant to Article 5 of the General Direction, purchasers would likely have to show that the incompleteness or inaccuracy of the Disclosure Statement resulted in quantifiable losses, before purchasers can claim damages from the developer. In any event, developers would appear to be running a greater risk by not providing a Disclosure Statement at all, which may result in the SPA being declared void.

As a general matter, SPAs should be consistent with the information provided in a Disclosure Statement.

3. Jointly Owned Property considerations

Though the JOP Law was enacted in 2007, there is still some lack of clarity around the implementation and regulatory aspects of the JOP Law and the Directions. Ongoing developments in this regard may affect what is required of developers and impact the jointly owned property structure eventually adopted for a

particular project. It may also affect arrangements at the Master Community level.

These are important matters for developers, not only for SPA and disclosure purposes but also in terms of developers' ongoing involvement and obligations in relation to their projects.

The Al Tamimi Property team will in the near future be completing a comprehensive article detailing developments, current issues and other matters regarding the implementation of the JOP Law and the Directions.

4. Additional matters for off plan sales

The regulatory requirements for developers wishing to sell off plan have already been covered in detail in the February 2013 edition of Law Update; however it is worthwhile noting developers' obligations in relation to escrow funds and registration.

Pursuant to Law 8 of 2007, developers must ensure all proceeds of sale of units sold off plan are deposited into an escrow account opened by application to RERA. Funds deposited in the escrow account must be used solely for the purposes of construction of the project.

Once off plan sales commence, developers must also ensure they comply with the registration requirements pursuant to Law 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai as amended ("Pre-registration Law"). Article 3 of the Pre-registration Law provides that no sale of any off plan property will be valid, unless recorded in the Interim Real Estate Register (known as the "Oqood" system). Registration in Oqood must be completed in accordance with the Land Department's rules and procedures. Currently Oqood registration can be completed online via the Land Department's website.

5. Conclusion

Legislative developments over recent years have significantly changed the requirements for developers taking their projects to market in Dubai. In particular, requirements have changed in relation to disclosure obligations, jointly owned property and off plan sales, with the emphasis moving towards greater transparency and consumer protection.

Developers should take care to ensure that all sales documentation is up to date and compliant with the most recent legal requirements before going to market.