

Real Estate Mortgages in the DIFC

Divya Abrol Gambhir - Partner - Banking and Finance
d.abrol@tamimi.com - Dubai International Financial Centre

Gaurav Jain
g.jain@tamimi.com

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DIFC property laws and regulations apply to all real property located within the jurisdiction of the DIFC. Dubai real property laws are not applicable within the DIFC and the Dubai Lands Department has no authority within the DIFC even though the DIFC is geographically located within the Emirate of Dubai. Therefore, the procedures adopted by the Dubai Lands Department and the Real Estate Regulatory Authority do not apply to properties located within the jurisdiction of DIFC.

The DIFC has also established the office of the Registrar of Real Property (the “Registrar”) which is responsible for approval and registration of all types of transactions relating to real property located within the DIFC in accordance with the DIFC property laws and regulations. The Registrar maintains a register of all properties and any property in the DIFC must be registered with the Registrar in accordance with all applicable DIFC property laws and regulations.

1. Mortgages in the DIFC

Real property or an interest in real property (i.e. apartments, lofts, commercial units, etc) in the DIFC may be mortgaged except for partial lots (i.e. part of an apartment or part of a commercial unit). The mortgage must include a sufficient description of the property, identify the interest that is to be mortgaged and include a description of the debt or liability that is secured by the mortgage. The mortgage is then required to be registered with the Registrar and post registration will receive a unique registration number in accordance with the order of the registration of the mortgage.

DIFC property laws and regulations also provide that a person who is in the course of acquiring an interest in real property may apply to the Registrar for an official search for the respective property which will provide details of any registered interests in the property.

1.1 Units where no title deeds have been issued

Title deeds are not issued for all properties in the DIFC and the issuance process for individual units has commenced very recently. Therefore, during this interim phase for units where no title deed is issued, the purchaser is required to register an interest in the unit purchased pursuant to a caveat which is registered with the Registrar. The Registrar issues a “No Objection Letter” (“NOL”) which confirms the registration of the purchaser’s interest in a particular unit. However a NOL is not a substitute to a title deed.

If such a unit for which no title deed is issued is to be mortgaged, the customer’s lender will register its interest (as mortgagor) by filing a caveat form and paying the applicable fees to the Registrar. The Registrar will issue an NOL to the lender and the customer until the issuance of the title deed of the relevant unit confirming the registration of each party’s interest.

The effect of a caveat is that, with certain exceptions, it prevents the registration of an instrument affecting the property or interest in respect of which the caveat is lodged. Caveats should be filed as soon as a person or entity gains a relevant interest in a property. The caveat in favour of the lender will remain

until the title deed has been issued. Once the title deed has been issued, the lender should file a withdrawal of caveat form and pay the applicable fees. The title deed for the unit will be issued once the lender removes its caveat and the same will be issued noting the mortgage in favour of the lender.

1.2 Mortgage registration for properties where title deeds have been issued

In scenarios where the title deed for a unit has been issued, the customer does not need to register a caveat. If such a unit is to be mortgaged, the customer's lender will register the interest as mortgagee by filing a mortgage form and paying the applicable fees.

2. Requirements for registration of mortgages in the DIFC

Mortgage registration must be completed by the mortgagee, who has a mortgage interest in real property located in DIFC, to establish a mortgage in a particular property.

2.1 Perfection of a mortgage for units for which no title deed is issued

The following documents are required for registration:

- a copy of the financing agreement between the mortgagee and the mortgagor;
- a caveat form signed and stamped by the mortgagor (caveat form no. 42); and
- a mortgage registration form signed and stamped by the mortgagor (mortgage form no. 19). This document will be recorded upon registering the strata plans for the same development, i.e. when the title deed for the unit is ready to be issued.

The payments required for such units are:

- lodgement of caveat fee USD 100 (AED 367.50);
- conventional mortgage registration fee of USD 100 (AED 367.50); and
- Islamic Mortgage Registration fee USD 273 (AED 1,004).

2.2 Perfection of a mortgage for units for which no title deed has been issued

The following documents are required for a unit for which no title deed has been issued:

- a copy of the financing agreement between the mortgagee and the mortgagor; and
 - a mortgage registration form signed and stamped by the mortgagor (mortgage form no. 19).
- The payments required for such units are:
- conventional mortgage registration fee of USD 100 (AED 367.50); and
 - Islamic Mortgage Registration fee USD 273 (AED 1,004).

3. Rights of a Mortgagee in the DIFC

DIFC property laws and regulations provides that real property or a registered interest in real property may be mortgaged by registering a mortgage; sub-mortgages and second and subsequent mortgages are also capable of registration. However, subsequent mortgages require the consent of the existing prior mortgagee(s).

Further, in order to sell or transfer mortgaged property, the Registrar requires the consent (written and in accordance with the registered mortgage) or a discharge of the mortgagee on any registered property in order to transfer the title. Therefore, the customer would be restricted in selling the property without the mortgagee's written consent having been provided to the DIFC.

Unless otherwise provided for in the mortgage, a registered mortgagee of real property has the following implied powers on default by the mortgagor:

- to sell the whole or part of the real property or any interest in the real property by whatever means the mortgagee considers appropriate, including by tender, public auction or private contract;
- to sever fixtures from the real property and sell them;
- to sell any easement, right or privilege of any kind over or in relation to the real property;
- to enter into possession of the real property and receive the rents and profits from it; and
- to foreclose.

However it is important to note that there is limited information in relation to any foreclosed properties and therefore limited precedent to rely upon.

4. DIFC Court Enforcement Proceedings

The DIFC property laws and regulations provide that a registered mortgagee is entitled to foreclose a mortgaged property in accordance with the DIFC property laws and regulations. In the event of a default under the financing agreement, the mortgagee can commence proceedings for foreclosure or for possession of the property in the DIFC court by filing a claim form in accordance with the agreed method of notice of court proceedings under the financing agreement.

One of the advantages of DIFC court proceedings is that under the Rules of the DIFC court, there is a mechanism whereby the mortgagee (as the claimant) may seek an immediate judgment against the defendant if it believes that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case or issue should be disposed of at trial.