

# Kluwer Arbitration Blog

## Public Policy in the UAE: Has the Unruly Horse Turned into a Camel?

Gordon Blanke (Blanke Arbitration LLC) · Sunday, October 14th, 2012

A recent ruling of the Dubai Court of Cassation (the highest Court in the Emirate, against whose rulings there lies no further appeal) raises serious concerns as to whether the unruly horse of public policy that became infamous in the early nineteenth century in the common law world and in particular along the shorelines of the British Isles has now bridged the gulf between the common and civil law world, made its way across the Persian Gulf and – washed ashore in the Emirate of Dubai – has turned into a camel. By way of reminder, the unruly horse was borne to English law with the valiant assistance of Mr Justice Burrough in 1824, when he described the doctrine of public policy in the following terms: “*It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law.*” (*Richardson v. Mellish* [1824] 2 Bing 229, 252) In its ruling of 16 September 2012 in *Baiti Real Estate Development v. Dynasty Zarooni Inc.* (Appeal No. 14/2012, Real Estate Cassation), the Dubai Court of Cassation has – in reliance on the principle of public policy – set aside an order for enforcement of a domestic arbitration award initially made by the Dubai Court of First Instance and subsequently affirmed by the Dubai Court of Appeal. On that occasion, the Court of Cassation gave an unprecedentedly wide interpretation to the concept of public policy as understood in the UAE, without – however – taking account of the particular conceptual and procedural nuances commonly attributed to public policy in an arbitration context. This said, Dubai Court case law on public policy is underdeveloped and does not provide much valuable guidance for the interpretation of the public policy concept in domestic arbitration. Irrespectively, the Dubai Court of Cassation’s sweeping approach in *Baiti* may set a worrisome – if not dangerous – precedent for the interpretation of public policy as understood in the UAE for purposes of both domestic and international arbitration going forward.

In brief, the dispute dealt with in the arbitration, which was subject to the Rules of the Dubai International Arbitration Centre (DIAC), was in relation to an off-plan property transaction whereby Dynasty Zarooni had purchased an entire building from and to be developed by Baiti in Dubai. The resultant arbitration award declared the sale and purchase agreement between the parties null and void and hence automatically terminated on the basis that the agreement was in violation of Article 3 of Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai (“*Law No. 13 of 2008*”). Article 3 provides for the mandatory registration of any sale and purchase of properties in Dubai in the Real Estate Register through the Dubai Lands Department. Any sale and purchase not so registered is null and void under the terms of that Article. As Baiti had failed to register the transfer of the off-plan property to Dynasty, the Sole Arbitrator considered the transaction between the Parties null and void and ordered Baiti to

reimburse to Dynasty the entire purchase price.

In the view of the Dubai Court of Cassation, the Sole Arbitrator did not have the power to adjudicate matters under Article 3 of Law No. 13 of 2008 given that “*such dispute* [i.e. the registration *vel non* of a property under Article 3] *is considered to be related to public order for being related to the rules of private ownership and the circulation of wealth ...*”. To arrive at this conclusion, the Court of Cassation relied on the definition of public policy contained in Article 3 of the UAE Civil Transactions Code, which provides in pertinent part:

“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 individual ownership and the other rules and foundations upon which society is based ...”

On this basis, the Court of Cassation concluded *verbatim*:

“Considering that public order is one of the basic controls that must have the priority of respect in all actions and judgments relating to the supreme interest of society and the social or political or economic or moral foundations upon which the State is founded. ... Moreover, pursuant to Article 3 of the [UAE] Civil Transactions Code, the provisions related to the circulation of wealth and rules of private ownership are within the rules and foundations upon which society is based. The legislator’s interference in deciding a legal principle regulating the terms and conditions for the circulation of such wealth and private ownership inside the State in terms of possession and rights in rem and the nature and scope of these rights as well as the methods of their acquisition and termination, including the rules and regulations relating to its registration in the Real Estate Register of the Emirate of Dubai, are all considered as part of the provisions related to the funds system within the State which is regarded as public order by nature, which in turn falls outside the scope of arbitration ... and instead lies within the competence of the courts.” (author’s translation)

It can hardly be denied that the wording of the Court of Cassation’s ruling is extremely wide, essentially capturing as “public policy” the application of any rules that relate to the circulation of wealth and private ownership. On a literal reading, therefore, the Court of Cassation appears to be saying that any issues in relation to the proper ownership of e.g. any real estate in the Emirate of Dubai are to be considered public policy. With all due respect to the Dubai judiciary, this interpretation of the public policy concept by reference to Article 3 of the UAE Civil Transactions Code cannot be correct. What the Court of Cassation has completely ignored in its interpretation of public policy is the statutory limit expressly imposed on the scope of public policy by the wording of Article 3 itself. Importantly, in its full text, Article 3 qualifies the true scope of public policy to be confined to matters of personal status, freedom of trade, individual ownership etc. “*in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari’a*”. In other words, only to the extent that any of the aforementioned matters are in conflict with the Islamic Shari’a are they to be considered public policy. This in turn means that it is the

ingredient of the Islamic Shari'a in a disputed issue that elevates it to the status of public policy. At the risk of over-simplification, what this truly appears to mean is that within the meaning of Article 3 of the UAE Civil Transactions Code, the Islamic Shari'a is regarded as public policy and is coincidental or even identical therewith. The Islamic Shari'a, in turn, arguably articulates itself in a number of specific ways that have little bearing on the majority of commercial and real estate arbitration, e.g. the award of specific types of damages, the nature and level of interest etc.

On a literal reading of the excerpted sections of the ruling, the Dubai Court of Cassation's conclusions appear to be based on the erroneous assumption that matters of public policy are by definition unarbitrable. This, we would like to believe, could only hold true to the extent that the UAE understanding of public policy within the meaning of Article 3 of the UAE Civil Transactions Code was correctly confined to the Islamic Shari'a, which may arguably fall within the exclusive jurisdictional competence of the UAE courts. A similar approach in this context was taken by the same Court in a previous ruling of 12 February 2012 in a similar case (Case No. 181/2011, Real Estate Cassation), which equally dealt with the nullification of an award on the ground of the arbitrator's application of Article 3 of Law No. 13 of 2008 and which was discussed in some detail in a previous blog earlier this year (*vide* Khalil Mechantaf, "[Public policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards](#)").

In light of the foregoing, it is our view that the Dubai Court of Cassation's two recent rulings of 12 February (and for that matter that of 16 September 2012) must remain confined to their specific context, to wit the application of Article 3 of Law 13 of 2008. The UAE and more specifically the Dubai judiciary – astride on the unruly camel of public policy – would be best advised to hold tight the reins and test the vagaries of public policy in a piecemeal fashion on a case-by-case basis in order to keep under control unforeseen consequences that too far-reaching a concept of public policy may entail for Dubai and the UAE more generally as a place of arbitration. To embrace a notion of public policy that may put at risk entire specialist areas of arbitration – such as real estate arbitration – that have formed in the Emirate over the past decade or so and that have become an important cornerstone of the DIAC, one of the leading arbitration centres in the region, would be entirely counterproductive and adversely affect the slow but steady recovery of investment after the economic downturn and the continued future development of commercial arbitration in the region.

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