

Termination and Damages: What happens when a Contract contains an option of Conditionality?

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On 14 February 2018, the Dubai Court of Cassation issued a judgment (Dubai Property Appeal 402 of 2017) in relation to a claim brought by an investor for the return of payments made towards a land purchase after the termination of a sale and purchase agreement (the Agreement).

In most cases involving the termination of sale and purchase agreements, the courts typically do not award damages if title to the land is returned to the original owner. This is on the basis that the contracting parties have been reinstated to their former positions with all contractual agreements, obligations and representations between them extinguished. If restoration is impossible, compensation may be ordered pursuant to Article 274 of the Civil Transactions Law.

This case is unique as the seller's land was returned to him and he was awarded damages representing the loss of opportunity and loss of profit in the failed sale. The court held that the seller was deprived of the opportunity to exploit the property and benefit from the price over the term of the contract. The Agreement notably contained an option of conditionality which allowed either party (the buyer or the seller) to elect to confirm or cancel the contract in the event of default by the other party. The Court of Cassation examined this term in its judgment.

The Dispute

The parties entered into the Agreement for the sale of a parcel of land. The Agreement provided that the seller may, at any time and without notice, terminate the Agreement immediately if any of the buyer's post-dated cheques were dishonoured, whereupon title in the land would revert back to the seller. The Agreement further provided that the seller would have the right to retain 10% of the amount already paid but was obliged to return the balance of the funds transferred and the advance payment to the buyer after selling the property.

The seller terminated the Agreement after the buyer (an investor) breached its payment terms. The buyer was unable to pay the instalments and accordingly, the seller withdrew title and terminated the Agreement. When the buyer requested the return of the amounts paid (less the 10% deduction stipulated in the contract), the seller refused. The buyer argued that the return of AED 7,687,000 plus interest (the balance remaining after the 10% deduction) was conditional upon selling the plot, a matter which the buyer said the seller had disclosed no facts about. The buyer commenced a claim in the Dubai Courts against the seller, demanding repayment. The seller counterclaimed, alleging that it was owed AED 19,613,080.00 as compensation for damages incurred as a result of the buyer's breach of contract, plus 9% interest from the contractual due date. The figure of AED 19,613,080 was calculated as the damage due to the seller's loss of opportunity to exploit the property or to benefit from the sale price over the course of more than 6 years

The Dubai Court's findings

Having lost at first instance and in the Dubai Court of Appeal, the seller appealed to the Dubai Court of Cassation.

The Court found that it had full discretion to interpret contracts in conformity with the intention of the concerned parties, having regard to the facts and circumstances of the case. However, the Court acknowledged that it must not go beyond the plain meaning of the contract. It followed that the Agreement contained an option of conditionality in favour of the seller.

Pursuant to Articles 218, 219, 221, 222, 224 of the Civil Transactions Law, a contract shall be non-binding on one or both of the parties, despite being otherwise valid and effective, if it included a term that allowed either party to terminate at will, without mutual consent or litigation. Each party may act unilaterally in cancelling the agreement if, by its nature, the contract was non-binding on that party or there was a condition in that party's favour creating the right to cancel.

In binding contracts that are capable of being cancelled, the Court of Cassation found it was permissible for the contracting parties individually or both to make it a condition in the contract or thereafter that the party or parties should enjoy the benefit of the option of conditionality in their individual favour for the period agreed between the parties.

If they could not agree on a particular period, it was permissible for the judge to determine that period in accordance with custom. The person having the benefit of the option of conditionality has the right to cancel or to affirm the contract. If he elects to confirm the contract, it becomes binding with retroactive effect on the date on which it was made. If he elects to cancel it, the contract shall be cancelled, without mutual consent or litigation, and deemed void ab initio.

The Court further held that:

- If the contracting parties have the advantage of the option of conditionality and one of them elects to cancel the contract, the contract shall be cancelled notwithstanding that the other may have affirmed.
- On cancellation of a contract, each party has to return to the other what it received under the contract and compensation would be payable to the party affected by the cancellation.
- In contractual liability, the obligor's fault is its failure, breach, or delay in performance of its contractual obligations.
- Three elements are necessary to engage contractual liability: fault, damage, and causation such that the lack of any one element would negate liability entirely.

The Court held that, in this case, the provisions regarding the option of conditionality in the Civil Transactions Law applied as opposed to the provisions regarding dissolution of contracts (also in the Civil Transactions Law). The court also examined whether there was any negligence on the part of the buyer that gave rise to liability in contract.

The Importance of the Judgment

The judgment is important as it highlights the nature of contracts where one or both parties have the option to resile from a contract during a specified period. A contract subject to the option of conditionality is a non-binding contract with regard to the person who has the option to stop the contract proceeding. For the party who doesn't have the right to exercise the option of conditionality, the contract is binding on him. Such contracts are effective but non-binding. They are effective because they have been validly concluded and the contract gives rise to all of its effects, but it is a non-binding contract because one of the contracting parties can cancel the contract on his own. Therefore, the seller was able to terminate the contract without paying damages for wrongful termination.

Al Tamimi & Company represented the successful claimant before the Dubai courts. Our litigation team regularly advises on real estate and construction disputes related to the For further information please contact [Mohammad Al Muhtaseb \(m.almuhtaseb@tamimi.com\)](mailto:m.almuhtaseb@tamimi.com).

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