

Why Musataha agreements are a popular property right for the healthcare industry in Dubai and Abu Dhabi

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Healthcare investors looking to develop hospital facilities in the UAE must consider how they will acquire the land to build their facilities and what type of property rights to acquire. The acquisition of property rights other than the purchase of freehold land is a financially sound way of reducing the amount of expenditure that would need to go in to developing healthcare facilities such as hospitals. The grant of a Musataha right is a popular way for healthcare investors to acquire property rights to build healthcare facilities as a Musataha right confers a right to build and own that building during the term of the Musataha. In this article we look at how healthcare investors can use Musataha rights to develop hospital facilities and the advantages of acquiring Musataha rights and the other options available for foreign investors based on the rules of property ownership for foreigners in the UAE.

1. What is a Musataha right?

A Musataha right is defined in Article 1353 of the UAE Civil Code (Federal Law No. 5 of 1985) (the “Civil Code”) as: “A right in rem conferring upon the owner thereof the right to build a building [...] on the land of another.”

The owner of a Musataha right owns the buildings which they have developed on the land and those buildings, together with the Musataha right, can be disposed of, as provided under Article 1357 of the Civil Code. Article 1359 of the Civil Code provides that the right of Musataha does not come to an end simply because the buildings on the land have been removed prior to the expiration of the term of the Musataha agreement.

2. Where can foreign healthcare investors own a Musataha right in Dubai and Abu Dhabi?

In Dubai, healthcare investors that are incorporated in the UAE that are wholly owned by UAE or GCC nationals or are individuals that are UAE or GCC nationals have the right to be granted a Musataha in any area in Dubai pursuant to Article 4 of Law No. 7 of 2006 concerning Real Property Registration (the “Dubai Property Law”). The Dubai Property Law also requires registration of a Musataha right with the Dubai Land Department (the “DLD”) to have any legal effect.

For foreign healthcare investors in Dubai, the option of a Musataha is available where the hospital facility is being developed in those areas designated for foreign ownership (“Designated Areas”). Foreign healthcare investors wanting to develop hospitals in areas which are outside Designated Areas must look

at other ways to secure premises, subject to whether an exemption is available. The Dubai Property Law provides that a Public Joint Stock Company is exempt from this rule as they can own or take a Musataha right of property in any area in the Emirate.

In Abu Dhabi, foreign healthcare investors (including those wholly owned by GCC nationals or are GCC nationals) will face similar challenges if they want to develop hospitals outside Designated Areas since they will be limited to taking a four year lease of land or existing premises. Foreign healthcare investors have the right to own floors or buildings but not the land in Designated Areas. The grant of a Musataha right is a good alternative for a foreign healthcare investor as it gives them the right to build on the land. A Musataha agreement must be registered with the Abu Dhabi Municipality ("ADM") pursuant to Law No. 3 of 2005 Concerning the Regulation of Properties in Abu Dhabi ("Abu Dhabi Property Law") for it to be enforceable.

Law No. 19 of 2005 Regarding Real Estate Property regulates the ownership of property in Abu Dhabi both in Designated Areas and outside Designated Areas. The law states that Implementation Regulations will set the conditions, provisions and terms of Musataha agreements outside these Designated Areas. However, these Implementation Regulations are yet to be issued and it would be useful for such regulations to be issued to gain more clarity on the regulation of Musataha agreements outside Designated Areas.

3. What is the difference between Musataha right and Usufruct right?

The Musataha right and the Usufruct right are both property rights conferred by the Civil Code except that the Musataha right gives the owner of the Musataha right the right to build, own and use the building during the term of the Musataha. The maximum term for a Musataha agreement is fifty years in both Dubai and Abu Dhabi. In Abu Dhabi, Law No. 19 of 2005 Regarding Property Ownership provides clearly that this term is renewable for a further term of up to 49 years. However the term of a Usufruct right may be for up to 99 years in both Dubai and Abu Dhabi.

Article 1333 of the Civil Code defines a Usufruct right as "a property right in favour of the usufructuary to use property of another and to exploit it provided that it remains in its original condition." The Usufruct right gives the usufructuary the right to use the property without the right to build. Article 1341 of the Civil Code requires the usufructuary to return the property to its original condition after termination of the Usufruct right.

A Musataha agreement would be a preferable option for a healthcare investor in this circumstance since it confers on the owner of the Musataha right the right to develop a property fit for purpose. The owner of a Musataha right is required to remove the building on the land and return the land to the landlord or may be required to leave the building on the land if requested by the landlord at the expiration of the term of the Musataha. These make good obligations are explained in more detail below.

The Usufruct is a property right which must be registered in the DLD pursuant to Dubai Property Law and with the ADM pursuant to the Abu Dhabi Property Law.

4. What is the difference between a Musataha right and a lease?

The DLD and the ADM recognise both short and long term leases. In practice, the term 'long term lease' is used to describe 'use rights' and 'occupation rights' (without the right to build). Long term leases are not otherwise mentioned in the Civil Code.

Article 4 of the Dubai Property Law refers to a foreigner's right to acquire a lease for a maximum period of

99 years. This long term lease must be registered with the DLD as a property right pursuant to the Dubai Property Law.

Foreign healthcare investors in Dubai who wish to develop hospitals outside Designated Areas are limited to taking short term leases of land or existing premises for terms of less than ten years. These leases are to be registered on the Ejari system at RERA and confer personal rights rather than property rights.

Similarly in Abu Dhabi a short term lease can be granted for areas outside the Designated Areas. The term of the lease must be no more than four years and must be registered on the Tawtheeq system.

The grant of a short term lease poses some challenges for a healthcare investor wanting to obtain financing for its development. This is discussed in more detail below.

5. Can the owner of a Musataha mortgage the Musataha right?

Article 1355 of the Civil Code provides that “it shall be permissible to assign or mortgage a right of Musataha.” Law No. 14 of 2008 Concerning Mortgages in Dubai (the “Mortgage Law”) reflects the position in the Civil Code that a Musataha right in Dubai can be mortgaged. This is useful in circumstances where a healthcare investor is looking to develop its hospital facility and secure financing to assist with initial capital costs and running of the facility.

In Dubai, Article 21 of the Mortgage Law provides that an owner of a Musataha right may mortgage its building (but not land that is still to be developed) unless otherwise agreed. The mortgage interest will only be for the term of the musataha.

Foreign healthcare investors wanting to develop hospitals in areas which are outside Designated Areas may face difficulty in obtaining finance since they will be limited to taking a lease of less than ten years of land or existing premises, making these shorter term ventures less attractive for banks. One option is to express the term as renewable for further terms, however, this may not provide sufficient comfort for a bank providing finance.

In Abu Dhabi, the law is clear in respect of landlord consent for the grant of a mortgage, which is not required for a Musataha right that is longer than 10 years unless the Musataha agreements states that landlord consent is required as per Resolution No.64 of 2010 the Chairman of the Executive Council.

6. What happens to the building on expiration of the Musataha right?

Article 1360 of the Civil Code requires that on expiration of the Musataha right, the provisions of Article 785 of the Civil Code will apply to the buildings developed on the land (unless otherwise agreed between the parties).

Article 785 of the Civil Code states:

“If the lessee has constructed a new building or planted plants in the thing leased, even with the consent of the lessor, the lessor may, upon the expiration of the lease, either require him to demolish the building or remove the plants, or he may take over ownership of the new buildings or plants placed there for such value as they would have if removed if the destruction or removal thereof would cause harm to the property, and if the demolition or removal would not cause harm to the property, the lessor may not require that they remain there without the consent of the lessee.”

While dealt with in the Civil Code, we recommend that the make good obligations of the owner of the Musataha right are considered carefully by the parties and documented in the Musataha agreement as this

is a commercially important issue. Considerations should include who bears the costs of removal, time frames for removal of the buildings, what condition the land should be returned to the landlord and, if the owner of the Musataha right is required to leave its buildings on the land, and what compensation is payable by the landlord. If the Musataha agreement is silent on make good obligations of the owner of the Musataha right then Article 785 of the Civil Code will apply.

7. Musataha fees

The DLD registration fee payable on a Musataha agreement is 1% of the total annual rent, which is lower than the fees payable on a long term lease (4% of the total rent value) or Usufruct agreement (2% of the total property value). This fee is collected from the owner of the Musataha right (unless agreed otherwise).

The fee payable on a Musataha agreement in Abu Dhabi is 2% of the total annual rent. The fee is usually paid by the owner of the Musataha right unless agreed otherwise.

8. Conclusion

The grant of a Musataha right for a healthcare investor has many benefits in the UAE. For a landowner, they secure revenue in respect of the land for a long period (typically fifty years or more). For healthcare investors, they do not have to spend a large amount of money by purchasing land.

We have assisted many clients in drafting and reviewing of Musataha agreements which is a clear indication that there is a high demand for this type of property right for the commercial and legal reasons discussed above.