

Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards

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As in most other jurisdictions, the violation of public policy in the UAE constitutes a ground for refusing the recognition of an arbitral award. Public policy is defined in Article 3 of the UAE Civil Code [Federal Law No. (5) of 1985] as follows:

"Are considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari'a".

A striking feature of this definition is that it is wide enough to encompass almost anything that goes into "trading in wealth" and "foundations on which the society is based", depending on the total discretion of UAE Courts. The ground of public policy as provided for in article 235(e) of the UAE Code of Civil Procedures (CCP) [Federal Law No. (10) of 1992], should always be considered as a sword against the recognition of an award whenever it is relied upon by the party resisting such recognition. Making things worse, decisions rendered by national Courts refusing recognition on such ground limit to a mere reference to public policy without detailing the method of the Court's reasoning, which would have helped the promotion of a coherent practice and the development of a consensus on principles and rules which may belong to public policy in the UAE. The finality of an award rendered in the context of a domestic or international arbitration is no exception to the application of this ground whenever the recognition or enforcement of the arbitral award would be against the public policy of the Emirates.

Another issue to bear in mind when it comes to public policy is article 203(4) of the CCP providing for the non-arbitrability of areas that cannot be subject to conciliation. Those areas are referred to in article 733 in Chapter 5 of the Civil Code dealing with conciliation.

The above is important to put in context the latest decision on the matter issued by the Dubai Court of Cassation (case No. 180/2011) on February 12, 2012.

In summary of the facts, the respondent purchaser filed a claim before the Dubai Court of First Instance requesting the recognition of an award rendered on January 6, 2010 by a sole arbitrator on the basis of an arbitration clause referring to DIAC [Dubai International Arbitration Center] arbitration provided in the sale agreement of a unit entered into with the appellant, real estate developer. The

award settled a dispute between the parties on the validity of the sale agreement, concluding that said agreement is null and void in application of article 3 of Law No. (13) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai. This article provides that sold units “must be registered in the Interim Real Estate Register within a determined period; otherwise the sale agreement would be invalid”. Failing to register the sold unit in due course, the award invalidated the said agreement and ordered the real estate developer, respondent in the arbitration, to return the sale amount and pay legal interests and costs of arbitration.

In the enforcement proceedings before the Dubai Courts, the Court of First Instance issued a decision on January 16, 2011 granting recognition of the award. The Court of Appeal, in its turn, upheld the decision in first instance on May 10, 2011 and rejected the arguments made by the appellant that the sole arbitrator went beyond the limits of his jurisdiction and violated the right to defend his claims.

The claim was finally lodged in last degree before the Dubai Court of Cassation, which issued its decision on February 12, 2012, annulling the judgment of the lower Courts granting recognition of the award. The Court of Cassation decided that conciliation is not allowed in matters which relate to public policy and referred to article 203(4) CCP, as detailed above, to consider that arbitration is not allowed in matters where conciliation is prohibited, and thus in matters of public policy. The Court further noted that “the selling of units without compliance with the registration requirement as provided for in article 3 of Law No. (13) 2008 may not be the subject matter of arbitration simply because this sale without registration contravenes public policy. Therefore, where a dispute subject to article 3 of Law No. (13) of 2008 is brought before an arbitral tribunal, and that tribunal rendered an award settling that dispute, such award is null as only the Court shall decide on the same dispute, at its own discretion, as it is a matter which relates to public policy”.

Although the registration of sold units in the said interim register could amount to a rule of public policy for the security of transactions in real estate properties, the way how the Dubai Court of Cassation relied on this ground to annul the award leaves further ambiguity on the conditions and scope of its application.

The Court here as well made a mere reference to public policy without providing a methodical approach that grasps the whole definition of this ground in article 3 of the Civil Code and apply it to the matter in question: “the requirement of registration of sold units”. This would allow the development of a consistent practice by national Courts on the use of public policy, reminding that any reference to it must be narrowly made and should not be interpreted expansively or even left to the sole discretion of the national Courts.

Additionally, even where the arbitrator is deciding on a dispute amounting to public policy, the review of the Courts should be limited to whether the recognition of the arbitrator’s award would contravene public policy. In this instance, the sole arbitrator annulled the sale agreement for failing to meet the registration requirement. Thus, no rule of public policy, if any, has been violated. In fact, the arbitrator made sure to apply article 3 as provided in Law No. (13) of 2008. The Court of Cassation could have only refused recognition or enforcement of the award if the latter had given effect to a solution prohibited by said article, or any provision forming part of the Court’s legal system; In other terms, when the recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests that the rule intends to protect.

The rule of public policy as defined in this case by the Court of Cassation is the requirement of registration of sold units in the real estate register. The Dubai Court of Cassation should have recognized the arbitrator’s award settling this dispute, as this empowerment is provided in article 212(2) of the CCP mandating the arbitrators to apply not only the rules of Law but also those of public policy. However, the Dubai Court of Cassation stripped the arbitrator’s jurisdiction by considering that

conciliation, and arbitration by way of application of article 203(4) of the CCP, is prohibited on matters of public policy. The Court could have instead relied on the ground of inarbitrability of disputes relating to the validity of sale agreement of units, rather than arguing that arbitrators cannot review disputes of public policy.

As there is yet no clear definition of public policy or a coherent judicial practice on what that might be, national Courts in the UAE should step forward in an attempt to spot the light on its conditions and scope of its application, and limit their interventionist approach to the sole review of whether the arbitrators' solution violates a rule that is considered of public policy.