IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NOVAK

Claimant/Respondent

and

NEWLAND

Defendant/Applicant

ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Judgement of H.E Justice Shamlan Al Sawalehi issued 30 October 2023 recognising the Arbitration Award to be binding and enforceable within the DIFC in the same manner as a judgement or order of the DIFC Courts in favour of the Claimant (the "Judgement")

AND UPON Application Notice No. ARB-020-2022/3 filed by the Defendant on 14 November 2023 to set aside the Judgement (the "Application")

AND UPON the Hearing held on 31 January 2024 (the "Hearing")

AND UPON a review of the written and oral submissions of the parties

IT IS HEREBY ORDERED THAT:

1. The Application is rejected entirely.

2. The Judgement is to be upheld.

3. Costs shall be paid by the Applicant for this Application on the standard basis, to be assessed by the Registrar if not agreed.

Issued By:
Hayley Norton
Assistant Registrar
Date of issue: 1 August 2024
At: 9am

SCHEDULE OF REASONS

1. This Application is brought by the Defendant to set aside the Judgement issued on 30 October 2023, which held that the Arbitration Award in favour of the Claimant was valid and enforceable in the DIFC.

2. The Applicant submits two branches of reasoning in their Application; the first is that the Judgement is in breach of Article 44(1)(b)(vii) of the DIFC Arbitration, and the second is that the Judgement should be set aside on procedural irregularities pursuant to RDC 4.7 and 4.13.

Background and Procedural History

3. Given the Court's familiarity with this dispute, recollection of the facts and procedural history need only be brief.

4. The dispute relating to the original Claim was triggered due to noncompliance with several Guarantees entered into by the parties between November 2018 and November 2019.

5. The Guarantees related to contracts between Novak, as employer, and Newton, as contractor, pursuant to which Newton agreed to carry out various construction works associated with Novak (the Construction Contracts).

6. Triggered by Newton's insolvency process, the Claimant issued demands for payment from Newland under all of the Guarantees. Whether the Claimant was entitled to these payments caused the crux of the dispute.

7. On 8 October 2020, the Defendant issued six separate Requests for Arbitration under each of the Guarantees which were subsequently consolidated into a single arbitration.

8. On 18 July 2022 the Award was issued in favour of Novak.

9. After it was determined that the DIFC Courts had jurisdiction to recognise and enforce the Award, on 30 October 2023 the Recognition Order (the Judgement) was issued.

10. On 14 November 2023, the Defendant applied to set aside the Judgement.

11. The Hearing for the Application was held on 31 January 2024.

Applicant's Submissions

12. First, the Applicant relies on Article 44(1)(b)(vii) of the DIFC Arbitration Law to submit that the Judgement ought to be set aside on public policy grounds:

> "(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 Court only:
>
> (a) .
>
> (b) if the DIFC Court finds that:
>
> (vi) .
>
> (vii) the enforcement of the award would be contrary to the public policy of the UAE."

13. I recognise and include in my considerations the background provided by the Applicant as to the applicability of public policy defences in the UAE and in international arbitration proceedings, but I do not see it relevant to repeat the lengthy submissions here as they offer a supportive role to the submission, not a substantive one.

14. The justification for this is that the Judgement is inconsistent with a judgement rendered by the Dubai Bankruptcy Courts ("DBC") on 21 July 2022 in relation to the trustees in the Newton bankruptcy application, which suspended the liquidation of the Guarantees for 3 months and referred the matter to an engineering expert committee. The liquidation was subsequently extended for 6 months from 15 December 2023. Because of this, the judgement effectively prevents the Applicant from making a payment under the Guarantees. As this makes up the substantive defence to the enforcement of the Award, such a defence ought to be permitted even though it was not previously articulated at an earlier stage in proceedings, and the Applicant reserves the right to raise a defence on the merits even after a failed jurisdictional challenge.

15. The Applicant also submits that they are within their procedural right to advance their defence to enforcement, as they are within the timeframes set out in the RDC. As the Respondent did not submit any opposition to the Applicant's procedural steps, I do not deem it necessary to comment on or set out this defence here, except for RDC 4.7 and/or 4.13, which have been addressed in paragraph 28 of this order.

Opposition's Response

16. The Respondent's position in opposing the Application is that the matter of public policy does not apply to the facts of this case, and reliance on such a provision mischaracterises the nature of arbitral awards and the Court's role in enforcing the Award. Even if the provision did apply, as the Respondent correctly points out, the threshold for a successful `public policy' submission is very high and the Applicant's have not made sufficient legal or factual submissions to reach that threshold.

17. Given that Article 44(1)(b)(vii) is derived from Art. V(2)(b) of the New York Convention and UNCITRAL Model Law, the Respondent relies on to advance their position. I concede that this is a sensible and appropriate approach, in consideration of the principle of international arbitration and the nature of arbitrations in general. International jurisprudence on public policy matters is unanimous in that sense; `public policy' has a high threshold and cannot normally be used to defeat an award.

18. The Respondent provides various precedent and international policy to support their submission, but I will include what I consider to be the most convincing. First, the NYC 58 commentary on public policy use on an international scale (2016 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)). As quoted by the Respondent, it has been common for courts to dismiss the argument that arbitration agreements are void under public policy, and others have recognised or enforced awards, even if only partially, that would otherwise be refused on public policy grounds. The reason for rejecting enforcement on public policy grounds would therefore have to be beyond compelling, or otherwise disrupt the neutrality of arbitration on an international scale.

19. The Respondent also rejects the Applicant's reliance on the alleged `conflict' between the Judgement and the decision of the DBC. The rejection of this submission is because it treats a temporary procedural order of the DBC as final and irrevocable, it disregards that the Judgement is an exclusive one between the parties to the Guarantees, not the construction contracts and Newton, it disregards that Novak is not a creditor of Newton in its insolvency and so it is not involved in the bankruptcy proceedings, and it mischaracterises the obligations imposed on them by the Award and the Judgement enforcing it.

20. To advance this point, by the time that the DBC's first order was issued, the `liquidation of guarantees' had been solidified by the award of the Arbitral Tribunal which then obligated the Appellant to pay the Respondent AED 160,722,046. The DBC's order did not have jurisdiction to reverse, suspend or block the transaction, nor did it make any attempt to do so. Additionally, the payment obligation in the Award is a final judgement on merit, and so cannot be relitigated, which is what the Appellants are attempting to accomplish with the DBC submission. Overall, the payment obligation is an entirely distinct obligation, which makes any enforcement action distinct, and so it cannot be in conflict with any other judgement or order, unless by the awarding or enforcement courts.

21. Last, the DBC judgement is not automatically entitled to recognition or enforcement by the DIFC Court, and so it does not need to be deliberated upon in these proceedings.

22. On procedural matters, the Respondent questions how appropriate the Applicant's reliance on RDC 4.7 and 4.13 is, as these two rules do not necessarily engage the sought Court powers to achieve their desired conclusion.

23. The Respondent seals their position by alleging that the Applicant is merely avoiding making payments by abusing their access to Court procedure, rather than relying on any legitimate error in the Judgement to achieve actual justice.

Discussion

24. I concede with the Respondent on all matters presented in the Application.

25. First, it is clear on all counts that the DBC decision does not impact the enforcement of the Award, nor any provisions within the Award that could confer an obligation on the debtor. Therefore, I dismiss this submission entirely without further discussion.

26. While I agree that public policy does have the capacity to oppose an arbitration award, the Applicant has not provided strong enough submissions or evidence to trigger a public policy defence. The Applicant overly relies on precedent and jurisprudence not relevant to the current proceedings. The authorities provided are explanatory at best as to what can amount to a public policy submission, but the Applicant fails to raise at least a singular solid point that would trigger the public policy provision, let alone reach the high threshold set. The matter of `inconsistent judgements', while normally relevant, does not apply here as Newton is not a party to the Award and their insolvency proceedings have no bearing on the debt obligations raised within.

27. On the procedural irregularities brought forward concerning the lack of reference to the witness statement of Naazim , I remind the Applicant that the Judgement was not written with reasons, but with the relevant orders only. I made no specific reference to either party's submissions or evidence in the Judgement. As the Applicant's procedural irregularity submission relies on unfairness, I see no merit to it and dismiss this matter.

28. On the Rules of the RDC, I agree that the Applicant has relied on provisions that do not necessarily support the conclusion they wish to achieve. First, RDC 4.7 is a mere statement of the Court's ability to make, vary or revoke an order. A supplementary rule, practice direction or valid submission would be needed to compel the court to engage in such case management powers. RDC 4.13 is of a similar nature; it relies on RDC 4.12, which is relevant in circumstances when the Court makes an order of its own initiative without hearing the parties. That was not the case for the Judgement.

Conclusion

29. I concede with the Respondent on this application. The Applicant has failed to reach the public policy threshold or submit a legitimate procedural error that would warrant setting aside the Judgement.

30. The Judgement shall be upheld, and costs shall be paid by the Applicant for this Application on the standard basis.