

Public Policy Challenges to Arbitration Awards

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration

h.arab@tamimi.com - Dubai International Financial Centre

Hussain Almatrood - Senior Counsel - Litigation / Family Business

h.almatrood@tamimi.com - Dubai International Financial Centre

However, there are other grounds which can at times be used for that purpose. One of these grounds has been used recently by the Dubai Court of Cassation; the arbitrator exceeding his scope by ruling on matters of Public Policy. In this article, we highlight the aforementioned judgment and the reasoning used.

Statement of Facts

A real estate developer ("Respondent") sold all their proposed property development on a plot in Dubai Waterfront to the purchaser ("Claimant") through an off-the-plan contract of sale; however, the Respondent defaulted on its obligation to execute the project. The Claimant requested arbitration at DIAC, as per the agreement, and the Respondent filed a counter-claim. The Arbitrator ruled that the sale agreement was invalid because the property was not registered on the interim property register as required by Law No. 13 of 2008, and that the Respondent must refund the amount paid by the Claimant within 14 days. Pursuant to Article 215, the Claimant filed with the Court of First Instance an application to get a Court order rendering the award executable.

The Respondent filed a counterclaim at the Court challenging the award for the following reasons:

- 1) because it was issued without terms of reference;
- 2) the arbitrator had exceeded his authority to resolve a property dispute under Law No. 13 of 2008; and
- 3) there was a contradiction between the reasoning and the operative part of the award.

Procedural History:

The Court of First Instance dismissed the counterclaim and confirmed the award. The Respondent appealed and the Court of Appeal upheld the lower court's decision.

The Respondent appealed to the Court of Cassation arguing among other reasons that the arbitration clause was invalid because it did not exclude any dispute from arbitration even if it related to the invalidity of the sale agreement based on real estate registration requirements in Law 13. Thus, the arbitration clause gave the arbitrator the authority to rule on matters of Public Policy and that is a matter exclusive for the Courts.

The Court of Cassation

The Court began its assessment by stressing its continued and consistent application of Article 216 of the Civil Procedure Code which does not allow for the merits of an arbitration award to be analyzed when a party seeks to confirm it. However, despite that general principle, the Court was quick to state that "when the arbitrator has exceeded the bounds of his authority and resolved an issue relating to public policy that is outside the realm of conciliation" the Court would intervene to correct the situation. The Court was also careful to limit the usage of a Public Policy exception by saying that absent a clear violation, there would be no justification for invoking such an exception.

The Court referred to Article 3 of the Civil Transactions Law which lists a number of general principles

considered to fall under Public Policy. In particular, the Court stated that rules pertaining to the registration of property on the property register in Dubai are provisions relating to the monetary system of the State and essentially are matters of Public Policy. Such rules could not be subject to an arbitrator's jurisdiction as the subject matter is not allowed to be adjudicated and ruled upon outside of the Courts.

Conclusion of the Court

The Court concluded that since the registration of real estate at the Dubai Register is a matter related to Public Policy, that issue could not be the subject of arbitration. The Courts have the exclusive jurisdiction on those matters.

Practice Note

Article 215 of the Civil Transactions Code states that an arbitration award would be certified by the Court if there is no reason to reject it. Article 3 of the same Code lists very general categories as being categories of Public Policy. Combining the two articles, it is widely understood that if the award violates Public Policy, that would be a reason to reject it pursuant to Article 215. The unique element in this judgment is that the Court ruled that matters of Public Policy are not even reviewable by the arbitrator and she would lack subject matter jurisdiction in that case.

The judgment is very clear with regards to land registration as that was the subject of the case under review. However, it is not clear how much the Courts would be willing to expand this Public Policy exception. Article 3 of the Civil Transactions Code, which the Court quoted in its decision is very wide in its scope and includes rules regulating "individual ownership" and "circulation of wealth". The Court was careful to state very early on, as mentioned above, that only matters which clearly fall under Public Policy would give rise to this exception; however, going forward this decision must be kept in mind as a possible obstacle to an arbitration clause.