Claim No: ARB 004/2022
ARB 005/2023

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE?COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MIRMA

Claimant in ARB-004-2022/Defendant in ARB-005-2023

and

MOBAL

Defendant in ARB-004-2022/Claimant in ARB-005-2023

ORDER OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Judgment of H.E. Justice Shamlan Al Sawalehi dated 8 February 2023 in ARB-004-2022 (the "Judgment")

AND UPON the Claimant in ARB-004-2022 ("Mirma") filing an Appeal Notice dated 1 March 2023 seeking permission to appeal against the Judgment (the "Permission Application")

AND UPON the Defendant in ARB-004-2022 filing a Respondent's Notice to the Permission Application dated 26 May 2023, and applying for a security over costs as a condition to the appeal (the "Appeal Conditions Application")

AND UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 20 March 2023 in ARB-005-2023 recognising an arbitral award (the "Order")

AND UPON MIRMA's Application No. ARB-005-2023/1 dated 13 April 2023 seeking to set aside the Order (the "Set Aside Application")

AND UPON the Claimant in ARB-005-2023 ("Mobal") filing Application No. ARB-005-2023/2 dated 26 May 2023 seeking permission to file a counterclaim; and security over costs (the "Counterclaim Application" or the "Adjournment Conditions Application")

AND UPON hearing the parties at the hearing listed before me on 20 June 2023

AND UPON reviewing the case file

IT IS HEREBY ORDERED THAT:

1. The Permission Application is dismissed, and Mirma shall pay MobalMobal its costs of the application on the standard basis, to be assessed by the Registrar, if not agreed.

2. The Appeal Conditions Application falls away. There shall be no order as to costs.

3. The Appeal Conditions Application falls away. There shall be no order as to costs.

4. The Adjournment Conditions Application falls away. Mobal shall pay Mirma its costs of the application on the standard basis, to be assessed by the Registrar, if not agreed.

5. The Counterclaim Application is dismissed, and Mirma shall pay Mobal its costs of the Counterclaim Application on the standard basis, to be assessed by the Registrar, if not agreed.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 12 September 2023
At: 3:30pm

SCHEDULE OF REASONS

1. This decision disposes of applications made in two related claims, ARB-004-2022 and ARB-005-2023. Mirma ("Mirma") is the Claimant and Mobal ("Mobal") is the Defendant in ARB-004-2022 and the parties are the other way around in ARB-005-2023.

2. In ARB-004-2022, Mirma asked the Court to set aside an arbitral award dated 2 November 2021 (the "Main Award"). In a judgment dated 8 February 2023 (the "Judgment"), I dismissed that claim. In ARB-005-2023, Mobal asked the Court to recognise and enforce the Main Award in the DIFC. By an Order dated 20 March 2023, I granted that claim (the "Recognition Order"). Five applications have ensued from these decisions:

1) in ARB-004-2022:

i. Mirma applies for permission to appeal the Judgment (the "Permission Application"); and

ii. Mobal applies for an order that any permission be conditional on Mirma providing security for the net sums due under the Main Award (the "Appeal Conditions Application"); and

2) in ARB-005-2023:

iii. Mirma applies for an order setting aside the Recognition Order (the "Set Aside Application"), but asks the Court to adjourn the application until the conclusion of any appeal in ARB-004-2022;

iv. Mobal applies for an order that any adjournment be conditional on Mirma providing security for the net sums due under the Main Award (the "Adjournment Conditions Application"); and

v. Mirma applies for permission to advance a counterclaim for enforcement of another award (CC4) made in the same arbitration proceedings (the "Counterclaim Application" and the "CC4 Award").

The Permission Application

3. Mirma applies for permission to appeal the Judgment on five grounds. Grounds 1 to 3 concern the "detention claims," discussed at [46] to [80] of the Judgment; Ground 4 concerns a public policy objection to the Main Award, discussed at [81] to [108]; and Ground 5 concerns the "wooden dhow claim," discussed at [30] to [45].

Ground 1

4. The first ground of the proposed appeal relates to [47] to [56] of the Judgment.

5. As explained at [46], the detention claims were comprised of claims in contract and in tort. As part of its analysis in relation to the contractual detention claims, the tribunal found that Mirma had "directly controlled" the detention. Mirma's case is that the tribunal's finding of "direct control" over the naval detention amounted to a conclusion that Mirma had exercised state authority. As a consequence, Mirma says, the tribunal had no jurisdiction over the detention claims generally-that is, over both the contractual and tort detention claims-and the tribunal's disposals of those claims were beyond the scope of the submission to arbitration for the purposes of Article 41(2)(a)(iii) which provides, as material, that "[a]n arbitral award may be set aside by the DIFC Court . if . the party making the application furnishes proof that . the award . contains decisions on matters beyond the scope of the submission to Arbitration." At first instance, I rejected this case. In this proposed appeal, Mirma says I erred in law in doing so.

6. At the outset, I think it is helpful to be clear about what it is that the tribunal found Mirma had "directly controlled": that was "the detention," which was "an event" (see, for example, the Main Award at [930] and [1031]). While in the Permission Application Mirma identifies the object of Mirma's direct control consistently with this finding (see, for example, its skeleton argument in support of the proposed appeal at [20] and [22]), its skeleton argument features other characterisations which, in my view, are inconsistent or at least not clearly consistent with it.

7. At [20] of its skeleton argument, Mirma says that the tribunal had found that "[Mirma controlled] the state's naval detention" (emphasis added; see also [25]). While strictly speaking this characterisation is, in my view, consistent with the tribunal's finding, by referring to the detention as the state's detention, I think any line between what might conceivably be Mirma's direct control of the detention on the one hand and the Navy's execution (see the Main Award at [911] and [922]) / order (ibid. at [930], [949], [1031] and [1037]) / carrying out (ibid. at [1044] and [1056]) of the detention on the other-if the tribunal had intended such a distinction-is potentially blurred. I have not been shown a statement in the Main Award that refers to the object of Mirma's direct control as being the State's or any other entity's event.

8. At [22] of its skeleton argument, Mirma says that the tribunal found that "[Mirma] controlled the actions of the Iraqi Navy" (emphasis added). I do not think it can be said this characterisation is consistent with the tribunal's finding. Its inconsistency with that finding is demonstrable by simply asking what question the tribunal was determining. As the tribunal put it in the heading before [1017] of the Main Award, that was "Whether the Detention of [Mobal's] Vessels Was an Event Directly Controlled by [Mirma]" (emphasis added). The same issue is reflected in the heading before [908]. The tribunal was looking for an event, not actions, controlled by Mirma.

9. In my judgment, the impression given by a statement that A controlled the actions of B is that A was in control of B. But at most the tribunal's finding, transposed into this analogy, seems to be that A controlled an event which B executed / ordered / carried out. The tribunal did not state that it considered, so far as I am aware, and staying with the analogy, that A controlled B itself. And yet at [20] of the skeleton argument we find a further characterisation of the tribunal's finding of Mirma's "direct control" that states exactly that (see also [22]). Mirma states there that the tribunal ruled that Mirma had "direct control over the *Iraqi Navy*" (emphasis added).

10. Mirma's characterisations of the tribunal's finding in relation to the object of Mirma's direct control trace a spectrum, in my judgment, with the *detention qua* event at one extreme, the *Iraqi navy* at the other, and the actions of the *Iraqi navy* somewhere between them. I think the further one moves away from the detention extreme and towards the *Iraqi navy* extreme, the more likely it is that Mirma's direct control was an exercise of state authority. If navy acts are state acts, then one would expect that direct control of either the navy or its acts might likewise constitute a state act. If, on the other hand, it is said that A directly controlled an event that was executed / ordered / carried out by the navy, the position is, in my view, much more ambiguous, and it would have to be asked what was meant by "direct control" before a conclusion could be arrived at on the question whether A's direct control constituted a state act. In my view, this ambiguity is betrayed by Mirma's submissions which variously characterise the object of Mirma's direct control as being an event, actions or an actor.

11. The ambiguity is resolved, in my judgment, by determining what the tribunal meant when it held that Mirma "directly controlled" the detention. This exercise, which I undertook in the Judgment, and particularly at [55], is useful, moreover, for another reason: even if it was established that direct control of the detention necessarily entailed the exercise of state authority, it is possible that the tribunal was wrong to conclude, on the basis of the supporting findings, that Mirma directly controlled the detention. And if that conclusion was wrong, I do not see that there would be

justification for carrying it across into the jurisdiction analysis, as Mirma says the tribunal should have done and now asks the Court to do. Instead, criticism of the liability analysis would be justified taking the jurisdiction analysis as a starting point rather than the other way around-albeit that any such criticism would no doubt amount to a criticism of the merits of the Main Award and therefore fall outside of Article 41 of the DIFC Arbitration Law. The important point, in my view, is that investigating what the tribunal meant when it held that Mirma had "directly controlled" the detention is an indispensable exercise.

12. With those preliminary observations made, I will address each of the components of Ground 1. Each italicised and indented heading below is based on a proposition made by Mirma.

The tribunal's finding that Mirma "directly controlled" the detention amounted to a finding that Mirma had exercised state authority

13. In my judgment, Mirma has failed to demonstrate why direct control of the detention *per se* much less direct control of the detention as explained by the tribunal amounts to a finding that Mirma had exercised state authority. Mirma's case is limited to reliance on a decision of the Rotterdam District Court in proceedings initiated by Mobal against the Republic of Iraq and in particular the following statement from that decision: ". Whatever form the Navy's supervision took, all cases involve actions that by their nature cannot be considered anything other than typical state actions. Such conduct is typically that of a sovereign state." In my judgment, however, and to the extent this statement should apply, it is distinguished, as the Dutch court was commenting on the *actions* of *the navy*, not on a third party's direct control of an event that was executed / ordered / carried out by the navy.

14. I explained in the Judgment, and in particular at [55] and [56], why I considered that Mirma had failed to establish its proposition that the tribunal had necessarily concluded that Mirma had exercised state authority. At the hearing of the Permission Application, leading counsel for Mirma submitted that a different judge on a different day might think that there is no practical difference between Mirma providing information that Mobal's vessels were not allowed to leave the zone on the one hand and Mirma ordering the detention on the other. Counsel submitted that that that was a distinction with no difference.

15. It is clear from the Main Award, however, that the tribunal intended to distinguish between the two. At [919], for example, the tribunal noted that it was not convinced that a certain piece of evidence which Mirma failed to produce would show, as Mobal had alleged, that Mirma had "ordered" the detention; instead, it would have likely showed that Mirma had "stated" that Mobal's vessels were not allowed to leave the zone. Indeed, the distinction is clearer yet in [923] where the tribunal implicitly but no less clearly distinguished between Mirma's information that Mobal's vessels were not allowed to leave on the one hand and the Iraqi navy's decision whether or not to detain them on the other: "The Arbitral Tribunal is of the opinion . that [Mirma] directly influenced the decision whether the Iraqi Navy detains or releases [Mobal's] vessels." In my judgment, if Mirma's provision to the Iraqi navy of information that Mobal's vessels were not allowed to leave the zone amounted to an order for the detention which in turn amounted to a state act, the Main Award itself does not support that proposition and it was incumbent upon Mirma to find support for it in evidence or authorities. I respectfully do not think that Mirma has done so.

The tribunal's finding that Mirma "directly controlled" the detention necessarily required the tribunal to adjudge the acts of the Iraqi state

16. Mirma proffers three examples in its skeleton argument of the tribunal allegedly adjudging the acts of the Iraqi state. The tribunal stated that the Iraqi navy (i) "ordered the detention" and ([930]) (ii) "ultimately denied [Mobal] the permission to leave" ([1044]). Mirma states that the tribunal also found that (iii) the Iraqi navy "created a hazard for the safety of [Mobal]'s personnel" through the existence of the naval detention ([937]). I think the third example in fact mischaracterises the tribunal's finding. The full passage states, "the Arbitral Tribunal is of the opinion that the detention created a hazard for the safety of [Mobal]'s personnel" (emphasis added). The detention, as I have emphasised, was an event. If a finding that the detention created a safety hazard for the safety of Mobal's personnel necessarily required the tribunal to adjudge the acts of the Iraqi state, that has not been explained.

Putting the third example to the side, it is sufficient to give a fuller citation of the passage cited from [1044] to demonstrate that the other two examples are not incidents of the tribunal adjudging the acts of the Iraqi state: "The Arbitral Tribunal considers that *it is not disputed* that it was the Iraqi Navy which ultimately denied [D] the permission to leave" (emphasis added). Indeed, at [911], the tribunal stated that, "*It is thus undisputed* and established that it was the Iraqi Navy who did not allow Claimant's vessels to leave the site" (emphasis added). It was agreed between the parties that it was the navy that carried out the detention. In my view, to adjudge is to perform an evaluative exercise. Where a fact is agreed, it is not clear to me how taking that fact as a starting point might amount to adjudging.

The tribunal's finding that Mirma was liable for the detention leads to the conclusion that the Iraqi navy was not justified in its actions and acted wrongfully

18. Mirma relies on two quotes from the Main Award which it contends show the tribunal adjudicating on the Iraqi Navy's actions: (i) ". there was no security concern with regard to the attempted leave of the HB6 which would have justified the Navy to stop the HB6" ([1028]) and ". in light of the absence of a security concern or any other reason that would have justified the Iraq Navy to prevent the HB6 from leaving." ([1031]). Both, however, are taken out of context. This can be shown by putting the quote from [1028] in its context, beginning with the previous paragraph:

> "1027 As with regard to [Mobal]'s Claim No. 6, the Arbitral Tribunal notes that the evidence on file, in particular the witnesses heard at the Hearing, confirm that [Mirma] informed the Iraqi Navy that [Mobal]'s vessels had no permission to leave the MEZ because of a disagreement between the Parties regarding the Schedule (see above, paras. 908 et seqq.).
>
> 1028 The documentary evidence confirms on top that there was no security concern with regard to the attempted leave of the HB6 which would have justified the Navy to stop the HB6."

19. The tribunal was evidently not using the word "justified" to mean "lawful" but to mean "reason," as Mobal argues. The tribunal was simply stating that because there was no other reason for the Iraqi Navy's actions, it could conclude that as a matter of fact it was Mirma's communication that caused the Navy's acts. The tribunal was entitled to find facts as to what caused the Iraqi Navy to detain D's vessels. The tribunal expressed

no view on whether the Iraqi Navy's actions were unlawful.

The Court conflated the tests for the contractual and the tort claims

20. Mirma criticises the Judgment for "conflating" the contractual test of "direct control" relevant to clause 23.3 with the issue of causation that the tribunal considered in the context of the tortious claim. Mirma gives as an example the following statement from [50] of the Judgment: "In my judgment, even if a naval blockade is a state act, it does not necessarily follow that causing one is" (emphasis added). C also correctly highlights that in my analysis I referenced and relied upon [1048] to [1051] of the Main Award which is to say I referenced and relied upon the tribunal's tort analysis.

21. This distinction between the contractual and tort claims does not appear to have been present in Mirma's case at first instance. In Mirma's skeleton argument at that stage, for example, the following was stated:

> "53. . the tribunal's finding that C *directly controlled* the Iraqi Navy's blockade was essential to the success of the detention claims.
>
> 56. In this analysis [at [1049] of the Main Award, that is, *as part of the tort analysis*], the tribunal. wrongly focussed on C's motivations, not on the character of the act in question. A naval blockade is a state act, regardless of the reasons for it.
>
> 57. . Having found that, in this case, C *controlled* the actions of the Iraqi Navy to implement a shipping blockade, it logically followed that the tribunal could not adjudicate on claims flowing from that action. C's primary case was that this was a state action by the Iraqi Navy. However, even if it was an action *caused* by C, it remained a state action, on which the tribunal had already accepted it was unable to adjudicate."

As can be seen from this passage, at first instance Mirma made no distinction between the contractual test (direct control) and the tort test (causation) and made express reference to the part of the Main Award that was referred to at [50] of the Judgment.

22. It is not completely clear what the importance of the distinction is. Nevertheless, I make the following points.

23. First, there seems to me to be a straightforward reason why the parts of the Main Award dealing with Mobal's tort claims are relevant to consideration of the question of whether Mirma's direct control of the detention amounted to a state act: that is where the tribunal considered whether the conduct which it found amounted to direct control of the detention constituted the exercise of state authority.

24. Second, it is not clear to me why it would be a defect in the Judgment if there was conflation between direct control and causation. Whether it is said that Mirma directly controlled or caused the detentions, the same reality, including the roles of Mirma and the Iraqi navy, is being described. And it is that reality which the tribunal analysed to come to its conclusion that Mirma had not exercised state authority in relation to the detention, and which was analysed in the Judgment to come to the conclusion that Mirma had failed to establish that the tribunal's finding amounted to a finding that Mirma had exercised state authority.

25. Third, insofar as it is Mirma's position that, even if causing the detention does not necessarily entail exercising state authority, directly controlling one does, this distinction would appear not to have a basis in the Main Award as the tribunal itself had "conflated" the two tests, as Mirma's counsel acknowledged at the hearing. At [1044], for example, the tribunal stated, "The Arbitral Tribunal recalls that it has determined above that the detention was in [Mirma]'s "direct control". *Accordingly*, while the detention was in the end carried out by the Iraqi Navy, it was caused by [Mirma]." (emphasis added). Indeed, under the heading `(a) Existence of an Event Directly Controlled by Respondent,' at [922], the tribunal stated, referring to certain evidence, that Mirma "was the direct cause of the Iraqi Navy's actions." and at the conclusion of this section, at [930], the tribunal stated that it concluded that Mirma's "information that the vessels were not allowed to depart did have the effect that the Iraqi Navy ordered the detention so that the detention must be considered as being in [MIRMA]'s `direct control'." (emphasis added). To say that MIRMA's information had the effect that the navy ordered the detention is, in my judgment, to say that MIRMA's information *caused* the navy to order the detention. Then at [1054], the tribunal reiterated its earlier conclusion that the detention was "caused" by Mirma, and referred back to its analysis on whether the detention was an event "directly controlled" by Mirma.

26. As Mobal has argued, the important element in both claims was the causal link between Mirma's statement and the Iraqi Navy's actions that led to the tribunal's conclusion that the naval detention was within Mirma's "direct control."

The scopes of the tribunal's jurisdiction and the submission to arbitration are the same such that if the tribunal exceeded one it exceeded the other

27. This proposition is implicit in Mirma's case. I do not think that Mirma has established that the two scopes are the same. Mobal says that the detention claims were put before the tribunal, and so were within the scope of the submission to arbitration. Ground 1 is really about arbitrability. I am persuaded by Mobal's argument.

Conclusion

28. For the foregoing reasons, I do not think that Mirma has a real prospect of success for Ground 1.

Ground 2

29. The second ground of the proposed appeal relates to [57] to [60] of the Judgment.

30. Ground 2 is closely connected to Ground 1. In its Procedural Order No. 3, the tribunal stated that it would "not judge on any acts of the sovereign State or third parties." Mirma says that, as a result of this statement, it did not pursue a jurisdictional objection in respect of Mobal's contractual detention claims: if the contractual claims required a finding that Mirma "directly controlled" the naval detention, and if that finding would amount to a finding that Mirma had exercised state authority, then the contractual claims would not succeed as the tribunal had said it would not

judge on that type of act. Had Mirma known that the tribunal would conclude that Mirma "directly controlled" the naval blockade, it would have challenged the tribunal's jurisdiction. Mirma says that it was unable to present its case for the purposes of Article 41(2)(a)(ii) which provides, as material, that "An arbitral award may be set aside by the DIFC Court only if . the party making the application furnishes proof that . the party making the application . was . unable to present his case." At first instance, I rejected Mirma's case. In this proposed appeal, Mirma says I erred in fact and/or law in doing so.

31. Did Mirma present its case on the tribunal's jurisdiction over the contractual basis for the detention claim? At [59] of the Judgment, I explained why I thought Mirma did. As Mirmahas correctly pointed out, however, each of the examples that I gave relates to the tort detention claims, not the contractual detention claims. I accept that from this perspective, it was not correct to say that Mirma had presented its case. (This is a convenient moment to acknowledge that, as counsel for Mirma pointed out at the hearing, at [50] of the Judgment I incorrectly strayed in my analysis to the state immunity doctrine, which was not in issue.)

32. With that said, as Mobal submits, Mirma makes the same point on jurisdiction in relation to the contractual and tortious claims, namely that *its act of communicating with the Iraqi Navy amounted to a state act*. Mirma argued that point before the Tribunal. It was advanced in connection to the tort claims only, but Mirma has not identified any argument which it would have made in connection to the contractual claim that it did not make. From this perspective, Mirma did present its case, and the Tribunal disagreed that Mirma's acts were state acts. While that finding was made in the context of the tort claims, in my judgment it is not at all clear why the tribunal would have come to a different conclusion when reapplying a single principle to a single set of facts.

33. Ground 2 is dependent upon Ground 1. Permission was refused on Ground 1 and so permission is refused for Ground 2. Even if I had granted permission for Ground 1, I would have refused it for Ground 2 for a number of reasons. Sufficient, however, is the following. Mirma was fully aware that Mobal's case was that the "direct control" test in clause 23.3 was satisfied. Mirma's case under Ground 2 apparently requires that Mirma not only stood by while Mobal advanced that case, but that Mirma went on to defend the case on its merits, not on jurisdictional grounds, while under an expectation that the tribunal had no jurisdiction to determine those claims. As Mobal contends, if Mirma considered that it had an objection to jurisdiction as regards the contractual claims, it was incumbent on MIRMA to make it, as it did with the tort claims.

Conclusion

34. For the foregoing reasons, I do not think that Mirma has a real prospect of success for Ground 2.

Ground 3

35. The third ground of the proposed appeal relates to [69] to [80] of the Judgment.

36. The tribunal found that Mirma's acts in causing the naval blockade were unlawful because they were not supported by lawful reason. Mirma says that this decision was based on a case that had not been argued or explained. It was a surprise point. Mirma's submissions had been directed at the case advanced, it says, not at the basis on which the case was decided. As a result, Mirma was unable, it contends, to present its case for the purposes of Article 41(2)(a)(ii). At first instance, I rejected Mirma's case. In this proposed appeal, Mirma says I erred in fact and/or law in doing so. It also says that there is a compelling reason why Ground 3 of the proposed appeal should be heard which relates to my conclusion in relation to the English decision of *Satyam Enterprises v Burton* [2021] EWCA Civ 287.

37. I think my conclusion concerning Mirma's reliance on *Satyam* has been misunderstood by Mirma. I did not reject *Satyam's* relevance in the DIFC at large. Instead, my position was, and remains, that Mirma failed to establish the decision's relevance to the present case.

38. To demonstrate my conclusion, it might be asked, are there any proceedings in which reliance on *Satyam* would clearly be inappropriate? The answer to that question, in my judgment, is in the affirmative, and those are proceedings in the inquisitorial system, which *Satyam* expressly sets apart from the proceedings it says its ruling is applicable to. On the other hand, reliance on *Satyam* would clearly be appropriate in English, adversarial civil litigation, because *Satyam* states that expressly, and in systems of justice relevantly similar to it, like, I have little doubt, DIFC Courts' proceedings.

39. The purported surprise point that Mirma complains of appeared, however, neither in inquisitorial nor adversarial litigation, but rather in ICC arbitration. Mirma asked the Court to consider the permissibility of that surprise point, not one that appeared in English or DIFC Courts, adversarial civil litigation. For all the Court knows, it was entirely legitimate, according to the procedure agreed by the parties, for the tribunal to decide the case on a basis that had neither been pleaded nor canvassed by or before it. Leading counsel for Mobal stated at the hearing that ICC tribunals are afforded a very wide remit to adopt whatever procedure is deemed appropriate to resolve disputes. That was not rebutted by Mirma. In short, if *Satyam* was relevant to the parties' ICC arbitral proceedings by analogy, it was for Mirma to spell out how exactly. Mirma did not do that at first instance and has not, in my judgment, done that in seeking permission to appeal.

40. Moving on, the crux of my decision can be found at [79] of the Judgment. There I explained that, according to my interpretation of Article 41(2)(a)(ii), the test is whether the applicant was "unable to present his case" (emphasis added), not whether the applicant was unable to present his position on another's case. I also indicated, between em dashes, that it had not been established that the "case" referred to in Article 41(2)(a)(ii) could be a part rather than the whole of a party's case. In other words, it was not clear whether Article 41(2)(a)(ii) is concerned only with a situation where a party was unable to present his case at large, for example, his defence, or whether it applied more broadly to particular aspects of a party's case also. In circumstances where the two illustrative examples given in Article 41(2)(a)(ii) of a party's inability to present his case seem to be examples of a fundamental inability to present a case, and where, unlike when an award contains decisions on matters beyond the scope of the submission to arbitration within the meaning of Article 41(2)(a)(iii), the remedy available for a breach of Article 41(2)(a)(ii) is apparently setting aside the whole award, in circumstances such as these it was imperative, in my view, for Mirma to go further than it did in explaining why the Judgment was wrong and how the criteria of Article 41(2)(a)(ii) had in fact been met.

Conclusion

41. I respectfully consider that Mirma has failed to show why the Judgment was wrong or why there is some other compelling reason why the appeal should be heard. Permission to appeal for Ground 4 is accordingly refused.

Ground 4

42. At first instance, Mirmaapplied to set aside the entire Main Award on the ground that it conflicted with the public policy of the UAE. The specific complaint related to Mobal's engagement of an Iraqi politician in relation to the naval detention of Mobal's vessels. The tribunal held that Mobal's "unethical conduct amounts to cheating or gross fault." Mirma's case was that Mobal's conduct tainted the Contract and that an award rendered on the basis of a contract tainted by bribery conflicts with public policy and should be set aside pursuant to Article 41(2)(b)(iii) which provides that "An arbitral award may be set aside by the DIFC Court . if . the DIFC Court finds that . the award is in conflict with the public policy of the UAE." I disagreed with Mirma. Mirma contends that I erred in fact and/or in law for doing so. This ground was not elaborated on at the hearing, but nor was it abandoned.

43. It is difficult to detect what Mirma considers were errors "in fact and/or in law" in the Judgment. Indeed, Mirma appears to approve of the legal analysis in the Judgment (see its skeleton argument at [45]). At [42] of its skeleton argument, Mirma says that the Court "did not credit the tribunal's own finding," and at [45] it states, "the Judgment failed to recognise that the tribunal itself recognised the seriousness of Defendant's conduct." The crux of Mirma's case under Ground 4 appears to be that the Court did not give sufficient weight to certain findings of the tribunal. The crux of the decision in the Judgment, however, was as explained at [99]: ". [Mirma] has not established that the connection between the Contract and the bribery is such that the Contract should be rendered unenforceable and the [Main] Award set aside."

Conclusion

44. For the same reasons that I gave in support of that conclusion, from [100] to [107] of the Judgment, I do not consider that Mirma has a real prospect of success in relation to Ground 4. It is dismissed.

Ground 5

45. In the Terms of Reference in the arbitration, Mobal's case in respect to the wooden dhow was that Mirma had "in bad faith refused to agree a contractual variation for [Mobal's] additional costs in removing the wooden dhow, despite its agent's prior approval." Mirma says that the tribunal ultimately made no finding on that claim and instead decided a different claim and that the Main Award should be set aside under Article 41(2)(b)(iii) as it contains decisions on matters beyond the scope of the submission to arbitration. I disagreed at first instance, and Mirma says that was wrong in fact and/or in law. Like Ground 4, this ground was not elaborated on at the hearing but neither was it abandoned.

46. C's criticism under Ground 5 focuses on one reason that I gave for concluding that Mirma had failed to establish that the scope of the submission to arbitration was confined to what was contained in the Terms of Reference. That reason, explained at [39] of the Judgment, was one of three main reasons and one of six reasons overall, each of which was free-standing, for coming to that conclusion. In other words, even if Mirma is correct in its criticism of the reason explained at [39], the ultimate conclusion is unaffected, supported by several other reasons.

Conclusion

47. Ground 5 is accordingly dismissed.

Conclusion

48. In my judgment, Mirma has not real prospect of success in respect to any of the proposed grounds of appeal and nor is there any other compelling reason why the appeal should be heard. The Permission Application is accordingly dismissed.

Costs

49. Mirma shall pay Mobal's costs of the Permission Application on the standard basis, to be assessed if not agreed.

The Appeal Conditions Application

50. As a consequence of my decision on the Permission Application, the Appeal Conditions Application falls away.

Costs

51. I make no order as to costs.

The Set Aside Application

52. Mirma's Set Aside Application is based on the same grounds raised in ARB-004-2022. Mirma says that that, given the identity of issues in the two claims, it would be sensible for ARB-005-2023 to be decided at the same time as or immediately after any appeal in ARB-004-2022. If the Set Aside Application is dismissed, Mirma will be obliged, it says, to issue an application for permission to appeal against that decision, and the Court will be obliged to deal with that appeal. Mirma proposes that the determination of ARB-005-2023 be held off, on case management grounds, until the final conclusion of any appeal in ARB-004-2022.

53. Mobal's position is that there is in fact no legal basis for the Set Aside Application in circumstances where the Judgment has already determined against Mirma the issues on which Mirma seeks to set aside the Recognition Order. The Judgment is final and binding unless, and until, set aside on appeal. Accordingly, the matters on which Mirma seeks to set aside the Recognition Order are, Mobal submits, *res judicata* in the DIFC. Mobal invites the Court to determine the Set Aside Application by dismissing it on the ground that it raises issues that have already been litigated and determined against Mirma.

54. Mobal submits that Mirma, when making the Set Aside Application, identified the wrong ground for resisting enforcement of the Main Award. The correct ground, Mobal contends, would have been Article 44(1)(a)(v) of the Arbitration Law which when combined with Article 44(2) may have provided a basis for adjournment of the Set Aside Application as well. These provisions provide, as material, as follows:

> "(1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Courts.
>
> (a) . at the request of the party against whom it is invoked, if that party furnishes to the DIFC Courts' proof that: .
>
> (v) the award . has been set aside or suspended by a Court of the State or jurisdiction in which, or under the law of which, that award was made.
>
> (2) If an application for the setting aside or suspension of an award has been made to a Court referred to in paragraph (1)(a)(v) of this Article, the DIFC Courts may, if it considers it proper, adjourn its decision and may also, on the application of the party seeking recognition or enforcement of the award, order the other party to provide appropriate security."

55. Taking Mobal's second point first, I respectfully disagree. I do not think that Mirma was mistaken, when making the Set Aside Application, for not relying upon Article 44(1)(a)(v) combined with Article 44(2). On my reading of these provisions, they are concerned with mutually exclusive circumstances. Recognition and enforcement of an award may be refused under Article 44(1)(a)(v) where the curial court has-that is, already-set aside or suspended that award. On the other hand, the powers of Article 44(2) are available where an application for set aside or suspension of an award is before the curial court, and until, implicitly-particularly when the remedies of Article 44(2) are considered-that application is decided. In other words, Article 44(1)(a)(v) is concerned with a situation where an award has been set aside or suspended, while Article 44(2) is concerned with a situation where an award is challenged but where the challenge has not yet been decided. Applying this to the present case, since the Main Award was made, there has never been a time, in my judgment, when Article 44(1)(a)(v) was engaged: the DIFC Courts, as the curial court, has not set aside or suspended that award. Mirma cannot, therefore, be criticised for not relying on that provision.

56. Moreover, the adjournment available under Article 44(2) relates to and appears to be contingent upon a pending "decision" of the DIFC Courts, that is-I think it is clear-a decision whether to refuse to recognise and enforce the relevant award under Article 44(1). If I am correct that Article 44 (1)(a)(v) and (2) cannot be engaged simultaneously, and if the powers of Article 44(2) are contingent upon the existence of an undetermined Article 44(1) application, it would follow, in my view, that at the time the Court might adjourn its decision pursuant to Article 44(2) on an application under Article 44(1), that application, contrary to Mobal's submission, could only be made on grounds other than those described in Article 44(1)(a)(v).

57. Turning to Mobal's first point in response to the Set Aside Application, I agree with its position. The issues in the Set Aside Application were disposed of by the DIFC Courts in the Judgment, and indeed were already decided at the time that the application was made. The Judgment is final in respect of those issues, notwithstanding that it may, if Mirma decides to renew its application for permission to appeal, be reversed or varied by the Court of Appeal. In my judgment, Mirma is estopped from re-litigating those matters except on appeal.

58. The policy underpinning *res judicata* is given effect, in my judgment, in Article 44 of the Arbitration Law itself. Article 44(3) provides that "Any party seeking recourse against an arbitral award made in the Seat of the DIFC shall not be permitted to make an application under paragraph (1)(a) of this Article if it has made or could have made an application under Article 41 of this Law." The Main Award was of course made in the seat of the DIFC. Mirma has made an application in relation to the Main Award under Article 41 of the Arbitration Law. In my judgment, Article 44(3) would therefore clearly bar Mirma from making the Set Aside Application insofar as it is made under Article 44(1)(a), which is to say in relation to Grounds 1 to 3 and 5 of the application, even without direct recourse to principles of res judicata.

59. Additionally, I think it is implicit in Article 44(2) of the Arbitration Law that, where there is no set aside application before the curial court, the Court should get on and decide any application made under Article 44(1) before it. There is currently no such application before the DIFC Courts as the curial court, and at the time of this decision nor is there a challenge to the Court's disposal of that application, though needless to say Mirma's application for permission to appeal may be renewed. To get on and decide the Set Aside Application consistently with my decision in the Judgment would result in a finding that none of Grounds 1 to 5 of the Set Aside Application are made out. And now I have had the benefit of considering the issues common to ARB-004-2022 and the Set Aside Application for a second time in the context of the Permission Application, where I have decided that Mirma has failed to demonstrate that it has a real prospect of success of establishing that my conclusions were wrong.

60. The upshot of all this, in my view, is that, if Mirma renews its application for permission to appeal the Judgment and is successful on appeal, and if the Main Award is set aside in whole or in part, there must be some available recourse against the Recognition Order-perhaps *qua* order of the Court-because the effect of Article 44(3) cannot be to force the DIFC Courts to enforce awards, or parts of awards, that it set aside, in whole or in part, on the basis that they were made in the DIFC.

61. But for the foregoing reasons, I do not think that the Set Aside Application as formulated was the correct approach. The application is, therefore, dismissed.

Costs

62. Mirma shall pay Mobal its costs of the Set Aside Application on the standard basis, to be assessed by the Registrar, if not agreed.

The Adjournment Conditions Application

63. As a consequence of my decision on the Set Aside Application, the Adjournment Conditions Application falls away.

Costs

64. Consistently with my reasoning in [57] to [59] above, I do not think the Adjournment Conditions Application was a necessary application to

make. Indeed, as I stated at [59], in my judgment there was no extant "application" for the purposes of Article 44(2) of the Arbitration Law, a jurisdictional requirement for the powers of that provision, at the time the Set Aside Application was made. That goes for the Adjournment Conditions Application also. I do not think, therefore, that the Court had the power under Article 44(2) to order security or that the Court should have ordered security under Rule 4.3(1) of the Rules of the DIFC Courts (the "RDC"), applying the Article 44(2) principles by analogy. As such, I order Mobal to pay Mirma its costs of the Adjournment Conditions Application on the standard basis, to be assessed by the Registrar, if not agreed.

The Counterclaim Application

65. Mirma seeks permission to counterclaim in ARB-005-2023 for recognition and enforcement of the CC4 Award. On Mobal's own case, that award forms an integral part of the Main Award. It has not been disputed that the issues which arise in respect of both awards are identical or that the two awards should stand or fall together. Indeed, I do not understand that it is disputed that it would in principle be appropriate and desirable to permit the counterclaim in the circumstances of this case. The only issue is whether the Court has the power to do so.

66. In my judgment, on a proper interpretation of the RDC, the only procedural basis to seek recognition and enforcement of an award is by an arbitration claim for such relief, there being no entitlement to bring or power permit such a claim by counterclaim in other proceedings. I have come to this conclusion while acknowledging that, in the present case, the only apparent consequence of Mirma not being able to seek recognition and enforcement of the CC4 Award by way of counterclaim is a negative one, namely that it has to issue yet another procedure, to no procedural benefit.

67. RDC 43.3 provides that, "Except where RDC 43.4 or RDC 43.5 applies an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure." RDC 43.4 and RDC 43.5 do not concern recognition and enforcement claims, and the RDC of course makes provision for the bringing of counterclaims in Part 8 claims, albeit that, unlike for Part 7 claims, the permission of the Court is required (RDC 8.37). But, in my judgment, the counterclaim provisions are not incorporated into the procedure for arbitration claims because there is a specific provision in Part 43 to the contrary, being RDC 43.3 itself.

68. As can be seen, RDC 43.3 provides that "an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure" (emphasis added). What is an "arbitration claim"? That is explained by RDC 43.2(3)A: "DIFC-ARB Claims mean: (a) any application to the Court under the Arbitration Law," and included in the list of 13 items one finds, at subparagraph (a)(xii), applications "for recognition or enforcement of an arbitral award under Article 42 of the Arbitration Law." An application for recognition and enforcement of the CC4 Award is therefore an "arbitration claim" for the purposes of Part 43 of the RDC. Such an application must be started by the issue of an arbitration claim form, in accordance with the Part 8 procedure. It follows, in my judgment, that an application for the recognition and enforcement of an award may not be pursued by way of counterclaim.

69. In my view, the foregoing provides a sufficient basis for dismissing the Counterclaim Application. Before concluding, however, I will add two further observation which I think supports the conclusion I have arrived at.

70. As can be seen, RDC 43.3 does not apply where either of RDC 43.4 and RDC 43.5 apply. The former rule concerns applications under Article 13 of the Arbitration Law and the latter rule concerns applications under Article 34 of the Arbitration Law. Both types of applications are "arbitration claims" for the purposes of Part 43 (see RDC 43.2(3)A subparagraphs (a)(ii) and (a)(ix), respectively). In the case of applications under Article 13 of the Arbitration Law (for dismissal or a stay of an action brought in the DIFC Courts in a matter which is the subject of an arbitration agreement), rather than being started by the issue of an arbitration claim form, the application "must be made," RDC 43.3 provides, "by Application Notice in the proceedings." And in the case of applications under Article 34 of the Arbitration Law (for Court assistance in taking evidence), the application "should be made in accordance with RDC Part 30." In my judgment, if there were any other category of claims falling within the definition of "arbitration claim" which were nevertheless exempt from the requirement that they be started by issue of an arbitration claim form, it would have been included alongside the exceptions of RDC 43.4 and RDC 43.5. That would have been the place for the RDC to provide, say, that an application under Article 42 of the Arbitration Law (for the recognition and enforcement of an arbitral award) which is advanced as a counterclaim must, should or may be made by Application Notice in the proceedings in accordance with RDC Part 8 or Part 21. The absence of such an exemption leads me to conclude that it does not exist.

71. Moreover, when the language of RDC 43.3 is compared to that of RDC 7.1, I think it becomes clearer yet that, except where RDC 43.4 and RDC 43.5 apply, any claim which is an "arbitration claim" is required to be started by issue of a claim form. RDC 7.1 provides that, "Except as provided by a Practice Direction proceedings must be started by a claim form under Part 7 or Part 8." (emphasis added). The term "proceedings" encompasses both claims and counterclaims (see, for example, RDC 4.2(5)), and so, where RDC 7.1 applies, that single thing which may later be comprised of claims and counterclaims (i.e. proceedings) is required to be started by issue of a claim form. The equivalent term in RDC 43.3, however, is "claim." As explained by RDC 43.2(3)A, "claim" here effectively means "claim to remedy," and so it applies equally to both claims and counterclaims. The consequence of this, in my judgment, is that the RDC requires that each arbitration claim, other than those falling within RDC 43.4 or RDC 43.5, start its life in a claim form.

Costs

72. Mirma shall pay Mobal its costs of the Counterclaim Application on the standard basis, to be assessed by the Registrar, if not agreed.