

Arbitrators Dealing with Real Estate Property Disputes – Is it a matter of Public Policy?

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June 2014

A detailed analysis showing the arguments against setting aside arbitral awards in the UAE based on Public Policy

The UAE is a young and dynamic country and its real estate market is developing at an incredible speed. It has a distinct identity as a regional hub for trade and investment which is attractive to foreign investors; however, in recent years there has been a number of court decisions concerning the sale of property which have reached unusual conclusions. This article will discuss how the rules of public policy are being interpreted by the courts to set aside property related arbitral awards.

With the real estate boom in the UAE, there has been an increasing number of arbitral cases involving developers, contractors and investors. In the past few years disputes have increased significantly. In 2012 the Dubai International Arbitration Centre (DIAC) administered 379 cases compared to 2003 where only 15 cases were administered. With respect to the ICC, out of a total of 2036 parties involved in ICC arbitration cases in 2012, 59 parties came from the UAE. The UAE (and Dubai in particular) has not only been a business hub for Middle Eastern and Asian investors but also a centre for dispute resolution for the entire Middle East and Africa. The economic growth in the Middle East, despite the four year downturn from the year 2008 to 2012, has attracted a lot of legal challenges and interest from the arbitration community. As the UAE continues to grow, it is likely more disputes will arise, some of which will find themselves in court and others in local and international arbitration.

Despite the increase in property disputes, the past few years has been an exciting time for the property market as a number of laws were enacted. The impact of these laws will also be seen in the judgments discussed below. This article will reference Dubai Law 13 of 2008 regulating the registration of off-plan property sales (as amended by Law 9 of 2009), Abu Dhabi Law 3 of 2005 concerning property ownership in Abu Dhabi (as amended by Law 2 of 2007), the UAE Civil Code 1985 (as amended) and the UAE Civil Procedure Law 11 of 1992 (as amended).

Cases

All the cases mentioned below consider the public policy concept in matters concerning property disputes.

Dubai Court of Cassation judgment 43 of 2009

In **Dubai Court of Cassation judgment 43 of 2009** dated 11 April 2010, the court held that “the provisions of Article 3 of Law 13 of 2008 regulating the preliminary land registry in the emirate of Dubai shows, as has been held in the precedents of this court, that registration of all dispositions over real estate units sold on plan must be registered, and that the person who has the obligation to submit the application for registration to the Department is the developer. His role is limited to submitting the necessary documents with the application. He is not the body entrusted with registration. The task of registration is entrusted to the Lands and Property Department. The time limit is 60 days as provided for in that article. That is a regulatory time limit and the mere fact that the developer goes beyond the time limit or delays submitting his application for registration will not

render the disposition void. What will render the disposition of a sale on the plan void is its not being registered at all. This is what was intended and aimed at by the legislature, in harmony with and consistently with the principle of the probative force of the real estate register.

Dubai Court of Cassation Judgment 180 of 2011

In **Dubai Court of Cassation Judgment 180 of 2011** issued on 12 February 2012, a dispute arose out of a contract concerning the sale of an off-plan unit. The Respondent requested the arbitrator to cancel the contract and refund it for payments it had already made towards the purchase price as the contract had not been registered on the interim property register. The Respondent sought ratification of the arbitral award. The court held that pursuant to Article 203 (4) of the Civil Procedure Law, arbitration is not permissible in areas that cannot be subject to conciliation. On that basis, the sale of off-plan units, without complying with the mandatory registration requirement, as provided for in Article 3 of Law 13 of 2008 regulating the interim property register in the Emirate of Dubai, cannot be the subject matter for arbitration as this is contrary to the principles of public policy.

Dubai Court of Cassation Judgment 14 of 2012

In **Dubai Court of Cassation Judgment 14 of 2012** issued on 16 September 2012, a claim was made to enforce three related DIAC awards that concerned a private property dispute and the application of Dubai law 13 of 2008 regulating the registration of off-plan property sales. The Court nullified the awards on grounds that the application of the relevant property law is a matter of public policy which cannot be resolved through arbitration.

The Court of Appeal held that the sale contract was void because it was not registered on the interim property register in accordance with Law No. 13 of 2008 (as amended by Law No. 9 of 2009) regarding the interim property register in the Emirate of Dubai as it involves rules of individual ownership and the circulation of wealth (which the courts considered a public policy issue). The Court held that the arbitrator erred and incorrectly applied the law by ruling on the issue of invalidity and the Court of First Instance's decision is contrary to the correct application of the rule of law. For this reason it was dismissed without the need to examine the remaining grounds of appeal. Arbitral Award No. 80-2009 (Dubai International Arbitration Centre) was set aside.

Abu Dhabi Court of Cassation Judgment 663 of 2012

In **Abu Dhabi Court of Cassation Judgment 663 of 2012** issued on 28 March 2013, the Appellant filed an action against the Respondent seeking to set aside an arbitral award. The Respondent had purchased units in the Appellant's buildings and pursued arbitration to cancel the sale and purchase contracts for the units on account of the Appellant's failure to complete the buildings. The Respondent requested a refund of the amount he paid towards the purchase price of the property. An arbitral award was issued which terminated the sale and purchase contract. The Court of Cassation, however, held that a court must intervene to investigate the irregularity in light of the rules of law of the judge's country even if the irregularity is not one of the grounds for setting aside the arbitral award under **Article 216 of the Civil Procedure Law**. This is in the event an arbitrator exceeds his authority and resolves an issue relating to public policy that is outside the scope of conciliation. Public policy is a set of guidelines for taking decisions and pursuing action that are of fundamental concern to society and the basis for the social, political, economic or ethical laws of the state, as a result, all public policy issued must be determined by the courts.

Dubai Court of Cassation judgment 282 of 2012

In **Dubai Court of Cassation judgment 282 of 2012** dated 3 February 2013, the courts limited the application of Article 3 of the UAE Civil Code, Article 203 of the UAE Civil Procedures law and Dubai Law No. 13 of 2008 to disputes where one of the parties is seeking a remedy for the

invalidity of the sale and purchase contract. In this judgment, one of the parties requested to cancel the sale and purchase agreement and refund the payment as the seller failed to deliver the unit. The Respondent in the arbitration challenged the enforcement of the award before the Dubai Courts on the grounds that it is a matter of public policy, therefore the arbitration clause, it was argued, was invalid and the award should be set aside. The Dubai Court of Cassation however, held that the remedy sought by the claimant in this arbitration was limited to cancelling the contract as the seller failed to comply with the terms and conditions of the sale and deliver the unit on the date agreed in the contract (which contains an arbitration clause). The court held that this is different from a request to invalidate the contract (because it had not been registered at the Land Register). Accordingly the arbitration award was upheld and deemed enforceable.

The remedy sought in the above case did not seek to void the transaction pursuant to Article 3 of the Dubai Law 13 of 2008. The remedy sought through arbitration was damages and a termination order, as a result, the arbitration award was upheld and enforced.

Abu Dhabi Court of First Instance judgment numbered 2847 of 2013

In a recent **Abu Dhabi Court of First Instance judgment numbered 2847 of 2013** issued on the 12 February 2014, the arbitration tribunal rescinded a contract relating to a property unit and ordered the refund of payments made by the Claimant in addition to damages payable as a result of the Defendant's breach of contract. In this case, the court held that the matter did not relate to a public interest of a political, social or economic nature concerning the system of society but related to the private interests of the parties in respect of which they are entitled to act and pursue conciliation. The arbitral award in question did not violate any rule of public policy.

What are the legal grounds for these judgments?

The courts based their decisions on both local and Federal law. The judgments cited case law that applied the relevant articles from the UAE Civil Procedure Law (in particular Article 203) pertaining to Arbitration, the UAE Civil Code as well as local property law relating to acquiring property in the Emirates.

Article 203 of the **UAE Civil Procedure Law** states that:

“1 – It shall be permissible for contracting parties generally to stipulate in the original contract or in a subsequent agreement to refer any dispute between them concerning the implementation of a specified contract to one or more arbitrators and it shall likewise be permissible to agree by special conditions to arbitration in a particular dispute.

2 – An arbitration agreement may be proved only by writing.

3 – The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void.

4 – It shall not be permissible to arbitrate matters in which conciliation is not permissible. An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute.

5 – If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be cancelled.”

Most of the judgments relied on **Article 203** to emphasize the fact that arbitrators are not

empowered to deal with matters which cannot be settled amicably between the parties. In other words, the parties cannot arbitrate or agree to arbitrate matters where they have no power. This principle, of course, exists in most comparative legislation but the courts in the above cases applied this principle and construed the meaning in a unique way as discussed in more detail below.

Most importantly the judgments relied on **Article 3** of the **UAE Civil Code (Law No. 5 of 1985 as amended by Law No. 1 of 1987)** which states the following:

“Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic sharia.”

Article 3 of the Civil Code therefore sets out the concept and wide reach of “public policy” in the UAE. The concept of public policy in the UAE is not very different from other civil law systems (however, only the Islamic states make reference to the Islamic Sharia which is considered part of public policy). Nevertheless, the meaning of public policy in the UAE is subject to wide interpretation.

What is relevant to these cases is the line in Article 3 which states that public order shall be deemed to include *“the rules of law enacted to regulate the circulation of wealth”*. It is evident from some of the UAE judgments mentioned above that the courts had knowledge or had been influenced by recent Egyptian court rulings. In Cairo Court of Appeals 91st Commercial circuit dated 25 September 2005, the Egyptian courts considered the principles of public policy in the context of setting aside an arbitral award involving the sale of property, however in this case, the sale and purchase agreement did not have a lawful purpose. One of the parties pursued arbitration with the *“intention of avoiding legal provisions that would apply should the dispute go to trial or avoiding regular service of process and the guarantees that are associated therewith, as afforded by court proceedings, or circumventing the procedure for establishing title to real property or conspiring to dispose of property in order to usurp property rights or circumventing the procedure for registering dispositions of real property and applicable fees.”* In the UAE cases discussed above, the issue of fraud does not apply. In **Court of Cassation Judgment 14 of 2012**, the court concluded that dealing with real estate property is construed as dealing with the circulation of state wealth and therefore arbitrators cannot arbitrate such matters according to Article 3 of the Civil Code. The Court of Cassation’s analysis is set out as follows:

1. The parties cannot agree to arbitrate matters which they themselves cannot reach an amicable settlement in nor can the arbitrator arbitrate matters where the parties cannot settle the matter amicably.
2. On the basis of Article 3, dealing with the circulation of wealth is a matter of public policy and the parties therefore cannot agree to arbitrate matters relating to this issue.
3. It can be concluded that an arbitration concerning real estate property (national wealth) is a matter that is not within an arbitrator’s scope, therefore, they cannot arbitrate matters concerned with the invalidity of a property disposition. As a result, any arbitration award that decides on the validity of a real estate transaction would be deemed invalid and the arbitration award will be set aside.
4. Reference was made to Article 3 of Dubai Law No. 13 of 2008 as amended by Law No. 9 of 2009 regulating the Interim Real Estate Register in the Emirate of Dubai;

Article 3 provides: *“1- The Interim Real Estate Register is used to record all disposals of Real Estate Units that are marked as sold off plan. Any sale or other disposition that transfers or restricts title or any ancillary rights shall be void if not recorded on that Register.*

2- Any developer who made a sale or other disposition that transferred or restricted title prior to the enactment of this Law should approach the Department to get it registered in the Real Estate Register or the Interim Real Estate Register, as applicable, within 60 days from the date this Law comes into force.”

In **Abu Dhabi Commercial judgment 663 of 2012** a similar law in Abu Dhabi (Law 3 of 2005 concerning property ownership in Abu Dhabi, as amended by Law 2 of 2007) also requires property to be registered in the Emirate of Abu Dhabi. Article 6 of Law 3 of 2005 (as amended) provides:

“The registration of all transactions effected on the Properties described in Article 10 of this Law which would create an original or subordinate real right or the transfer or the removal thereof, and also the conclusive judgments confirming such matter, in the Register kept for this purpose at the Relevant Department within whose jurisdiction the property is located; non-registration shall result in all the above rights being considered as having not been created, transferred or removed as between the relevant parties or with respect to others.

This provision shall apply to lease contracts with a term of more than four years. Unregistered Transactions shall not be relied upon nor shall they have any effect save for the personal obligations between the parties involved.”

The difference between the Abu Dhabi judgment and the above mentioned judgments is that the court stated that *“where a mandatory rule of law does not relate to public policy... or its purpose is the protection of private rights and interests, there would be no justification for invoking the public policy argument.”* However, in **Abu Dhabi case 663 of 2012** public policy was invoked as the subject matter of the arbitral award concerned a property disposition that did not comply with Abu Dhabi’s registration requirements. As mentioned above, property registration is a public policy issue.

With respect to (**Abu Dhabi Judgment 2847 of 2013**), the court held that Article 3 of the Civil Code is a *“broad article that cannot be applied to all forms of circulation of wealth and rules of individual ownership as only some [forms] relate to public policy such as those that relate to property registration, right of freehold ownership in the Emirate of Abu Dhabi, and the disposal and transfer of land according to Law 3 of 2005 regulating property registration in the Emirate of Abu Dhabi and Law 19 of 2005 concerning property ownership (as amended by Law 2 of 2007).”*

The judgment also states that *“Where an arbitration concerns matters of public policy, there are cases where autonomy comes into play in choosing to resolve a dispute by arbitration. In such cases, the role of public policy is to ensure that the dispute is not resolved in a manner that goes against the requirements of protecting the interests of society. The parties are entitled to act with respect to the private interests at stake and there would be no violation of public policy in referring disputes (in relation to such interests) to arbitration rather than the courts of the State, provided that the arbitration does not produce an award in conflict with public policy. An arbitral award may be set aside as contravening public policy only if the award violates any of the rules of public policy while the arbitration agreement would remain valid notwithstanding.”*

Are these judgments now UAE law?

Until the new UAE Arbitration law is promulgated (the draft is currently in an advanced stage) and until another judgment is issued by the Court of Cassation to overturn the principles mentioned above, it is likely that the lower courts in the UAE will follow the principles set out by Dubai and Abu Dhabi Court of Cassation in relation to the invalidity of sale and purchase agreements of properties in the UAE which have not been registered at the Land Registrar. The main issue, according to these judgments, is that the arbitrator cannot decide that the contract is invalid due to a failure to register or transfer land.

Is Article 3 of Dubai law 13 of 2008 a matter of public policy – and why:

It is common for a state to require that real estate transactions be registered at the Land Department whether it relates to the preliminary sale which is made at the beginning of the construction of the building or any other transaction. However, it is important to highlight a legal doctrine applied in some civil law jurisdictions in relation to the issue of invalidity. In the UAE, a contract will be considered invalid if the contract's subject matter is unlawful or the contract doesn't take a certain form specified by law (e.g. a sale and purchase agreement must be registered at the land department).

Article 209 of the Civil Code provides: *“A valid contract is a contract which is lawful in its essence and description, in that it is made by a person of proper capacity in respect of a subject matter properly falling within the ambit of a contract, having an existing, valid and lawful purpose and in proper form, and unaccompanied by any vitiating condition.”*

There are two main types of invalidity that are distinguished by the well known jurist Abd El Razaak el Sanhuri in his commentary *“Al Waseet fi Sharh al qanun al madani”* (which has influenced UAE law and judgments). The first type (relative invalidity) is where a valid contract becomes effective (it meets all the requirements of a valid contract- there is consent, lawful subject matter and purpose) but is subject to a condition/defect that can still be satisfied in the future (i.e. registration of a sale and purchase agreement). In the case of relative invalidity, the aim of the outstanding requirement/condition is provided by law to protect the interests of an injured party (a private individual) and there is very little harm or benefit to the state in that transaction. In this case, it is up to the injured party to bring a complaint of relative invalidity. If the injured party didn't raise this argument, the court will not declare the transaction invalid (on its own initiative). Relative validity protects the interests of the individuals not society. In Arabic, this is called *“butlan nisbee”*. The second type is absolute invalidity *“butlan mutlaq”* which means the contract was invalid from the outset. The aim of absolute invalidity protects public interests and matters relating to public policy. If an injured party failed to file a complaint, the court or tribunal still have to declare an invalidity to protect the interests of society. As a result, if the invalidity relates to a matter of public policy (absolute invalidity), the court will declare the contract null and void on its initiative (Dubai Civil Appeal 216 of 2003).

As a result, a sale transaction for the sale of a unit between a buyer and seller cannot be construed narrowly and be deemed a matter of public policy. The requirement to register the sale of the unit at the Land Register is aimed to protect the parties to a transaction who are investing in the UAE. The purpose is to ensure the seller secures his schedule of payment and the buyer obtains delivery of his property at the price and date agreed. Accordingly, the public policy defence should not be argued in cases involving Article 3 of Dubai Law 13 of 2008.

In the judgments delivered by the courts, the courts have provided that the parties are free to register their transaction at anytime in the future. As confirmed by the courts, the 60 days provided by law is a regulatory time limit and it is not compulsory to register the transaction within 60 days. The judgments also conclude that a disposition of property will only be considered void if it is not registered at all. This judgment demonstrates that the parties can reach a settlement over the issue of registration amicably. It can also be argued that Article 203 of the UAE Civil Procedure law will not apply as parties can reach settlement in these types of issues and accordingly, can be arbitrated. This is the conclusion correctly reached by the court in Dubai Court of Cassation judgment 43 of 2009 which confirms the fact that the doctrine of relative invalidity applies, not the doctrine of absolute invalidity. It is an invalidity which is made for the protection of private interests and not a matter of wide public interest to society.

Conclusion

The essence of the UAE judgments provide that the purpose of the Land Register is to register property or to annul contracts relating to the sale of land/unit and this is the exclusive jurisdiction of the Register which can only be supervised by the court. What can be gleaned from some of the judgments and the discussion above is that it is imperative for property dispositions to be registered, otherwise, a party seeking a declaration of invalidity and nullification of the contract can proceed to the UAE Courts, not arbitration. This narrow interpretation does not, however, effect the parties' agreement to proceed to arbitration if the parties want to rescind the contract, claim a refund or to enforce a contract of sale. As a result, the award is likely to be upheld and enforced.

It is essential to also highlight that the courts must not examine the merits of an arbitral award once it has been issued. **Dubai Court of Cassation judgment 225 of 2005** delivered on 10 December 2005 held that when a court is looking to confirm an arbitral award, a Court should not examine the substantive aspects of the arbitral award and the extent it conforms to the law. Any challenge raised by any of the parties to arbitration with respect to the arbitral award in terms of the arbitral tribunal's opinion on the dispute or the invalidity or insufficiency of the reasons for the award is unacceptable. It is sufficient that the award include a copy of the arbitration agreement, a summary of the parties' arguments, documents and the reasons supporting the tribunal's opinion in the operative part of the award. Moreover the award should not violate any rules of public policy.

In summary, it can be deduced from the above that:

1. Arbitrators are not prohibited from dealing with matters of public policy. However, it is prohibited for the award or the agreement to be contrary to public policy. As seen in the cases mentioned above, the courts did not state that arbitrators must not deal with matters of public policy;
2. In the above cases, the courts are advancing the public policy argument because of Article 3 of the Civil Code. The UAE Courts are of the view that dealing with real estate and property dispositions is akin to dealing with the circulation of the country's wealth (as provided in Article 3). There is nothing in UAE law that provides that dealing with real estate is considered dealing with national wealth and as a result falls under the meaning of Article 3. Article 3 in my opinion does not apply to real estate or property dispositions made in the private sector between private individuals. However, in most national resource transactions such as in precious metals, commodities, oil and gas and water, the preferred method of dispute resolution is arbitration. What is actually classified as public policy is the country's control and regulation of its national resources not the private sector's right to transact among themselves. In matters concerning the sale and purchase of commodities or real estate, the transactions of which can be complex in nature, it is recommended that the disputes are resolved by arbitration
3. Further, an action for the termination of a contract of sale is a claim for a right of entitlement based on contract. An arbitrator will not examine or look at matters that are within the ambit of the Land Register. The arbitrations discussed above did not settle disputes concerning the right of registration or non registration. The arbitrator is actually dealing with the contract of the parties upon which they agreed to arbitrate the dispute and not to step in the shoes of the Land Department. The arbitrator should look into the breach of one party's obligation under the contract and the remedy sought by the other.

Previously published by ICC UAE quarterly Magazine.