

Abu Dhabi Court of Cassation addresses the arbitrability of real estate disputes

by Hassan Arab - h.arab@tamimi.com - Dubai International Financial Centre
Dalal Al Houti - d.alhouti@tamimi.com - Dubai International Financial Centre

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In recent years, the UAE property market has experienced significant changes due to the enactment of new laws regulating the registration of off-plan property sales.

By virtue of these laws all dispositions over real estate units sold off plan must be registered, failure to do so would render such disposition void. This is a matter of UAE public policy.

Given that it is generally accepted that the enforcement of an arbitral award may be refused if the subject matter of the dispute is not capable of resolution through arbitration and if enforcement would be contrary to public policy, it is understandable, that due to the mandatory nature of these laws, questions concerning the arbitrability of real estate disputes have arisen. This is supported by the fact that as a result of the court's broad interpretation of Article 3 of the UAE Civil Code, concerning public policy, a number of awards settling property disputes have been refused. Article 3 defines public policy in fairly wide terms including all matters concerning 'the circulation of wealth' and 'rules of private ownership' which the articles goes on to say are matters for the state and not a private arbitration tribunal. That said, we have witnessed the courts slowly refining their interpretation of the said provision and in turn narrowing their application of the public policy rule.

This is most recently evident in the Abu Dhabi Court of Cassation Case No.55 of 2014 where the court made a distinction between circumstances in which the subject matter of the dispute does not relate to a public interest concerning the system of society but relates instead to the private interests of the parties in which conciliation is permitted. An arbitration clause may be successfully invoked in the latter case.

The facts of the case

The Claimant had entered into a sale and purchase agreement for a residential unit in Sky Gardens Tower, Reem Island, Abu Dhabi. The Respondent defaulted in its obligation to achieve timely handover of the unit.

In accordance with the arbitration clause in the agreement, the Claimant commenced proceedings before the Abu Dhabi Commercial, Conciliation and Arbitration Centre ("ADCCAC") to cancel the agreement and recover the payments made to the Respondent totaling AED 590,169.5. An award was rendered by the arbitrator in the Claimant's favour.

The Claimant filed for enforcement proceedings before the Abu Dhabi courts. The Court of First Instance confirmed the award and the Respondent sought by way of a cross-application to annul the award.

The Court of Appeal relied on Article 3 of the Civil Code which views the circulation of wealth and rules of individual ownership as matters of public policy and therefore non-arbitrable to overturn the Court of First Instance's ruling.

The Court of Cassation

The Claimant successfully appealed this decision on the basis of misapplication of the law and insufficient reasoning. The Court of Cassation held that “the arbitrator correctly applied the law in declaring his jurisdiction and taking up the application filed for termination of the sale and purchase agreement and recovery of payments made to the Respondent. Such rights can be the subject of conciliation. The dispute is about the termination of a contract for a freehold unit and a claim for the recovery of payments already made due to breach of contract which is not a public policy issue.”

The Court of Cassation explained that a rule of law enacted to regulate the circulation of wealth and individual ownership of a state in terms of possession and the acquisition of rights in rem, and the nature and scope of such rights, the means by which they are acquired and extinguished, including rules pertaining to their registration on the property register “are all provisions relating to the monetary system of the State which are essentially public policy.” As such, they cannot be subject matter for arbitration and any related dispute would fall within the ambit of the local courts even in circumstances where there is a valid arbitration agreement. This reasoning is further supported by the fact that conciliation is not permitted in matters relating to public policy and since, as a matter of public policy, arbitration is not permitted in matters in which conciliation is not permissible, there can be no arbitration for dispositions of property involving existing rights or creating new ones if a mandatory provision has not been complied with in terms of registering the property since this would be contrary to public policy.

If, however, the claimant’s action strictly seeks to terminate the sale contract due to non-performance or breach by the opposing party, the arbitration clause in the contract should be applied. It follows that an arbitral award declaring the termination of the contract in an arbitration proceeding, conducted pursuant to such clause, should not be void.

In this instance, the arbitrator issued an award ordering the termination of a sale purchase agreement and the refund of monies by the respondent. The Court considered the arbitral award to be valid, as the settlement of the dispute did not involve the circulation of wealth or public policy, as explained above. The Court of Cassation reasoned that “there is no justification for invoking public policy grounds to apply this mandatory rule of law, which, being unrelated to public policy, can be the subject of conciliation and, in turn, a subject matter for arbitration.”

Therefore, whilst it is still essential that the disposition of property be registered, the Abu Dhabi Court of Cassation’s recent interpretation of public policy does not preclude a party from invoking an arbitration clause to enforce or rescind a contract, or claim a refund of monies paid, provided it is based on breach of contract.