Obstacles in Ratifying an Arbitration Award

Challenging the ratification of an Arbitration Award before the Dubai Court

In order for an arbitration award to have full effect or enforcement, it must be ratified by the Dubai Court. The successful party in the arbitration proceedings is required to initiate proceedings before the Dubai Court of First Instance requesting the ratification of the award rendered by a sole arbitrator or Arbitral Tribunal. The unsuccessful party in the arbitration proceedings will often file a counter claim requesting the Dubai Court to set aside the Final Award and state its grounds for such a request.

By permitting the unsuccessful party to file a counterclaim to set aside an arbitration award, this raises numerous obstacles in the ratification process, which often does result in the Dubai Court setting aside an arbitration award. The obstacles of ratifying an arbitration award include counterclaims where the arguments for setting aside the award include procedural errors or public policy.

Procedural Errors

The Arbitral Tribunal is required at all times to adhere to procedural requirements as laid out by the applicable arbitration rules and the UAE Law. In the event that any procedural rule is overlooked, which affects the rights of either party, this will give the Court grounds to set aside an arbitration award.

In a recent judgment issued by the Dubai Court of Cassation, in Cassation no. 472/2014 (Real Estate), the Court of Cassation overturned an Arbitration Award on the grounds that the arbitrator failed to allow the Defendant to submit documents relating directly to its defence at a hearing, despite the proceedings being ongoing. By failing to adhere to a procedural requirement that each party shall have the opportunity while the proceedings are ongoing (before closing proceedings to issue the Final Award), the arbitration award was subject to nullification.

Matters which are procedural in nature are expressly provided for in legislation. Article 212 of the Civil Procedures Law confirmed a party's right to submit its defense and accompanying documents before the proceedings are closed. The Arbitral Tribunal in the above mentioned matter failed to consider this procedural requirement thereby rendering the Final Award null and void. Additionally, it is important to take into account Articles 73.1 and 78(3)(c) of the Civil Procedures Code (as amended) which state respectively as follows:

> Article 73.1 -" *The Court may allow litigants, during the case proceedings to submit documents or defenses or new means of evidences, or to amend their demands or to submit incidental demands which they are not able to submit to the Case Management Office. The Court may not accept the submission of documents if there is proof that the party could have submitted the documents to the Case Man agement Office*."
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> Article 78(3)(c)- " *The Court shall hear the pleadings of the Parties and the defendant shall be the last one to speak*".

Additionally, there are instances where an unsuccessful party in arbitration proceedings is able to cancel an arbitration award in the event the Arbitral Tribunal fails to adhere to

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Article 216 of Civil Procedures Law in relation to the time limit to render the Final Award. There have been instances where the Parties have expressly agreed that their consent must be sough on each request for an extension of time, failure of which puts the Arbitral Tribunal in breach of procedure. There have been some instances where time limits have lapsed and the Arbitral Tribunal have been unable to obtain a retrospective extension, ther eby ensuring that any award issued would be void.

Public Policy

Matters involving public policy cannot be arbitrated under UAE law. The realms of public policy include dealing with matters relating to the exercise of authority by Government Departments, registration in the Interim Real Estate Register and transfer of land.

Article 3 of the UAE Civil Code provides:

> *"Public order shall be deemed to include...matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individual ownership and other rules..."*

Article 203(4) of the Federal Law No.11 of 1992 UAE Civil Procedures Law ("Civil Procedures Law") provides:

> *"It shall not be permissible to arbitrate matters in which conciliation is not permissible".*

Conciliation is not permissible [meaning that these matters cannot be waived, amended, cancelled or resolved by the consent of the Parties such as] in respect of matters of public policy /order.

On 12/2/2012, the Dubai Cassation Court made the following determinations in case no. 180/2011 (Real Estate).

i. Reconciliation to a dispute is not permitted in matters which relate to the UAE's public order and that Article (203)(4) of the UAE Civil Procedures Code stipulates that "arbitration shall not be permissible in matters where reconciliation is not permissible".

ii. "[T]he disposition of units sold off plan without compliance with Article (3) of Law no. (13) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai which provides that these units must be registered in the Interim Registry in the Emirate of Dubai may not be the subject matter of arbitration simply because this [the disposition without registration] contravenes public order. As such, if a dispute that is subject to Article (3) of law no. (13) of 2008… is brought before an arbitrator and if the arbitrator issues an award in that dispute, such award will be null and therefore the Court shall decide the same issue [issue in dispute], at its own discretion, as it [is a matter which] relates to public order".

Conclusion

It can be seen from the above examples that there remain numerous options for challenging an arbitration award. The majority of overturned awards are a result of

arbitrators who are not well versed in UAE arbitration law and procedure and interpret the laws in a manner similar to their home jurisdictions.

It is important to consider the fact that in the UAE legal system, arbitration is an exception jurisdiction and a provision to refer a matter to arbitration must be expressly provided for in an agreement. Whereas, the Court has an overriding jurisdiction as if no dispute resolution method is indicated in an agreement, disputes are automatically referred to the Court as the UAE Courts have full jurisdiction to hear all the disputes arising between the concerned Parties. Additionally, in the event that a dispute is referred to the Court despite the existence of a valid arbitration clause, the Courts will not automatically refer the dispute to Arbitration. The Respondent to the dispute must raise an objection in the court proceedings and reserve his rights to arbitration. Failure to object to court proceedings when there is a valid arbitration clause and failing to reserve rights in respect of arbitration will ensure that the Court shall have the jurisdiction to proceed with hearing the dispute, irrespective of the arbitration clause pursuant to Article (203)(5) of the Civil Procedures Law.

In the UAE, arbitration is an exceptional jurisdiction and its scope of authority is limited by the local Courts. While not common, the Arbitral Tribunal's authority can be overridden and superseded by the Court. Ratification or enforcement of an award does not commence at the Execution Court, but rather at the Court of First Instance, and can proceed to the Appeal Court and the Court of Cassation. The basic fact that an arbitration award must be ratified by the Court in order to become enforceable is evidence of the exceptional nature of arbitration. As arbitration is an exceptional jurisdiction, an Arbitral Tribunal cannot exceed its scope of powers, and must adhere to each procedural requirement in a strict manner, otherwise, the arbitration award shall be subject to nullification before the Court.

In order to counteract this problem, a unified Arbitration Law must be implemented in order to ensure that the UAE is at the forefront of alternative dispute resolution methods, and arbitration must be given the independence to function with respect to the enforcement of an award without the currently necessary ratification process and involvement of the Court. The current practice of narrowly interpreting the arbitration clause should cease and arbitration must be considered as a valid method of alternative dispute resolution. While enforcement may have to remain within the Court's power, an application for enforcement of the arbitration award should be filed rather than the current ratification process. The role of the enforcement Court should be to determine matters limited to public policy and procedural errors in the arbitration proceedings only. This will take the UAE one step closer to becoming an international arbitration hub.

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