

Dubai Court of appeal judgment on the scope of public policy in Real Estate Arbitrations

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The Facts of the Case

A Dubai real estate developer entered into a [sale and purchase agreement](#) with an individual. The agreement contained a clause that the parties agreed to resolve their disputes in relation to the purchased real estate unit to arbitration before the Dubai International Arbitration Centre ('DIAC'). However the clause also stated that before doing so a party would need to give 20 days notice.

A dispute arose between the parties due to the performance of the agreement and the purchaser filed for arbitration before DIAC.

Before the arbitration tribunal, the developer argued that the tribunal lacked jurisdiction since the Claimant to the arbitration filed the case before the DIAC after the twenty days period set out in their agreement. The arbitral tribunal issued an interim arbitral award confirming its jurisdiction to hear the dispute.

The developer therefore filed a case before the Dubai Court of First Instance seeking to set aside the interim arbitral award issued by the DIAC arbitral tribunal.

The Claimant argued, amongst other things, that the arbitral award is null and void on public policy grounds since it was issued based on an arbitration clause included in a sale of an off-plan construction unit agreement.

First Instance Court:

The court dismissed the case for being premature. It held that the tribunal's award on jurisdiction did not resolve the case, and so could not be subject to annulment proceedings. Only a final award can be subject to such proceedings.

Dubai Appeal Court:

Before the appeal court, the developer submitted a new argument to support its request to set aside the arbitral award. It argued that the arbitral award violated public order because it related to the registration of an off-plan unit in the interim register, which the courts have already held is a public order issue and not a matter to be arbitrated.

The appeal court found that this argument was inadmissible and dismissed the case. Although the Court accepted that issues concerning the registration of real estate units were matters of public order and so

not arbitrable, the court noted that the purchaser was not seeking to terminate the sale and purchase agreement on the basis that it was not registered. The claim was based on the developers failure to construct the unit. The arbitral tribunal therefore had jurisdiction to hear the dispute.

The Court referred to the judgment of the Dubai Court of Cassation, real estate appeal no. 282/2012, in which it was held that:

“An arbitration clause in an off-plan contract for the sale of a property unit is unenforceable where an action is brought to annul the sale contract for non-registration on public order grounds, as the subject matters falls outside the realm of conciliation and is not therefore capable of settlement by arbitration. However, if the claimant merely sought to terminate the contract for non performance because the developer has failed to fulfill his obligation to build the property unit, the arbitration clause would be deemed valid and enforceable. As such, an award issued – for termination of the contract- pursuant to arbitration conducted on the basis of that arbitration clause is not void, as would be the case if the Claimant had sought to annul the sale contract for non registration of the off-plan sale in the interim property register”.

Conclusion

There has been some confusion in the past as to what extent real estate disputes are arbitrable. The earlier decision of the Dubai Court of Cassation made it clear that real estate disputes are generally arbitrable, but that the specific issue concerning the registration of units on the property registers is a matter of public policy that cannot be decided by the parties (and by extension an arbitrator appointed by them). The Court of Appeal judgment reported above helpfully confirms this, and has recognized the importance of the earlier Court of Cassation judgment. Though it may be appealed it nonetheless bodes well.

Arbitration clauses are widely used in the property sector and this judgment will give greater confidence that they will be upheld. It remains the case however that claimants must be careful to avoid basing any part of their claim on issues of registration.