



CONSULTATION PAPER NO. 1

February 2022

**REAL PROPERTY LAW
DIFC LAW NO.10 OF 2018**

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PROPOSAL RELATING TO AN AMENDMENT TO THE REAL PROPERTY LAW NO.10 OF 2018

Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“**DIFCA**”) proposes to enact an amendment to the Real Property Law No. 10 of 2018 (“**Real Property Law**”). This Consultation Paper No.1 of 2022 (“**Consultation Paper**”) seeks public comments on the proposed amendments to the Real Property Law (“**Amendment Law**”).

Who should read this paper?

2. This Consultation Paper would be of interest to persons purchasing or intending to purchase property with a mortgage within the DIFC, mortgagees entering into mortgage contracts with purchasers and their respective legal advisers.
3. DIFCA invites interested parties to provide their views and comments on the issues outlined in the Consultation Paper, using the table of comments provided in Annex B.

How to provide comments

4. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

5. You may choose to identify the organisation you represent in your comments.
6. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

7. The deadline for providing comments on the proposals in this Consultation Paper is March 29 2022.
8. Once we receive your comments, we will consider if any further refinements are required to the Amendment Law annexed to this Consultation Paper at Annex B. Once DIFCA considers

the Amendment Law to be in a suitable form, it will be enacted as an amendment to the Real Property Law to come in to force on a date specified and published.

9. The Amendment Law is in draft form only. You should not act on it until the Amendment Law is formally enacted. We will issue a notice on our website when this happens.

Defined terms

10. Terms identified throughout this paper by the capitalisation of the initial letter of a word not specifically defined in the Consultation Paper are to be interpreted as having the definition provided in the Amendment Law. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

11. The Proposal to replace the Real Property Law with the Amendment Law stems from a review of Part 9 of the Real Property Law relating to Mortgages.
12. Part 9 of the Real Property Law creates the right for a purchaser to buy a property within the DIFC with a mortgage and Chapter 2 of Part 9 further deals with the powers and remedies of Mortgagees in the event of a default by a Mortgagor.
13. The DIFCA proposes that these specific powers and remedies could be further clarified and brought more into line with current common law practice for the reasons set out below. Furthermore, it is the DIFCA's view that the right of a Mortgagee to seek a Court Order for a foreclosure of a Mortgage pursuant to Article 63(1)(e) of the Real Property Law causes a potential inequity for a Mortgagor in terms of extinguishing a Mortgagee's right to apply for an equity of redemption where the property is worth more than the debt secured at the time of the default.

Key changes proposed

14. The Amendment Law will enhance the Real Property Law with regards to the Mortgagee's powers and remedies in the circumstances of a default by a Mortgagor in the following ways:
 - (a) the removal of the Mortgagee's right of foreclosure in Article 63(1)(e) with the corresponding removal of Article 70 in its entirety;
 - (b) clarifying a Mortgagee's rights and obligations with regards to the exercise of its statutory power of sale in the event of a default by a Mortgagor by amendments to Article 63(3)(a); and

- (c) the removal of the reference to the wording, “under the principles of English common law and equity” in Article 29(b).

Removal of right of Foreclosure

15. As mentioned above in the background section of this Consultation Paper, it is the DIFCA’s view that the Mortgagee’s right of foreclosure is not in keeping with current common law practice and that it does not align with the actual intention of the Real Property Law. Consequently, the DIFCA proposes that it should be removed.
16. Common law practice regards a mortgage as security for a debt secured against Real Property. Equity allows a right of redemption in favour of a defaulting Mortgagor in the event that the property is sold at a higher value than the debt secured against it. If a Mortgagee is successful in a foreclosure action then it becomes the owner of the property and has no obligation to return to the Mortgagor any excess it makes from the sale of the same after recouping its debt and the payment of any other debts secured against the property by way of registration. The foreclosure remedy essentially removes the right of an equity of redemption in favour of the Mortgagor and has for this reason fallen out of favour as a suitable remedy in the English Courts over time.
17. The Real Property Law in Article 58(2) states that, “For the avoidance of doubt, the Mortgagor is taken to have an equity of redemption under the principles of English common law and equity”. We consider that these provisions are in direct conflict with Article 63(1)(e), which gives the right to a Mortgagee to apply for a Court Order for foreclosure, thereby extinguishing this equity of redemption, which is specifically referred to as existing in a Mortgagor’s favour.
18. Furthermore Article 58(1) specifically states that, “A Mortgage operates only as a charge on the Lot for the debt or liability secured by the Mortgage,” reinforcing the position that foreclosure should not be included as an alternative remedy in the Real Property Law. This foreclosure remedy means the Mortgagee could potentially stand to profit from a Mortgagor’s default where the value of the property at the time of default is higher than the debt secured by the mortgage. Our research indicates that this remedy is now largely recognised by academics and UK judges as draconian and unfair on property owners who default on mortgages for these reasons.
19. It is therefore proposed that Articles 63(1)(e) and Article 70 are removed from the Real Property Law.

Q1. Do you agree that there is a contradiction in the intention of the Real Property Law between the foreclosure remedy in favour of a Mortgagee under Articles 63(1)(e) and 70 and the equity of redemption principles under Article 58? If not, please provide details.

Q2. Do you have any further comments in this regard that you would like to be taken into consideration?

The exercise of a Power of Sale by a Mortgagee

20. There are several areas relating to a Mortgagee exercising its power of sale that we consider can be enhanced under the proposed Amendment Law.
21. Firstly we consider that the statutory power of sale referred to in Article 63(1)(a) should only be exercisable if the Mortgage contract between the parties allows for it and that this power is not expressly prohibited in the Mortgage contract. In addition, it is the DIFCA's view that the Registrar of Real Property ("**RORP**") of the DIFC should not be the arbiter of whether such a right exists in the Mortgage contract and whether, therefore, the Mortgagee has correctly exercised its power of sale. This onus should be on the Mortgagee and we have therefore included additional wording at Article 63(3)(a) to cater for this. The RORP's role should be limited to accepting a Transfer of a Real Property Interest once the power of sale has been exercised in accordance with the Real Property Law.
22. As currently drafted, Article 65(1) of the Real Property Law allows a Mortgagor to apply to the Court to seek an injunction to restrain a Mortgagee's exercise of its power of sale. We consider that access to this remedy should remain to ensure that Mortgagors have a right of action against the incorrect exercise of the power of sale by Mortgagees.
23. Article 67(1)(a) of the Real Property Law currently states that the proceeds of sale (once the Mortgagee has exercised its power of sale) are to be paid into the Court to be used to discharge any prior Registered Real Property Rights against the property. The obligation on the Mortgagee to pay sums into Court will effectively become redundant as the remedy to apply for a Court Order for foreclosure is removed. There will be no active Court proceedings to which the payment of sums into Court would relate to. The only scenario in which sums might be payable into Court is if the Court orders a sale of the property as the outcome of an injunction application by the Mortgagor. However we consider that Article 65(2) of the Real Property Law is sufficient for this purpose. We have therefore removed the reference to the payment of the sale proceeds into the Court at Article 67(1)(a). We have also made further minor amendments to Articles 67(2)(c) and (d) to provide better consistency with the existing drafting of the Article.

Q3. Do you agree that a Mortgagee should not have to obtain a Court Order in order to exercise a power of sale upon the default of a mortgage by a Mortgagor? If not, please provide details.

Q4. Do you agree with the removal of the provision at Article 67(1) relating to the payment of sale proceeds into the Court? If not, please provide details.

Q5. Are there any other issues arising in connection with the powers of Mortgagees in the Real Property Law which are in your opinion not adequately or appropriately dealt with or need further clarification? If so, please provide details.

24. Under the Real Property Law various references are made to: “under the principles of English common law and equity”. It is DIFCA’s view that this reference is not required in Article 29(b), as English common law does not specifically recognise the concept of indefeasibility of title and the existing reference to title being indefeasible once registered at Article 29(b) is sufficient to establish this principle.

Q6. Do you have comments with regards to this proposed amendment?

Legislative Proposal

25. This legislative proposal contains the following:

- (a) the Amendment Law (at Annex A);
- (b) a table of comments to provide your views and comments on the consultation paper (at Annex B).