

# The termination of real estate contracts for delay: A recent judgment of the Abu Dhabi Court of Cassation

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## Introduction

The Abu Dhabi Court of Cassation has held that if a developer performs his obligations under a sale and purchase agreement either before or during the course of court proceedings, but before a final decision has been issued, the court will not grant the purchaser's request for an order terminating the agreement (Abu Dhabi Court of Cassation judgment 21 of 2020). This article will consider the principles set out in this judgment with regard to implicit termination clauses and the termination of real estate agreements.

## Background

A purchaser entered into a sale and purchase agreement ("SPA") with a developer for the sale of a real-estate unit in a project located in Saadiyat Island, Abu Dhabi. The project was delayed by several months beyond the agreed completion date. However, the developer eventually completed the project and requested the purchaser to pay the outstanding instalments. The purchaser did not accept the delay and initiated proceedings before the Abu Dhabi Court of First Instance, to request (i) the termination of the SPA because of the delay and (ii) the refund the paid instalments (the purchaser had failed to pay a number of instalments due under the SPA), and (iii) payment of compensation for loss of profit.

## Court of First Instance & Court of Appeal

We represented the developer before the Court of First Instance. The main question in this case was whether the Court should agree to terminate the SPA based on the purchaser's request.

We argued that although the project was delayed, it was almost complete by the time the purchaser filed the case, and relied on Article 272 of the UAE Civil Code. Article 272 provides that the judge has the power to grant the debtor (i.e. the developer in this case) an extension of time to perform its contractual obligation, and to award the creditor (i.e. the purchaser) compensation instead of terminating the bilateral contract. Article 272 of the Civil Code states:

*"1. if one of the parties in a bilateral contract, does not perform his contractual obligations, the other party may, after serving a formal notification to the debtor, demand, before the court, the performance of the contract or its rescission.*

*The judge may either decree immediate specific performance of the contract or grant the debtor specified additional time to perform the contract, the judge may also grant an order of termination and compensation in all cases if deemed justified.” (Our translation)*

This indicates that if the contract does not contain an explicit termination clause, and a cause for termination arises, the court is not bound to grant a request for termination based on an implicit termination clause enacted for the benefit of the non-defaulting party in the event that the other party defaults on his reciprocal obligation. The court may order the obligor to perform the contract immediately or may defer performance to a specified date. And the court may deny the request for termination if it finds, in all the circumstances that:

- The obligor is no longer in default of performance of its obligations in that it has pre-empted a decision granting termination by performing its obligation either before or during the course of the proceedings, but before a final decision has been rendered, provided that such late fulfilment is not detrimental to the obligee seeking termination; or
- The damage caused to the non-defaulting party may be remedied without termination, such as with pecuniary damages.

We also asserted that the developer agreed to pay the purchaser an amount equivalent to the loss of rent for the delayed period notwithstanding the fact that when the developer had completed the project, the purchaser had still failed to pay some of the instalments on the dates agreed in the SPA.

The Court of First Instance decided, amongst other directions, to (i) terminate the SPA and (ii) order the developer to refund the paid instalments, plus AED 100,000 in damages.

We appealed the above judgment on the grounds that the developer had demanded payment of the remaining outstanding instalments, completed the project and requested the purchaser to take delivery of the unit. As a result, the developer was deemed to have performed its major contractual obligations. We requested the Appeal Court to apply Article 272 of the UAE Civil Code, and accordingly to award the purchaser compensation for the loss of rent for the delayed period, instead of terminating the SPA. The Court of Appeal rejected the appeal and upheld the judgment issued by the Court of First Instance.

## **Court of Cassation Court**

We challenged the judgment of the Court of Appeal before the Abu Dhabi Court of Cassation, and presented the same legal arguments raised before the Court of Appeal and the Court of First Instance.

The Court of Cassation accepted our grounds for appeal, and issued its judgment in Abu Dhabi Court of Cassation judgment 21 of 2020. In its reasoning, the Court of Cassation confirmed that the developer had fully completed the project and that the unit was ready for handover prior to the date of issuing a final judgment in this dispute. Therefore, the Court of Appeal judgment had not complied with the applicable law provisions when it upheld the judgment issued by the Court of First Instance.

The residential unit in question was completed and was ready for occupancy. The developer had served a handover notice on the purchaser prior to the Court of Appeal’s ruling, yet the Court of Appeal granted the purchaser with the option of terminating the SPA, notwithstanding that it had fully performed the SPA by that stage, and without giving reasons for this oversight.

The Cassation Court highlighted that the Court of Appeal should have applied article 272 of the UAE Civil Code, and only have awarded the purchaser compensation for the loss of rent for the delayed period.

# Conclusion

The judgment highlights that if performance remains possible and a developer is able to complete the project (and notifies the purchaser that the sold unit is ready for handover) prior to issuance of a final judgment by a court of law, then, the purchaser's request to terminate the SPA may not be granted by the courts. Compensation may be awarded instead.

However, there may be exceptions to the foregoing in the event a clause in the relevant SPA allows for immediate termination of the agreement, without the need for a court order, if a project is delayed beyond the agreed date.

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