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Case Study

Limits to Party Autonomy in Arbitration: Non-arbitrability of Public Policy Matters

Overview

The right of the parties to ultimately determine all procedural and evidential matters has been at the core elemental essence of International Arbitration. Nevertheless, the flexibility for the parties to shape the way of conduct of their arbitration is not without its restrictions. In the recent judgment No. 141 rendered on 29/11/2022, the Dubai Court of Cassation demonstrated how a dispute's arbitrability can be eroded and how it cannot be further conciliated or be subject to arbitration in the event that a violation of a peremptory provision legislated in the country has occurred. In the present case, a dispute has arisen from the deregistration of a transaction concerning the sale and purchase of a land which comes into being an unarbitrable subject matter. The verdict under study marked a key case pursuant which the Court has declined to recognize and enforce a decision of the Court of Appeal vesting an Arbitral Tribunal with jurisdiction over Public Policy matters.

Legal Background

Pursuant to the second (2) provision of Article 4 of the Federal Law No. (6) of 2018 on Arbitration: "*Arbitration is not allowed where matters cannot be submitted to conciliation*", the legislator has explicitly restricted the fundamental principle of Party Autonomy by confirming the existence of sensible matters and types of disputes for which the resolution has been unilaterally reserved to the

domestic Courts notwithstanding any arbitration agreement to the contrary between the parties. In this judgment, the Court has distinguished the “Public Policy” trait of the second provision of Article 11 of the Law No. (13) of 2008 regulating the Interim Real Property Register in the Emirate of Dubai amended by the Law No. (19) of 2020 stipulating that: *“Where a purchaser fails to fulfil his contractual obligations under an Off-plan Sale agreement concluded with a Developer, the following rules and procedures will apply: 2- Promptly upon receipt of the notification and verification that the purchaser is in breach of his contractual obligations, the DLD must: serve a thirty (30) days’ notice on the purchaser requiring him to fulfil his contractual obligations towards the Developer. The notice must be in writing and dated; and must be delivered to the purchaser either in person or by registered mail with acknowledgement of receipt, email, or any other means prescribed by the DLD”*. In view of the fact that the lawmaker has categorized as public policy the subject of registration of transactions involving the purchase of a property, it is without doubt that the reasoning behind such classification remains its significant impact on the contractual stability between parties.

Decision of The Dubai Court of Cassation

With respect to the dispute between the plaintiff and the respondent concerning the deregistration of the land in the Dubai Land Department (DLD) and the unilateral rescission of the purchase and sale agreement, the buyer has filed a lawsuit before the First Instance Court. The case was presented before the Courts requesting rescission of the purchase and sale agreement, ordering the respondent to return the amount settled from the land’s price, and requesting a compensation for the damages suffered by the plaintiff. The latter has dismissed the plaintiff’s claim due to the existence of an arbitration clause. In the same direction, the Court of Appeal upheld the lower Court’s decision, ruling that the domestic Courts had no jurisdiction over the matter and that the case was inadmissible on the basis of the arbitration clause. The Court of Cassation in Dubai held that the question of deregistration of a transaction concerning the sale and purchase of the land property was a matter for the National Courts to decide and hence, a question of jurisdiction to be reviewed by the Courts.

Furthermore, the Court of Cassation has indicated neither the arbitrator with his sole discretion nor the parties have the right to present a Public Policy related matter before the arbitral tribunal. Along these lines, the Court has established an explicit boundary to the parties’ autonomy in arbitration, refraining them from expelling the domestic Courts’ jurisdiction over delicate matters of Public Policy. Moreover, the Court has reasoned that the DLD’s requirement of issuing and serving a written notice to the purchaser urging him to fulfil his contractual obligations within a deadline of (30) thirty days from the notice received from the developer stipulated in the Law No. (19) of 2020 shall in no case be an arbitrable subject matter otherwise a Public Policy violation would occur.

The verdict issued is aligned with the Article (3) of the UAE Civil Code’s denotive elaboration of Public Order providing the following: *“Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari’ah”*.

Correspondingly, the UAE has construed and developed its own formulation of Public Policy in accordance with the country’s core economic, religious, social and political standards that identifies its legal system. The rationale behind the Court’s finding of non-arbitrability of real estate disputes with



regards deregistration issues consists in the fact that all conflicted disputes related to the “*circulation of wealth, rules of private ownership*” comprise matters of Public Policy.

Through this verdict the Court has been able to shed light on the fact that real estate disputes involving deregistration issues belong to public policy. Considering all of the above, the Court has decided to reject the attempt to compel arbitration in such dispute involving federal statutory rights given judicial protection on the grounds of non-arbitrability and Public Policy.

Conclusion

Lastly, despite the prime significance of party autonomy that may overlap the conduct of arbitration, considerable limitations fall within the scope of Public Policy exception. The judgment No. 141 of the Court of Cassation in Dubai is a cornerstone refraining potential public policy violations from occurring. Along the same lines, by rendering such decision, parties to arbitration are being provided with a leeway for evading the Arbitral Tribunal’s jurisdiction. For instance, in the present dispute, notwithstanding the unsettlement price of the sale and purchase contract being an arbitrable matter, the plaintiff succeeded in withdrawing the Arbitral Tribunal’s jurisdiction by underlining a Public Policy breach. That said, a clever party who’s seeking to challenge the arbitration’s jurisdiction for convenience, time saving, or cost-efficiency purposes is entitled to explore the occurrence of Public Policy violations leading to transfer of competence to domestic courts.