



Photo: Silvia Baron

It has been reported that several developers in Dubai have issued hundreds of cancellation notices to purchasers who were late in their payments. Picture for illustrative purposes only

# Cancellation notices raise issues

As Dubai developers get tough, defaulting buyers could look at options to minimise damages.

**Andy van Smeerdijk**  
Editor

With reports of cancellation notices being issued by Dubai developers to buyers who have defaulted on their payments, lawyers say purchasers do have a form of recourse, given their particular circumstances.

This follows a report in a UAE newspaper that said Dubai developers had issued hundreds of cancellation notices to purchasers who were late in their payments.

It cited the Dubai Land Department as its source. According to the report, notices had been issued to purchasers of properties developed by Emaar Properties, Deyaar Development, Omniyat Properties and Al Fajer Real Estate.

When asked how the developer responded to defaulting buyers, an Emaar Properties spokesperson said in a statement, "Emaar Properties sends notices through the Land Department to all defaulting customers in the normal course of business and in line with the related legal processes."

Given that defaulters are being issued notices, then, this is just the first step in the termination procedure. Andrew Yule, associate at Afridi & Angell law firm says

property purchasers have recourse, depending on their circumstances. "Under Decree 6, there is a specific procedure that must be followed before a contract can be terminated. Initially, there must be a notice to the purchaser advising that the purchaser is in arrears. If the purchaser wishes to challenge such a notice, he should do so in writing to both the Land Department and the developer.

"The purchaser may be able to persuade the Land Department to hold a roundtable meeting among all parties at which the purchaser can explain his position. Even if the developer does proceed to terminate the contract, the purchaser still has the option of challenging this under the dispute resolution procedure detailed in the contract — by going to court or arbitration."

**Termination of contracts**  
Yule says purchasers should be careful before withholding payment as this will put them into default, "thereby running the risk that the developer will attempt to terminate the contract and retain the appropriate monies.

"Every case should be considered on its own merits," he says. "However, important factors will include whether

**'Purchasers should be careful before withholding payment as this will put them into default.'**

construction has started, the current percentage of completion of the project, whether the contract between developer and purchaser actually specifies a completion date (and whether, under the contract, that date can be varied in certain circumstances), whether the contract contains a Real Estate and Regulatory Agency approved payment schedule linked to construction milestones and whether the developer has registered the contract in the Interim Real Estate Register."

According to the law, if a buyer defaults on repayments, his refund will depend on how far a project has been completed.

If the developer has not yet completed 60 per cent of a project and terminates the purchase agreement, it is entitled to 25 per cent of the payments made by the buyer. If it has completed 80 per cent,

it can retain up to 40 per cent of the property's value or put up the property for auction.

The purchasing contract may specify whether disputes are to be resolved before the Dubai courts or at arbitration, says Yule.

"If it is silent on this issue, then it will be [taken to] Dubai courts," he adds. "There are costs to be paid to the courts or to the arbitration centre before a case will be heard. The chances of success for a case are significantly increased by retaining experienced and knowledgeable lawyers. This will result in competent analysis of facts and law, and expert drafting of pleadings. Inexperienced or unknowledgeable lawyers can lose the strongest of cases."

The likelihood of being compensated for legal costs must also be considered, he says. "The majority of incurred legal costs are generally not recovered ... even if a purchaser wins a case."

Mohammad Sultan Thani, assistant director general of the Land Department, recently told a local newspaper that although hundreds of letters had been sent out to defaulters, no properties had yet been put up for auction.

See also Page 34

# Filling the regulatory gap?

■ Drafted due to the shortcomings of Law No 13, Decree No 6 clarifies when a contract can be rescinded and what penalties await errant developers.

Nazanin Aleyaseen

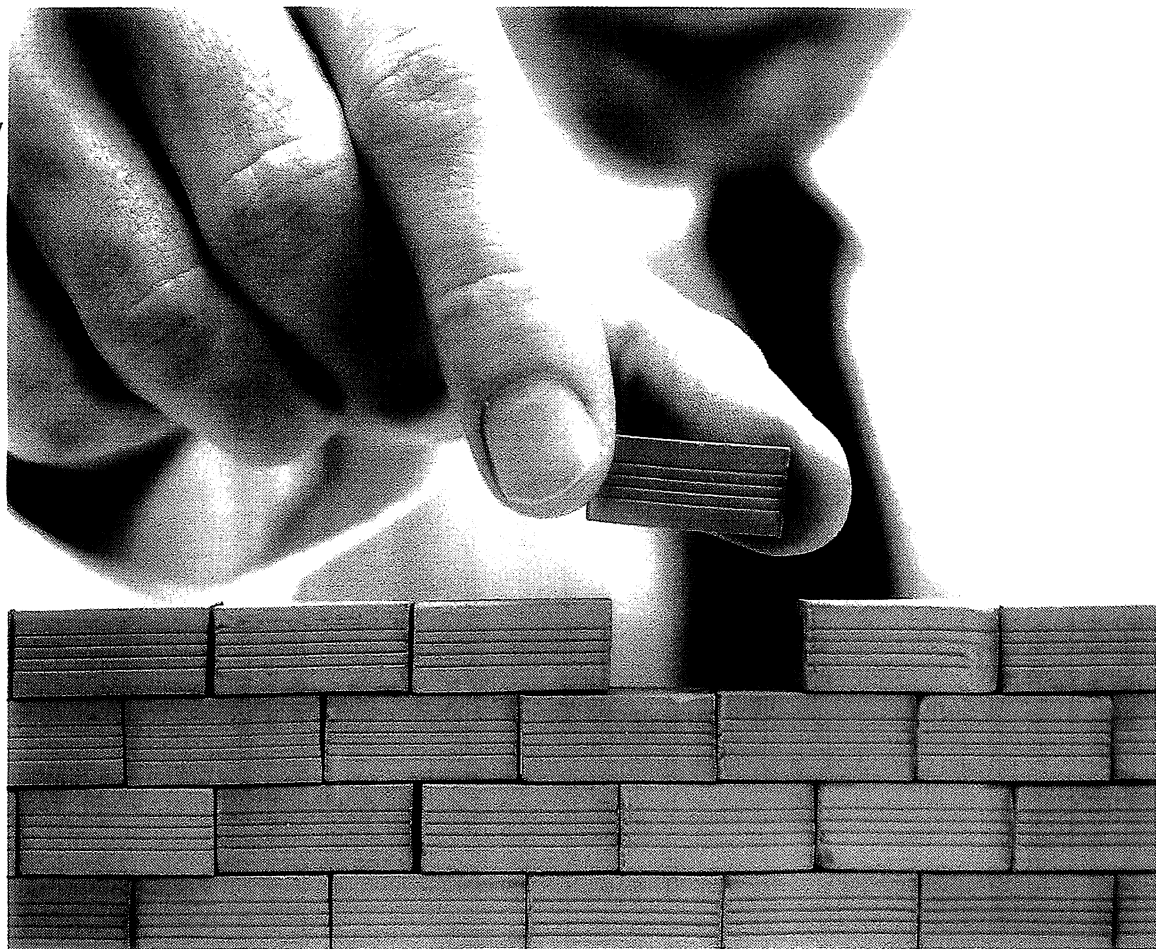


Prior to the downturn, the Dubai Land Department issued various laws in an attempt to regulate the booming off-plan market in Dubai. Such measures were adopted by the Land Department to facilitate accountability, transparency and responsibility within the off-plan market to promote investor confidence.

As these laws were in their infancy, many of the provisions lacked the requisite specifics to allow developers and investors to know what remedies were available in case of non-compliance. Since then, regulators have been striving to fill in the gaps that these new laws created. The Land Department released the details of the highly anticipated Executive Council's Decree No 6 of 2010 which was issued on February 14 this year and was published in the Official Gazette on April 15 in an attempt to provide clarification on existing laws.

Clarification as to when a contract can be rescinded is outlined in the Decree. Besides, it also mentions the penalties for developers who are not in compliance with existing laws.

In August of 2008, the Dubai Land Department issued Law No 13 of 2008. As a regulatory measure, Article 3(2) of Law No 13 required developers to approach the Land Department to register the sale of an off-plan unit purchased prior to August 31, 2008, in the Interim Real Estate Register within 60 days of August 31, 2008. Article 3(1) of Law No 13 stated that where a sale entered into after August 31, 2008, was not registered in the Interim Real Estate Register, the transaction was null and void.



Article 3(2) had no such wording and did not outline a penalty for developers who failed to comply.

After the market downturn, investors seeking to terminate their contracts and recoup their investments began arguing that if their transactions were not registered in the Interim Register by October 30, 2008, they were entitled to a return of their investment irrespective of whether the transaction was registered at a later time. Decisions of the Courts on this matter were inconsistent with some judges agreeing with investors while others agreed with developers.

Decree No 6 attempts to fill in the gaps that Article 3(2) of Law No 13 left behind. Article 2 of the Decree provides that a master developer or sub-developer is required to register a legal disposal of a real estate unit within the periods specified

**Failure of developers to comply with the timelines in Article 3(2) will not deem a transaction null and void.**

in Article 3(2) of Law No 13. However, a master developer or sub-developer will be deemed to be in compliance with Article 3(2) even if the actual registration takes place after October 30, 2008.

Article 3 of the Decree provides that if the registration takes place outside the period specified in Article 3(2), then the master developer or sub-developer will have to pay a fine of Dh10,000 to the Land Department.

Accordingly, the failure of developers to comply with the timelines in Article 3(2) will not deem a transaction null and void but will result in a monetary penalty.

#### Investors' rights to rescission

Although investors can no longer look to the non-compliance with Article 3(2) of Law No 13 to rescind contracts, the Decree has set out in Article 20 specific circumstances in which investors can look to the courts or tribunals to rescind contracts as follows:

1. If the developer refuses without justifiable reasons accepted by the Land Department to deliver to the investor the final real estate unit sale contract;

2. If the developer does not have a construction milestone payment plan approved by the Land Department/Real Estate Regulatory Agency (Rera).

3. If the developer significantly changes the specifications agreed upon in the contract.

4. If the real estate unit is proven to be unusable due to major structural defects.

5. In any other case which allows rescission of the contract in accordance with applicable laws.

Accordingly, Article 20 provides much needed clarification to investors as to when a developer's non-compliance will entitle them to rescind the contract. It also protects investors from default proceedings by a developer who alleges default under a payment plan that is not construction based.

This is to prevent developers from demanding payments when construction is not progressing and also in a way provides an incentive to developers to continue with construction.

Over the past year and a half, purchasers and developers have been investing considerable time and resource on litigation which, at the best of times, was uncertain. The Decree attempts to remedy this uncertainty. The uncertainty now is whether investors will exercise their rights afforded to them.

The writer is a lawyer with Afridi & Angell law firm. This article does not constitute legal advice.