

Arbitrability of Disputes: Issues of arbitrability and public policy in the UAE

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Determining the Public Ways Through Private Disputes

Contracting parties are often justifiably keen to avail the perceived advantages of arbitration over litigation. These benefits include the choice of a neutral forum, enhanced enforceability of decisions internationally, and greater flexibility and privacy (if not confidentiality) of proceedings.

But too often parties simply re-use arbitration clauses from other documents and insert them into their new contract, without considering whether arbitration is an appropriate dispute resolution mechanism in all the circumstances or a path which will avail the most effective means of enforcing their contractual rights. More importantly, contrary to some commercial parties' expectations (or rather, ambitions), not every dispute is "arbitrable" i.e. permitted to be settled by arbitration.

Choosing the right path and knowing whether or not a dispute is arbitrable requires an analysis of all the laws affecting the parties and their transaction. Each State decides in accordance with its own social, political and economic policy which matters may be fit for arbitration and those which must remain within the domain of the domestic courts or other special tribunals.

The Common Law position

In a case related to one of Europe's worst oil spills by The Prestige, the English Commercial Court reviewed the common law authorities on this topic and recited with approval the commentary in Mustill & Boyd, Commercial Arbitration (2nd ed) (1989) at pp 149-150:

"English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. [...] the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under article 85(3) of the Treaty of Rome. It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration: indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases."

The issue of arbitrability was also considered in the English Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2012] Ch 333. In that case, Patten LJ stated at [40] that "it is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process". Longmore LJ at [94] identified the key consideration as being whether reference of such matters to arbitration is prohibited as a matter of statute or public policy.

Recent developments in common law jurisdictions mean that certain disputes which were previously prohibited for public policy reasons from being arbitrated, can now be arbitrated if the parties so agree. Examples include agreements to arbitrate divorcing couples' claims for financial relief under pre-nuptial agreements; warring shareholders' disputes and claims for compensation for unfair prejudice in the conduct of company affairs; disputes arising from intellectual property licensing agreements; and disputes arising from conduct which was also subject of regulatory and/or criminal sanction, including anti-competitive transactions.

However, even in arbitration-friendly jurisdictions, it remains the position that criminal and regulatory matters, and those which affect the capacity or legal status of a person (individual or corporate) including bankruptcy or insolvency, are usually not arbitrable. Similarly, disputes about rights or interests in property (real or intellectual) granted by the State cannot be arbitrated, such as land title by registration; patents or trademarks; and other claims invoking statutory relief such as claims under employment, retail insurance policies or consumer legislation.

The issue of arbitrability is more vexed in developing economies such as the UAE and other GCC States where the debates concerning public policy are more fluid but often less transparent and where the competition between evolving private and public interests is much more acute. Some decrees disallow arbitration expressly or impose special pre-conditions before a dispute can be arbitrated. For example, contracts between foreign corporations and a local agent are routinely afforded special protection by law and to reinforce such protection, any disputes arising from these contracts must be resolved by recourse to litigation in the domestic courts rather than by arbitration. Also, traditionally there have been strict limits imposed on the arbitrability of disputes involving State or municipal entities, consistent with the desire to maximise control of foreign trade and investment and of the exercise of public functions.

Arbitrability in the UAE - an issue of UAE (not foreigners') public policy

Arbitrations in the UAE are governed by the provisions found in Chapter 3 of the Civil Procedures Law (Federal Law No. 11 of 1992). These provisions do not apply in the Dubai International Financial Centre which has its own arbitration law. Pursuant to Article 203 of the Civil Procedures Law, for an arbitral tribunal to have jurisdiction to determine the merits of a specified dispute and to issue a valid final award, there must exist a written agreement signed by all of the parties that the dispute be arbitrated. Moreover, even if there exists a contract containing the arbitration clause between each of the parties and duly signed by them, it should still be considered whether the subject matter of the dispute and the claims as formulated are arbitrable.

In this regard, Article 203(1) provides that any dispute which arises over the implementation (performance) of a particular contract may be arbitrated. However Article 725 provides that the compromise or settlement of any dispute (an accord) must relate to permissible subject matters for contracts and not contradict mandatory law or UAE public policy. Thus, UAE law appears to restrict arbitral power to decide only contractual claims, there being no arbitral jurisdiction to decide tortious, delict or statutory claims or to award non-contractual relief. Further, Article 203(4) provides that arbitration is not permissible in matters in which conciliation is not allowed and the Court of Cassation has on many occasions determined that as a matter of UAE law no conciliation is permitted for matters relating to public policy.

The DIFC's Arbitration Law (No. 1 of 2008 as amended) contemplates fewer restrictions than UAE law on the types of disputes and claims which may be arbitrated in the DIFC. However DIFC law still requires much the same analysis to be undertaken to determine whether a dispute is suitable for arbitration or instead whether arbitral proceedings might be invalid or an award vulnerable to be set aside on grounds of conflict with UAE public policy.

Article 41 (2)(b) of the DIFC Arbitration Law provides that an arbitral award may be set aside by the DIFC Court only if:

1. the subject-matter of the dispute is not capable of settlement by arbitration under DIFC Law;
2. the dispute is expressly referred to a different body or tribunal for resolution under this Law or any mandatory provision of DIFC Law; or
3. the award is in conflict with the public policy of the UAE.

This requires consideration of what actually is the public policy of the UAE. The Federal Law of Civil Transactions No. 5 of 1985 (the “Civil Code”) is the platform for all civil and commercial laws in the UAE and governs all contracts. It also addresses public policy. Article 3 of the Civil Code states:

“Public policy 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, circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based, in such a manner as to not conflict with the definitive provisions and fundamental principles of Islamic Shari’a.”

Oft quoted are judicial statements to the effect that 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 ethics laws of the State. However, where a mandatory rule of law does not relate to public policy, within the above meaning, or its purpose is the protection of private rights and interests, there would be no justification for invoking a public policy exception (see judgment of the Abu Dhabi Court of Cassation in Commercial Appeal No. 663/2012 (28 March 2013)).

Meanwhile, Article 733 of the Civil Code states that the following potentially usurious transactions are unequivocally not permitted to be the subject matter of an accord or compromise and are thus not arbitrable.

1. The cancellation of a debt by another debt.
2. The sale of food by way of commutative contract prior to delivery.
3. The deferred exchange of gold against silver and vice versa.
4. Riba al nasia (usurious interest in consideration of the deferment of the payment of a debt).
5. Reducing part of a deferred debt owed by a debtor in consideration of accelerating the date of payment.
6. Reducing the amount of a guarantee on a deferred debt owed by a debtor in consideration of accelerated payment with an increase.
7. An advance involving a benefit.

But the generality of these statements about public policy does nothing to reduce the uncertainty of arbitral jurisdiction in new and developing areas of law. As the legal and social infrastructure of each Emirate matures and internationalises, new legislation proliferates and so the issues of public policy become more complex, and the attitudes to its application more variable. This uncertainty is particularly pronounced in the determination of real estate disputes.

Real Estate Disputes

From the early 2000s developers’ and landlords’ standard form agreements routinely inserted arbitration clauses purporting to cover any type of dispute arising in relation to the contract. This was the result of a lack of confidence in local litigation due to the delays and vagaries associated with the local courts. However, legislation soon caught up to offer a more sophisticated regulatory framework for the Emirates’ principal areas of economic growth. The interpretation of these laws has resulted in some conflicting and confusing decisions regarding the validity of arbitral proceedings and certain awards in this area. Trying to regulate the property boom (and bust) in recent years, the Emirates of Abu Dhabi and Dubai have been particularly active in legislating for the development, sale, purchase and leasehold of real estate.

Arbitral awards dealing with the consequences of non-registration of contracts for the sale of an “off plan” property unit have been declared unenforceable in Dubai on public policy grounds because the subject matter falls outside the realm of conciliation and is not, therefore, capable of settlement by arbitration (Dubai Court of Cassation Property Appeal No. 282/2012 (3 February 2013)). Other attempts to arbitrate

very similar claims to terminate the contract or to adjust the price for non-performance (for example, because the developer has failed to fulfill his obligation to build the property unit in good time) have however been held to be valid and enforceable. In Abu Dhabi it has been decided that arbitration is available for matters relating to property unless the dispute concerns the rules and regulations governing property registration, right of freehold ownership in the Emirate of Abu Dhabi, or the disposal and transfer of land (Abu Dhabi Court of First Instance Commercial Action No. 2847/2013, 12 February 2014).

Escrow Accounts

The issue of arbitrability of claims for recourse against escrow accounts (in which monies are deposited pending completion of a real estate project) and also of claims in respect of cancelled projects, is even more complex.

Article 11(5) of Dubai Law No. 13 of 2008 (regulating the Interim Real Estate Register in the Emirate of Dubai as amended by Law No. 9 of 2009) gave the Real Estate Regulatory Authority (“RERA”) exclusive power to cancel a real estate project upon a reasoned technical report. Subordinate legislation Executive Council Resolution No.6 of 2010 sets out procedures by which RERA can cancel real estate projects. Article 26 of the Resolution provides that if there are insufficient funds in the escrow account to fully refund all purchasers, the developer must pay the short fall to purchasers within 60 days from the date of cancellation of the project, which period can be extended at the discretion of RERA.

Article 27 of the same Resolution provides that if the developer fails to repay purchasers within the period established pursuant to Article 26, then RERA shall take all the required procedures to secure the rights of the purchasers including referring the issue to the competent judicial authorities. Decree No. 21 of 2013 vests jurisdiction in the Special Judicial Committee to hear claims relating to cancelled projects. The relevant judicial authority is now confirmed as the newly established Committee and the Decree expressly excludes the jurisdiction of the national courts.

Arbitral tribunals would have no power to order how matters shall be dealt with by the competent authorities including the Land Department and Special Committee and consequently, it appears that most if not all disputes pertaining to the cancellation of registered real estate development projects, ownership of real estate in Dubai, and recourse to monies held in escrow accounts registered at the Dubai Land Department, require some exercise of State function and thus invoke public policy. Consequently, land contracts in the UAE may not be suitable for arbitration because not all of the relief which might be needed to resolve disputes arising from such contracts can be granted validly by an arbitrator.

Conclusion

In a rapidly evolving economic, social and legal environment the achievement of contracting parties’ desire to resolve their disputes validly by arbitration has depended much upon the way in which the claim is formulated and the precise nature of the relief sought. Therefore, parties transacting in an increasingly regulated market need to choose their pathways to satisfactory dispute resolution carefully because otherwise they cannot be guaranteed an enforceable arbitral award.

Whether the “arbitration game is worth the candle” can be difficult to determine, especially in the absence of a clear statement of jurisdictional policy from the legislators. Unless and until the scope of arbitrable disputes is clarified by decree, it is better to invest some time considering all the available dispute resolution pathways and to choose the most viable, rather than setting off blindly down a familiar alley which may result in a dead end.