

Dubai Court Judgment Concerning Severability and Public Policy in Arbitral Awards

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration
h.arab@tamimi.com - Dubai International Financial Centre

February 2015

Most of these cases have arisen from real estate disputes in which the purchaser of an off-plan unit has sued the developer on the basis that the unit was not registered and accordingly the sale invalid. The court has repeatedly held that issues of property registration are not arbitral and any award upholding such a claim is to be annulled.

In a recent case the Dubai Court of Cassation has underlined this principle by explaining that even if the award is justified on other grounds, if the award contains a determination on a matter of public policy, the entire award will be annulled and not just the decision concerning public policy.

Severability

The Dubai Court of Cassation has in the past severed elements of an arbitral award which the court found the Tribunal did not have jurisdiction to make.

A recent example is Dubai Court of Cassation Property Appeal No.282-2012 (dated 3 February 2013). In this case, a purchaser sued a developer for the return of money paid under a sale and purchase agreement. The purchaser succeeded in a domestic DIAC arbitration, receiving an award for the return of his payments (AED 4 million), interest, and his legal costs of AED 110,000.

The developer challenged the award before the Dubai courts. Among a number of arguments raised, the developer claimed that the Tribunal did not have the power to award legal costs as no such power existed under Dubai law or the DIAC rules, and the parties had not agreed to confer such a power. The award was therefore to be annulled because the Tribunal had exceeded its jurisdiction.

The Court of Cassation agreed with the developer that the Tribunal had exceeded his jurisdiction when awarding legal costs. However the Court did not agree that this meant that entire award was to be annulled, but instead annulled the award regarding legal costs, and upheld the remainder.

Cassation Case 320 of 2014

In the recent case of Dubai Court of Cassation Property Appeal No.320-20123 (dated 22 June 2013), the Court annulled the entire award rather than just that section in which the Tribunal had exceeded its jurisdiction by considering a matter of public policy.

In this case, a purchaser sued a developer for failing to handover and construct the unit in accordance with the completion date in the sale and purchase agreement. The basis of the claim was that the agreement was to be terminated and the purchaser's money repaid because (1) the developer had failed to handover by the completion date and (2) the unit had not been registered. In the award the Tribunal accepted both of these arguments, and accordingly terminated the sale and purchase agreement and ordered the developer to repay the money paid by the purchaser.

The Court of First Instance ratified the arbitral award, as did the Court of Appeal. Before the Court of Cassation the developer argued that the award should be annulled because it dealt with an issue concerning registration under Article 3 of Dubai Law 13 of 2008, which is an issue of public policy not capable of being settled by the parties and, by extension, arbitration.

The Court of Cassation accepted this argument, holding that where a dispute includes issues that are not subject to conciliation (and by extensions arbitration) the overall dispute cannot be arbitrated. If the arbitrators accept jurisdiction over the non-arbitral issue and issue an award on it, the entire award is to be annulled.

In this case the Tribunal found that the purchaser had established a right to terminate under the terms of the agreement (as the unit had not been handed over in time) and also under Law 13 of 2008 for failure to register. Since the award was based on an issue that was matter of public policy falling outside the jurisdiction of the Tribunal, the entire award was to be annulled.

Comment

Although the Court of Cassation in Property Appeal No.320-20123 could have considered severing the offending part of the award or allowing the award to be enforced on the basis that there were other non-public policy related grounds for the order made by the Tribunal, it is probably that it did not do so because under like the order for legal costs in Property Appeal No.282-2012, it could not easily sever the offending section. This is because the order for legal costs would have been one separate item found in the operative part of the award (i.e. the order conventionally found on the last page), whereas the issue of public policy would have been in the main body of the award dealing with the reasoning for the decision. This is why, although in both cases the Tribunal exceeded its jurisdiction, in one the Court agreed to sever the offending part, but in the other it was unable to do so.

It often happens that when bringing a claim a claimant will plead a number of different grounds for the relief sought. This case shows that care must be taken not to raise issues of public policy, as if dealt with by the Tribunal they will cause the award to be annulled even if the claim succeeds on other grounds unrelated to public policy. Tribunal's themselves should simply refuse to consider any issue that it believes falls under public policy or which is otherwise outside of its jurisdiction.