

UAE

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**IBA SUB-COMMITTEE ON RECOGNITION AND  
ENFORCEMENT OF AWARDS - Public Policy**

*The UAE Country Report*

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## Introduction

The primary domestic source of law in the United Arab Emirates (UAE) relating to arbitral proceedings is contained in articles 203 to 218 of the Federal Law number 11 of the year 1992 on the UAE Civil Procedure Code (CPC). Chapter four of Book Three of the CPC regulates the execution of foreign judgments, orders and instruments, which is applicable *mutatis mutandis* to arbitral awards by virtue of Article 236 of the same law. Moreover, Article 238 of the CPC sets a requirement for judges to comply with the terms and conditions of the relevant international conventions.

The legislature is currently considering promulgating a UAE federal law on arbitration. Apart from the CPC, and on an emirate level, the Dubai International Financial Centre (DIFC) promulgated the arbitration Law number 1 for the year 2008, which governs arbitration proceedings in the DIFC. The DIFC arbitration law is in line with the UNCITRAL Model Law on Arbitration.

The UAE acceded to the New York convention on the enforcement of arbitral awards (New York Convention) on June 13, 2006 and it entered into force on November 19, 2006. Whilst the New York Convention is the most common and tested instrument used in practice for the recognition and enforcement of international awards in the UAE, the UAE is also a member to other bilateral conventions as well as multilateral conventions that could be of relevance to arbitration and enforcement including for example (i) the 1983 Riyadh Convention on the Judicial Cooperation between the States of the League of Arab States, which entered into force in the year 1999, and (ii) the 1996 Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications.

## The Ratification of the Award as a Prerequisite to Enforcement

It should be noted that in addition to the recognition of the arbitral award, its ratification (or recognition) is a condition precedent for its enforcement in the UAE. In other words, ratifying an award is a condition *sine qua non* to requesting its enforcement and obtaining a writ of execution. Enforcement is therefore a two stage process. Requesting a court to ratify an award for execution in the UAE is to be filed in the same manner as any ordinary procedure for filing an action before the courts of the UAE. In such process, the courts are not supposed to review the merits of the award. On the contrary, the review is limited to confirming that the award complies with the relevant procedural requirements such as the non-violation of public policy.

## The Concept of Public Policy in the UAE

In order to properly understand the origin of public policy under the UAE laws, reasonable consideration must be given to a number of texts which constitute the grounds on which the concept of public policy in the UAE relies. First and foremost, Article 2 of the UAE Civil Transactions Law, being Federal Law No. 5 of 1985, as amended, (the "Civil Code") which stipulates that the "*rules and principles of Islamic Jurisprudence (fiqh) shall be relied upon in the understanding, construction and interpretation*" of UAE law.

Second, Article 3 of the same law which sets out a broad interpretation of public order so that it “include[s] 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 individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia.”

Third and more specific to arbitration, Article 203 of the CPC which, as a general rule, provides that as a matter of public policy, arbitration shall not be permissible in matters in which settlement is not permissible. These include, but are not limited to, bankruptcy,<sup>1</sup> labour disputes,<sup>2</sup> commercial agency agreements,<sup>3</sup> disputes relating to deferred debt,<sup>4</sup> issues such as forgery and criminal activity.<sup>5</sup>

Finally, Article 5 of the New York Convention sets the following principle according to which the host state can refuse enforcement on public policy grounds:

- The existence of an invalid arbitration agreement under the parties’ agreed governing law or under the law of the country where the award was made (i.e.: the laws of the UK) or that a party was under some incapacity;
- The party against whom the award is invoked was not given proper notice of the arbitration, or was unable to present his case or there has been a violation of due process;
- The award fails to comply with the scope of the arbitration agreement and deals with a dispute that does not fall within the terms of the submission to arbitration;
- There have been irregularities affecting the composition of the arbitral tribunal;
- If the award has not yet become binding on the parties, or if it has been set aside or suspended by the courts of the seat (i.e.: the courts of the UK);
- If the subject matter of the dispute is non arbitrable under the UAE laws, meaning that it cannot be settled by arbitration; and
- If the recognition or enforcement of the award would be contrary to the UAE public policy provisions.

### **Public Policy as Defined by Domestic Courts**

In recent years, the UAE definition of public policy changed back and forth i.e. from a broad to a narrow interpretation of public policy or vice versa particularly when it comes to the resolution of property disputes. Even if there is a valid contract between the parties and a valid arbitration clause

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<sup>1</sup> Federal Supreme Court Criminal Appeal No. 493 of 18 dated 26 October 1997 in which it was held that bankruptcy rules form part of UAE’s public policy due to their connection to UAE’s credit system.

<sup>2</sup> Federal Law No. 8 of 1980 (as amended), the Labour Law. See also Dubai Court of Cassation Labour Appeal No. 123 of 2009, dated 15 March 2010.

<sup>3</sup> Federal Law No. 18 of 1981 (as amended), the Commercial Agency Law, Art 6.

<sup>4</sup> Civil Transactions Law No. 5 of 1985 as amended by Law No. 1 of 1987, Art 733.

<sup>5</sup> Which must be referred to the court and the arbitration must be suspended until the court has reached a final decision. See Civil Procedures Law No. 11 of 1992, Art 209(2).

contained therein, it should always be considered whether the subject matter of the dispute and the relief sought are arbitrable and whether certain procedural requirements have been followed. If such movements fail to be taken into account, the recognition and enforcement of the arbitral award may be refused, particularly in a jurisdiction such as the UAE where courts often apply domestic standards of public policy to set aside or refuse the enforcement of foreign awards.

The lack of comprehensive legislative platforms to support the enforcement of foreign awards and the inexperience of some of the local judiciary in international arbitration, the UAE courts, by relying on strict provisions of the CPC - which remain applicable even though the UAE is a member of the New York Convention - have at times been reserved in their application of the terms of the Convention to the enforcement of foreign arbitral awards. As a consequence, the courts have been influenced by procedural grounds, which are commonly invoked in the ratification process of domestic awards under the applicable provisions of the CPC, for setting aside foreign arbitral awards.

### **Enforcement of Arbitral Awards - Public Policy**

While there are many favourable decisions, the fact that there is no doctrine of binding precedent in the UAE makes it difficult to predict with certainty the scope of its public policy application in the UAE.

Both substantive issues and procedural laws are covered by public policy and should strictly conform thereto. On more than one occasion, the courts have exercised their discretion and refused the enforcement of an award involving a foreign party due to a domestic procedural irregularity outlined in the CPC, as was the outcome of the Bechtel case.<sup>6</sup> In this instance, the Dubai Court of Cassation refused to enforce an arbitral award rendered in favour of the claimant on the ground that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.<sup>7</sup>

Similarly in the Abu Dhabi Court of Cassation No. 924 of 2009, the appellant sought to have the award set aside for failure of the arbitrator to swear in the witnesses in accordance with Article 211 of the CPC. In this instance however, the court determined that while unsworn testimony is void, the arbitral award did not rely on the unsworn witness' testimony and as such, the arbitral award in question remains valid. Hence, the challenge was ruled as baseless and the appeal was dismissed accordingly. This judgment slightly limits the scope of Article 211 of the CPC and demonstrates the court's "pro-enforcement" position since it did not set aside an entire award due to a procedural oversight by the arbitrator.

The Abu Dhabi Court of Cassation in Case No. 55 of 2014 held 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

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<sup>6</sup> International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai, Dubai Court of Cassation, case no. 503/2003, dated May 15, 2004.

<sup>7</sup> International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai, Dubai Court of Cassation, case no. 503/2003, dated May 15, 2004.

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.*”<sup>8</sup> As such, they cannot be a 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 settlement is not permitted in matters relating to public policy and since arbitration is not permitted in matters in which conciliation/settlement is not permissible,<sup>9</sup> 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 on the register since this would be contrary to public policy.

The ruling of the Court of Cassation in the case of Bayti Real Estate Investment Company LLC v Dynasty Zarooni Inc<sup>10</sup> has been interpreted by a number of practitioners to mean that any dispute relating to property ownership would fall within ‘rules of individual ownership’ and so would fall under the ambit of public policy considerations and thus not subject to arbitration. However, the judiciary have since distinguished this case and limited the application of ‘public policy’ on the basis that it applied only to issues relating to the disposition and registration of ownership.<sup>11</sup>

Moreover, the Dubai Court of First Instance in its ruling dated January 12, 2011, in the Maxtel International FZE v Airmec Dubai LLC (the “Maxtel Case”), decided to enforce two arbitral awards and rejected the debtor’s request to refuse enforcement and annul the awards based on procedural grounds including (i) the lack of capacity to sign the arbitration clause on behalf of the respondent, and (ii) the failure of the arbitrator to comply with the requirement of oath-taking for witnesses in the UAE. The court rejected said arguments and held that “*the court’s supervisory role when looking to recognize and enforce a foreign award is strictly limited to ensure that it does not contradict with Federal Decree which the UAE acceded to the New York Convention on the recognition and enforcement of foreign awards and satisfies the requirements of Articles 4 and 5 of the Decree and the New York Convention.*” The Maxtel Case decision by the Court of First Instance was appealed twice. In the first appeal, in its ruling dated February 22, 2012, the Court of Appeal confirmed the ruling of the Dubai Court of First Instance. In the second appeal, in its ruling of October 18, 2012, the Court of Cassation confirmed the ruling of the Court of Appeal.

Unlike the pro-enforcement approach followed by the courts in the Maxtel Case, the Dubai Court of Cassation in its ruling dated August 18, 2013, confirmed the Court of First Instance ruling and the Court of Appeal ruling with regard to the non-enforcement of an ICC foreign award in a case between a French company and the Government of Sudan (the “Canal de Jonglei Case”). The Court of Cassation affirmed that the lower courts were correct in their refusal of enforcement of the Canal de

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<sup>8</sup> Abu Dhabi Court of Cassation Commercial Appeal No. 55 of 2014 dated April 3, 2014.

<sup>9</sup> Civil Procedures Law No. 11 of 1992, Article 203(4).

<sup>10</sup> Dubai Court of Cassation Case No.14 of 2012, dated September 16, 2012.

<sup>11</sup> Civil Transactions Law No. 5 of 1985 as amended by Law No. 1 of 1987.

Jonglei award given that the UAE courts lacked jurisdiction. The lack of jurisdiction was based on the fact that the case was brought against a party having no domicile or place of residence within the UAE, no branches in the UAE and the obligations are not related nor carried out or concluded in the UAE. The court stated in its decision that “*UAE courts have no jurisdiction over cases against an alien who maintains no domicile or residence in the UAE unless the case involves an obligation concluded, performed or was supposed to be performed in the UAE or, in the case of a foreign juridical person whose head office is abroad, it has a branch in the UAE and the dispute relates to a matter pertaining to that branch.*” The court also stated that the issue of *international jurisdiction, or lack thereof, is a matter of public policy*. The findings of the courts with regards to the Canal de Jonglei Case were criticized heavily by the legal community in the UAE.

In a very recent ruling dated November 23, 2014, the Dubai Court of Cassation confirmed the Court of Appeal’s decision and granted enforcement of a foreign arbitral award rendered in Germany according to the ICC Rules rejecting *inter alia* (i) the argument that distribution agreements are non-arbitrable according to the UAE laws which is a matter of public policy, and (ii) the arbitral proceedings should have been conducted in Paris, France. The court granted enforcement of the award and denied that the arbitrability of distribution agreement is a matter of public policy.

## **Conclusion**

The importance of a pro-arbitration attitude by UAE Courts is crucial for the development of the legal system in the UAE as well as the development of the UAE being a business and financial hub in the Middle East region. It is evidenced that the notion of public policy is developing constantly in the UAE. Different judgments reflect that after acceding to the New York Convention, the notion of public policy has been interpreted in a more international manner by UAE courts. In other words, the UAE courts differentiate between international and domestic arbitrations when deciding on challenges that are related to public policy. Whilst in a domestic award a court may hold that witnesses should have taken the oath or awards should be signed in every page, the courts will not -with some exception- consider similar arguments in international awards. The recent court decisions relating to enforcement of arbitral award are assuring. However, further awareness is required to insure consistency in the jurisprudence of the UAE courts with regards to the interpretation of public policy.

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*THE UAE COUNTRY REPORT - TABLE OF CASES*

Identification of the decision	Summary of the public policy arguments	Substantive	Procedural	Enforcement denied	Enforcement accepted
Dubai Court of Cassation Case No: 180/2011	<ul style="list-style-type: none"> <li>• Dispositions of real estate units sold on plan must be registered with the preliminary land registry.</li> <li>• Failure to register should invalidate the transaction and the advance paid should be returned.</li> </ul>		Yes	Yes, on the basis that registration with preliminary land registry is a matter of public policy and hence not arbitrable.	
Dubai Court of Cassation Case No: 14/2012	<ul style="list-style-type: none"> <li>• Dispositions of real estate units and related registration of the property in the preliminary land registry and interpretation of Dubai Law No: 13 of 2008 are matters of public policy and related dispute cannot be resolved through arbitration.</li> </ul>		Yes	Yes, on the basis that interpretation of Dubai Law No: 13 of 2008 is a matter of public policy and hence not arbitrable.	
Abu Dhabi Court of Cassation Case No: 663/2012	<ul style="list-style-type: none"> <li>• Disputes relating to transaction of property are matters of public policy;</li> <li>• In the circumstances where the tribunal exceeds his authority, the award should be set aside.</li> </ul>		Yes	Transaction and dispute relating to properties is one of the public policy elements and not arbitrable.	

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	<ul style="list-style-type: none"> <li>If the parties agreed to arbitrate a dispute involving both matters of capable and incapable of conciliation, the Court shall have jurisdiction to hear the disputes.</li> </ul>				
Dubai Court of Cassation Case No: 282/2012	<ul style="list-style-type: none"> <li>The transaction involves property and hence not arbitrable on public policy grounds.</li> <li>The Claimant argued that the remedy sought was limited to termination of the contract and this is not a claim to invalidate the contract on the basis of not being registered with the land register.</li> </ul>		Yes		Yes, claim for termination and damages are arbitrable when the remedy claimed does not relate to invalidity on the basis of Article 3 of Dubai Law No: 13 of 2008.
Abu Dhabi Court of First Instance case No: 2847/2013	<ul style="list-style-type: none"> <li>The transaction involves property and hence not arbitrable on public policy grounds.</li> </ul>		Yes		Yes, claim relates only to interests of private parties and did not relate to a public interest of a political, social or economic nature concerning the system of society

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					and did not violate the rules of public policy.
Abu Dhabi Court of Cassation Case No: 55/2014	<ul style="list-style-type: none"> <li>• Circulation of wealth and the rules of individual ownership of property are matters of public policy which cannot be subject to conciliation, pursuant to Article 3 of the Civil Law.</li> </ul>		Yes		Yes, on the basis that the dispute is not related to registration and non-registration of the transaction but merely a dispute related to construction and delivery of the unit.
Dubai Court of Cassation Case No: 320/2013	<ul style="list-style-type: none"> <li>• All property transactions should be registered with the relevant authorities in order for it to be valid and enforceable.</li> </ul>		Yes	Yes, on the basis that matters of public policy are not arbitrable.	
Dubai Court of Cassation Case No: 156/2013	<ul style="list-style-type: none"> <li>• The Courts should recognize awards even though the Respondent is not domiciled.</li> </ul>		Yes	Yes, on the basis of lack of jurisdiction and public policy.	
Dubai Court of	<ul style="list-style-type: none"> <li>• The Courts should recognise the award and the arbitrability of distribution</li> </ul>		Yes		Yes, on the basis

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Identification of the decision	Summary of the public policy arguments	Substantive	Procedural	Enforcement denied	Enforcement accepted
Cassation Case No.: 434/2013	agreements is not a matter of public policy.				that the arbitrability of distribution agreements is not a matter of public policy.