THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL
BEFORE CHIEF JUSTICE WAYNE MARTIN, H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI AND JUSTICE ANDREW MORAN

BETWEEN

NIHAN

Claimant/Respondent

and

(1) NICHOLAS
(2) NIAZ

Defendants/Appellants

Hearing :	**21 October 2024**
Counsel :	Zoe O'Sullivan KC instructed by Kochhar & Co. Legal Consultants for the Appellants Gregor Hogan instructed by Al Tamimi & Company for the Respondent
Judgment :	**14 November 2024**

JUDGMENT OF THE COURT OF APPEAL

UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 12 April 2023 recognizing and enforcing a final arbitral award in favour of the Claimant/Respondent, (the "Respondent") (the "Recognition and Enforcement Order")

AND UPON the Appellants' Application No. ARB-008-2023/1 dated 28 April 2023 to set aside the Recognition and Enforcement Order (the "Set Aside Application")

AND UPON the Amended Order of H.E. Justice Shamlan Al Sawalehi dated 25 April 2024 dismissing the Set Aside Application

AND UPON the Appellants' Application No. ARB-008-2023/2 dated 8 May 2024 for permission to appeal and stay on the operation of the Recognition and Enforcement Order (the "PTA Application" and "Stay Application")

AND UPON the Appellants' Application No. ARB-008-2023/3 dated 12 July 2024 for retrospective extension of time for the service of the PTA Application and associated documents on the Respondent; and payment of the filing fees for the PTA and Stay Applications (the "Extension of Time Application")

AND UPON the Order with Reasons of H.E. Justice Shamlan Al Sawalehi granting the Extension of Time Application and the PTA Application and dismissing the Stay Application

AND UPON the Appeal Hearing held before the Chief Justice Wayne Martin, H.E. Deputy Chief Justice Ali Al Madhani and Justice Andrew Moran with counsel for the Appellant and counsel for the Respondents in attendance on 21 October 2024

AND UPON review of the filings made on the case file

IT IS ORDERED THAT:

1. The appeal is dismissed.

2. The Appellants are to pay the Respondent's costs of the appeal fixed at AED 195,000 payable immediately.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 14 November 2024
Time: 2pm

SCHEDULE OF REASONS

Summary

1. Permission to appeal was granted by the Judge at first instance on the ground that the appeal raised an important question of law in relation to the proper construction and application of Article 44(1)(b) of the DIFC Arbitration Law (the "Law").[1] The reasons which follow will identify the

question which arose and the principles pertinent to the resolution of that question. The reasons will also explain why, in the particular circumstances of this case, the Judge at first instance was correct to decide that Article 44(1)(b) did not apply and there was therefore no reason why this Court should not recognise and enforce the relevant arbitral award.

The DIFC Arbitration Law

2. The DIFC Arbitration Law is modelled on the UNCITRAL Model Law on International Arbitration (the "Model Law"). The provisions of the law relevant to this appeal are Articles 42 and 44. Article 42 provides:

> "42(1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44."

3. Article 44 provides:

> "44(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:
>
> (i) the subject matter of the dispute would not have been capable of settlement by Arbitration under the laws of the DIFC; or
>
> (ii) the enforcement of the award would be contrary to the public policy of the UAE."

4. It is pertinent to observe that the two grounds upon which the Court may refuse recognition and/or enforcement specified in Article 44(1)(b) are also grounds upon which an award made in the seat of the DIFC may be set aside pursuant to Article 41(2)(b) of the Law.

5. As already noted, the Law is derived from the Model Law. However, Article 44(1)(b) of the Law departs from the terms of the Model Law in a respect which is critical to the issue which arises in this case. The corresponding grounds in Article 36 of the Model Law are expressed as follows:

> "36(1)(b) if the Court finds that:
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State."

6. Article 36 of the Model Law in turn reflects the terms of Article V of the New York Convention[2] which provides:

> "V (2) recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country."

7. When Article 44(1)(b) of the Law is compared to each of Article 36 of the Model Law and Article V(2) of the New York Convention it is apparent that the legislator has made a deliberate choice to depart from the language of those international instruments by providing that, when recognition and enforcement is sought in the DIFC, the question of arbitrability is to be determined under the laws of the DIFC rather than the laws of Dubai or the UAE, whereas the question of enforceability is to be determined by reference to the public policy of the UAE. This distinction lies at the heart of the issue in the case, for reasons which will be explained by reference to the circumstances of the case.

The parties

8. The Claimant/Respondent is Nihan ("Nihan"), a company incorporated under the laws of Spain having its registered office in Spain.

9. The First Defendant/Appellant is Mr Nicholas , a national of the UAE whose business address is in the UAE.

10. The Second Defendant/Appellant Niaz is, a company organised under the laws of the Ras Al Khaimah Free Trade Zone which has its registered office in in Ras Al Khaimah, UAE.

11. The parties are the shareholders in Nu'aimaan ("Nu'aimaan"), a company incorporated in the UAE as a special purpose vehicle for the construction and operation of a water desalination plant in the UAE . Nihan holds 40% of the issued shares in Nu'aimaan and the other parties hold the remainder of the issued capital.

The agreements

12. The parties entered into two agreements - a Shareholders Agreement ("SHA") and a Memorandum of Association ("MoA"). Each of those agreements contains an arbitration agreement. Each arbitration agreement provides that any arbitration pursuant to its terms shall be conducted pursuant to the Rules of Arbitration of the International Chamber of Commerce (the "ICC"). The arbitration agreement in the SHA expressly provides that the arbitration is to be seated in the DIFC. The arbitration in the MoA makes no express provision in relation to the seat of the arbitration. When an arbitration was commenced under the provisions of both arbitration agreements, the parties concurred in a determination by the ICC to the effect that the arbitration under the MoA should also be seated in the DIFC.

The arbitration

13. A dispute arose between the shareholders in Nu'aimaan and in May 2020 Nihan commenced arbitral proceedings. A Tribunal was constituted and on 31 December 2021 issued its final award. The Tribunal determined that each of Mr Nicholas and Niaz had breached the SHA and the MoA and ordered those parties to purchase all of the shares of Nihan in Nu'aimaan for a price of AED 47,538,871. The Tribunal also ordered Mr Nicholas and Niaz to pay interest on the purchase price until full and final payment and the costs of the arbitration in the amount of USD 480,000 plus VAT and to reimburse Nihan the amount of USD 486,659.40 which it had paid by way of deposit on the Tribunal's costs. Orders were also made by the Tribunal in relation to the parties' costs which it is unnecessary to detail in these reasons.

14. Mr Nicholas and Niaz did not comply with the award. Nor did they apply to set aside the award within the period of three months allowed by Article 41 of the Law.

The proceedings in this Court

15. On 10 April 2023 Nihan commenced proceedings in this Court seeking recognition and enforcement of the award pursuant to the jurisdiction conferred upon the Court by Article 5(A)(1)(e) of the Judicial Authority Law ("JAL")[3] and Article 42 of the Law.

16. On an application made without notice to the Defendants, His Excellency Justice Al Sawalehi (the "Judge") made orders for recognition and enforcement of the award on 12 April 2023.

17. On 28 April 2023 the Defendants applied to set aside those orders on the following grounds:

(a) The subject matter of the dispute was not arbitral in the UAE;

(b) Alternatively, enforcement of the award would be contrary to the public policy of the UAE.

18. It is pertinent to note that the first ground misstates Article 44(1)(b)(i) of the Law by referring to arbitrability in the UAE, rather than arbitrability under the laws of the DIFC. The principal witness statement filed in support of the application to set aside the orders for recognition and enforcement contained the same misstatement at points, although at other points it correctly referred to arbitrability by reference to the laws of the DIFC.

19. The gist of the application lay in the proposition that disputes which might result in an order for the transfer of property subject to systems of registration, such as land and shares, were not arbitrable because the laws and public policy of the UAE required that such disputes be determined by Courts. At first instance it was submitted that as a consequence, the dispute was not arbitrable under the laws of the DIFC or alternatively, enforcement of the award would be contrary to the public policy of the UAE.

20. Expert evidence of Advocate Ali Al Zarooni was tendered in support of the application to set aside the orders for recognition and enforcement of the award. Mr Al Zarooni has been a lawyer practicing in Dubai before the UAE Courts since his admission in 1997. Mr Al Zarooni's opinion relied heavily upon the provisions of Article 3 of the UAE Civil Code[4] which relevantly provides:

> "Shall be considered of public policy, provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a."

21. Mr Al Zarooni asserts that because provisions relating to the circulation of wealth and individual ownership are matters of public policy, registration of real estate is a matter of public policy and therefore any issue arising in relation to registration should not be arbitrable. He relies upon a decision in the Dubai Court of Cassation in 2012 which is said to support of this proposition.

22. Mr Al Zarooni further relies upon Article 4 of the UAE Arbitration Law[5] which provides that "agreement on arbitration may not be concluded with respect to matters where conciliation is not allowed". He asserts that conciliation is not allowed or permissible in relation to matters associated with public policy, again relying upon Article 3 of the Civil Code.

23. Mr Al Zarooni asserts that the ownership of shares is related to private ownership and the circulation of wealth, within the meaning of those terms in Article 3 of the Civil Code from which it follows, according to the principles he espouses, that because shares are the subject of registration, disputes which might result in orders relating to the registration of shares are not arbitrable in the UAE. Significantly, Mr Al Zarooni expresses no view in relation to the question of whether disputes of this kind are arbitrable under the laws of the DIFC. It may be inferred that there are two reasons for this:

(a) The laws of the DIFC are not matters for expert evidence in this court; and

(b) Mr Al Zarooni does not hold himself out as having any expertise in relation to the laws of the DIFC.

24. The only observation made by Mr Al Zarooni on the subject of enforcement is the following sentence:

> "As disputes which involve transferring shares cannot be determined by arbitration, enforcing an arbitration award which deals with the transfer of shares would be contrary to the UAE public policy."

25. Mr Al Zarooni does not support this assertion with any reasoning or by reference to any authority. His assertion is no more than a bare *ipse dixit*. As such, it carries no weight. At the hearing of the appeal, senior counsel for the Appellants accepted that there was no evidence that enforcement of the award would be contrary to the public policy of the UAE.[6]

26. Mr Al Zarooni's unreasoned assertion with respect to enforcement is undermined by a contradictory statement made later in his report, in the

following terms:

> "Unless the DIFC Court judgment is challenged based on the existence of an issue relating to the UAE public policy, and a stay order is obtained from the DIFC Court, being the court of competent jurisdiction in the present case, the RAK Court of Execution may not consider the issue of the UAE public policy and would rather proceed to execute the DIFC Court's judgment which would be considered as the final judgment."

The decision at first instance

27. The Judge dismissed the application to set aside the orders for recognition and enforcement.[7] He summarised the respective positions adopted by the parties in the reasons he gave. The Defendants contended that if a matter is not arbitrable under the laws of the UAE because arbitration of the subject matter, involving the transfer of property rights, would be contrary to UAE public policy, it cannot be arbitrable under the laws of the DIFC, because it could not be enforced. The Defendants relied upon Article 3 of the UAE Civil Code[8] and Article 4 of the UAE Arbitration Law to support this proposition. We digress to observe that this submission, like the application to set aside the orders, elides the clear distinction drawn in Article 44(1)(b) of the Law between arbitrability, which is to be determined by reference to the laws of the DIFC, and enforcement which is to be assessed by reference to the public policy of the UAE. As will be seen, that fundamental flaw was maintained in the submissions to this Court.

28. On the subject of public policy, the Defendants cited H.E. Justice Al Sawalehi's earlier decision in *Lachesis v Lacrosse*[9] in which His Excellency observed:

> "In my view, Loralia Group can be said to be an authority for the proposition that the public policy of the UAE is the same from jurisdiction to jurisdiction within the UAE. As such, the UAE's public policy in, say, on shore Dubai is the same as that in the DIFC. It follows that if a part of the UAE's public policy was authoritatively articulated in Dubai Law, it would be an articulation of the public policy of the UAE for the purposes of DIFC Law, too."

29. Nihan contended that the Defendants' argument confused and elided questions of arbitrability under DIFC Law and arbitrability under UAE Law, whereas only the former was relevant. Nihan further contended that the Defendants had failed to establish the share transfer was non-arbitrable under UAE Laws.

30. The Judge rejected the Defendants' assertion that the starting point for the analysis was Article 4 of the UAE Arbitration Law or Article 3 of the Civil Code. He observed that those laws have no application within the DIFC, and that therefore the relevant starting point was Article 44(1)(b) of the Law.[10]

31. The Judge observed that many of the written and oral submissions advanced by the Defendants confused Articles 44(1)(b)(i) with Article 44(1)(b)(ii) "such that it was not readily discernible where one began and where one ended".[11] He observed that the Defendants' submission:

> "Not only conflates issues of non-arbitrability under UAE Laws with non-arbitrability under DIFC Laws, it also conflates the issue of subject matter non-arbitrability under DIFC Arbitration Law, which is one source for refusing recognition or enforcement under 44(1)(b) with the second source of refusal under DIFC Arbitration Law being where recognition or enforcement will be contrary to UAE public policy under Article 44(1)(b)(ii). They are separate and distinct categories."

32. The Judge also observed that the decision of the UAE Government to create Free Zones with their own legal systems, resulting in differing arbitration laws for a Free Zone such as the DIFC on the one hand, and on shore UAE on the other, is also a matter of UAE public policy.[12]

33. The Judge drew upon Mr Al Zarooni's expert report to conclude that even in the UAE Courts the question of arbitrability of share transfers and/or registration of shares is far from settled.[13] The Judge went on to explain his earlier observations in Lachesis v Lacrosse, observing that while UAE public policy may be understood as being unitary, "its application within the UAE is not indivisible"[14]. So, for example, in another case - *Loralia Group* [15], he concluded that although there was a UAE public policy prohibition against lawyers charging contingency fees, such fees were not contrary to public policy in the UAE. He stated:

> "Lachesis should not be understood to mean that a unitary UAE public policy is not indivisible in its application"[16] .

34. The Judge went on to observe that in any case both decisions were distinguishable because in this case the source of UAE public policy depends upon federal laws which have no application in the DIFC - namely, the Civil Code and the UAE Arbitration Law. He referred to earlier decisions (to which reference will be made below) to the effect that the decision to exempt the DIFC from the civil laws of the UAE is a matter UAE public policy.

35. The Judge went on to draw a distinction between a reference to "public policy" for the purposes of instruments such as Article 3 of the Civil Code, on the one hand, and public policy in the context of grounds for refusing to recognise or enforce an arbitral award on the other. In this context the Judge referred to the often cited decision in *Banyantree TE Ltd v Meydan Group LLC*[17] where the Court observed:

> "The public policy defence should be applied only if the arbitral award fundamentally offended the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on the part of the arbitral tribunal. The courts have also stated that to refuse to enforce an award on the ground that it violates public policy, the award must either be contrary to the essential morality of the State in question or disclose errors that affect the basic principles of public and economic life. Not every infringement of mandatory law amounts to a violation of public policy."

36. The Judge also referred to an observation in *Lucinethlucineth v Lutinalutina Telecom Group Ltd*[18] where the Court observed that in order to establish conflict with the public policy of the UAE it must be established that the award "fundamentally offends the most basic and explicit

principles of justice and fairness" in the UAE, or "intolerable ignorance or corruption on the part of the arbitral tribunal"[19] .

37. He also referred to his own earlier decision in *Lachesis v Lacrosse,* in which he observed that even if an award conflicted with UAE public policy "unless the conflict was sufficiently serious - for example, if recognizing the award and enforcing it would require abandoning the very fundamentals on which the legal system is based - it is unlikely that the Court would exercise its discretion to set aside the award".[20]

38. The Judge concluded that if the proper meaning of "public policy" in the context of Article 44 of the Law was applied, there was no basis upon which recognition or enforcement of an award relating to the transfer of the shares in a private company would "fundamentally offend the most basis and explicit principles of justice and fairness" or "require abandoning the very fundamentals on which the legal system is based".

39. The Judge also reviewed the expert report from Mr Al Zarooni in detail in his reasons. After analysing the report in detail he was:

> ".not persuaded that even in the UAE, the laws or jurisprudence clearly or distinctly demonstrate that the subject matter in question in this case is non-arbitrable. The expert report in my opinion does not satisfactorily address how enforcement of the final award would amount to a violation of UAE public policy."[21]

The application for permission to appeal

40. The Appeal Notice disclosed three grounds of appeal, although the skeleton argument filed in support of the application for permission to appeal identified five grounds, namely:

> (a) The Judge was wrong to find that the grounds for refusing recognition and enforcement based on lack of arbitrability and public policy are distinct and separate.
>
> (b) The learned Judge was wrong to find that the parties' submissions and evidence relating to the non-arbitrability of the dispute under UAE law were "peripheral and inapplicable".
>
> (c) The learned Judge failed to give sufficient weight to the uncontested evidence of the Applicant's expert.
>
> (d) The learned Judge was wrong to hold that the high threshold necessary to refuse recognition or enforcement on public policy grounds was not met in this case.
>
> (e) The appeal raises an issue of general public importance which it is important for the DIFC Court of Appeal to consider.[22]

41. Significantly, no ground of appeal, nor any argument advanced in the skeleton served in support of the application for permission to appeal challenged the Judge's finding that the dispute was arbitrable under the laws of the DIFC.

42. After reviewing the parties' competing contentions the Judge held:

> "None of the Appellants' arguments advanced in grounds 1 to 4 have a realistic prospect of success. Nonetheless, . in my view there are compelling reasons for the appeal to be heard, namely, to enable the Court of Appeal to provide guidance on certain questions of law that underpin some of the grounds the Appellants identified."[23]

43. Following publication of the orders with reasons in respect of the application for permission to appeal, the Respondents wrote to the Court seeking clarification of the grounds in respect of which permission had been granted, and of the "certain questions of law" to which reference was made in the passage of the reasons cited above. That query was referred to the Judge, who directed that the parties be advised that:

> (a) Permission to appeal has been granted solely on ground 5 of the Appellants' grounds of appeal.
>
> (b) The potential question of law is whether the grounds for refusing to recognise and enforce the Arbitral award under Article 44(1)(b)(i) based on subject matter non-arbitrability, and Article 44(1)(b)(ii) based on public policy, are distinct and separate.

44. The question of law identified by the Judge is essentially the issue raised by proposed ground 1 of the appeal. However, the Judge had found that Ground had no realistic prospect of success. Further, the characterisation of the grounds specified in the two sub-paragraphs of Article 44(1)(b) as either inter-connected on the one hand, or distinct and separate on the other, would not of itself necessarily determine the outcome of the appeal, especially in a context in which the there was no challenge to the finding that the first paragraph of Article 44 (1)(b), relating to non-arbitrability, had not been satisfied.

45. The Judge was clearly correct to conclude that ground 1 of the proposed appeal had no realistic prospect of success. The two sub-paragraphs of Article 44(1)(b) are clearly distinct and separate, not only by reference to the grammatical construction of the paragraph, but also by reference to the subject matter of the two sub-paragraphs. The first is concerned with arbitrability under DIFC Law, and the second is concerned with enforceability assessed by reference to the public policy of the UAE. As already noted, the legislator made a deliberate choice to specify that arbitrability be determined by reference to the laws of the DIFC, not the UAE, and the Judge was plainly correct to hold that provisions in UAE commercial laws that have no application in the DIFC such as the UAE Civil Code and the UAE Arbitration Law are irrelevant to the assessment of arbitrability under the first sub-paragraph of Article 44(1)(b). And in any event, the Judge's determination of that question has not been challenged on appeal, perhaps reflecting the fact that there was no credible argument to the effect that the dispute was not arbitrable under the laws of the DIFC.

46. The proposition advanced at first instance, to the effect that as the dispute was not arbitrable under the laws of the UAE, it followed that it was not arbitrable under the laws of the DIFC ignored:

> (a) The obviously deliberate choice of the legislator to select the laws of the DIFC rather than the UAE as the criteria for the assessment of

arbitrability; and

(b) The fact that the UAE has deliberately chosen to create Free Zones, such as the DIFC, in which the commercial laws of the UAE do not apply; and

(c) Article 44(1)(b)(i) requires the issue of arbitrability to be assessed by reference to laws, being particularly the laws of the DIFC, and not public policy - public policy is only relevant to enforceability, which is the subject of the second sub-paragraph.; and

(d) The parties had expressly chosen the DIFC as the seat of arbitration under the SHA and had not opposed the ICC's determination that the DIFC should be the seat of the arbitration under the MoA.

47. Party autonomy is a fundamental principle of arbitration. The creation of Free Zones within the UAE, having differing commercial laws and differing arbitration laws enables parties to choose the legal regime which they wish to govern their arbitration. Consistently, with the cases to which reference will be made below, that freedom of choice is part of the public policy of the UAE. In this case the parties exercised that freedom to choose that the arbitration of their dispute would be governed by the laws of the DIFC, where there is no doubt that the dispute was arbitrable. The successful party also had the freedom to choose to enforce the award in the courts of the seat, with the consequence that arbitrability for the purposes of recognition and enforcement is also assessed by reference to the laws of the seat.

48. The issue posed with respect to the characterisation of the relationship between the two sub-paragraphs of Article 44(1)(b) admits of only one answer, which is that they are separate and distinct and must be considered and addressed on that basis.

49. In the circumstances of the case, the permission to appeal should be construed, and would likely have been construed by the parties, as extending to the following issues:

(a) Was the Judge wrong to conclude that the Appellants had failed to establish that the dispute was not arbitrable within the UAE as a matter of public policy; and

(b) If so, did it follow that the award was not enforceable as a matter of the public policy of the UAE.

50. At the hearing of the appeal senior counsel for the Appellants accepted that the only question in the appeal was whether the Judge was wrong to conclude that it had not been established that enforcement of the award would be contrary to the public policy of the UAE[24]. She confirmed that the essential contention of the Appellants was that the arbitration of the dispute was contrary to the public policy of the UAE, from which it followed that enforcement of the award was also contrary to the public policy of the UAE. That contention necessarily raises the two questions identified in the preceding paragraph.

Non-arbitrability under the public policy of the UAE

51. The terms of the expert report with respect to the public policy of the UAE in relation to the arbitrability of the dispute have been summarised earlier in these reasons. The expert report was carefully analysed by the Judge in his reasons. After considering the provisions of the Civil Code and the UAE Arbitration Law upon which the submission was based, and the authorities to which reference was made by the expert, the Judge was not satisfied that it had been established that arbitration of the dispute would have been contrary to the public policy of the UAE, noting that mere reference to general topics, such as private ownership or the circulation of wealth as matters of public policy in Article 3 of the Civil Code did not of itself mean that disputes bearing some connection to those topics were not arbitrable.

52. In the view of this Court it was open to the Judge to conclude, on the evidence before him, that the Appellants had failed to establish that arbitration of the dispute the subject of the award, if conducted in the UAE rather than the DIFC, would have been contrary to the public policy of the UAE.

53. Having failed to establish that the Judge erred by concluding that it had not been established that arbitration of the dispute within the UAE outside the DIFC would have been contrary to public policy, the premise for the contention that enforcement of the award would be contrary to the public policy of the UAE falls away. However, as the Judge considered this to be an issue of some public importance, the Court will proceed to consider the issue of enforceability under the second sub-paragraph of Article 44(1)(b) on the counter-factual premise that it had been established that arbitration of the dispute in the UAE would have been contrary to the public policy of the UAE.

54. In this Court's view the Judge was correct to conclude that even if it had been established that arbitration of the dispute within the UAE outside the DIFC would have contravened matters of public policy specified in Article 3 of the Civil Code of the UAE it did not follow that enforcement of an award following an arbitration seated within the DIFC would be contrary to the public policy of the UAE within the meaning of that term in Article 44(1)(b)(ii), essentially for the reasons which he gave.

55. As already noted, there was no evidence of any weight in support of the Appellants' proposition that enforcement would be contrary to public policy simply because the dispute was not arbitrable by reason of matters of public policy. The expert's bare assertion of that proposition without any reasoned support or reference to authority was contradicted later in the expert's report.

56. Also as already noted, given that the dispute was arbitrable in the seat within the UAE chosen by the parties, the Appellants' proposition is directly contrary to the public policy of the UAE evident in the creation of Free Zones which provide parties with the autonomy to choose which system of laws will govern the resolution of their commercial dispute. Acceptance of the Appellants' proposition would stifle that choice, contrary to UAE public policy.

57. *Fiske and Firmin v Firuzeh*[25] was another case in which it was asserted that enforcement of an arbitral award would be contrary to the public policy of the UAE, within the meaning of Article 44 of the Law. In support of that contention it was argued that the enforcement of arbitral awards in the DIFC against defendants domiciled in on shore Dubai would deprive persons of rights which they enjoyed under the provisions of the UAE Civil Procedure Code (the "CPC").[26]

58. After observing that the rules of the CPC are not applicable in the DIFC pursuant to UAE Federal Law 8 of 2004 His Excellency Justice Al Madhani observed:

> "It is very well known that public policy can be generally defined as a system of laws, regulations, regulatory measures or courses of action concerning a public matter and that the source of that public policy is usually laws.
>
> Thus, it can be said that it is public policy in the whole of the UAE not to apply the CPC within the DIFC and that leads us to conclude that there are no conflicts as long as the said Dubai and DIFC laws apply within the Centre (DIFC)."[27]

59. In *Loralia Group LLC v Landen Saudi Company*[28] an application was made to set aside an award made in arbitral proceedings seated in the DIFC on the ground that contingency fee arrangements conflicted with the public policy of the UAE. In that context His Excellency Justice Al Sawalehi observed:

> "A determination of these issues requires enquiry into the content of "the public policy of the UAE" as regards to success fees for legal representation given in the course of a DIFC seated arbitration. I need not be convinced that the public policy referred to in Article 41 of the DIFC arbitration law refers to the same public policy as the UAE as a whole. This is an uncontroversial finding at this time. However, the respondent is correct in its assertion that "public policy of the UAE", at least as used to invalidate an otherwise valid final arbitral award, is narrow and nuanced.
>
> Both parties accept that public policy may differ between the DIFC and on shore Dubai in circumstances where arguments are based upon legal provisions that explicitly do not apply in the DIFC, such as the UAE Civil Procedure Code. However, I would reframe this statement to say that the uniform UAE public policy allows for differing outcomes in certain circumstances where matters are rightfully brought before the DIFC Courts rather than other UAE Courts. While the outcomes may differ, the public policy applied is actually the same. Public policy of the UAE encompasses the constitutional and legislative creation of the DIFC and thus incorporates the intended differences legally allowed within the DIFC."[29]

60. The Judge went on to find that while UAE Federal Law prohibited contingency or success fees for legal representatives in the UAE outside the DIFC, those laws did not apply within the DIFC, and only unreasonable contingency fee arrangements were prohibited in the DIFC. As the arbitral tribunal had awarded the successful party fees by reference to the contingency arrangement, it followed that the tribunal was satisfied that they were reasonable and therefore, as the arrangements complied with the laws of the DIFC, they could not be contrary to the public policy of the UAE.

61. As already noted, in his reasons in this case, Justice Al Sawalehi reconciled passages in his later judgment in *Lachesis v Lacrosse* with his observations in *Loralia* and reinforced his conclusion in *Loralia* that because different legal systems existed within the UAE, as a matter of UAE public policy, it followed that there could be different outcomes within those differing legal systems when matters of public policy are considered.

62. The term "public policy" used in Articles 41 and 44 of the Law draws its provenance from international instruments, notably the New York Convention and the UNCITRAL Model Law. The meaning of the term in the context of those instruments has been established by a series of decisions in the national courts of various countries which have been followed by decisions in this Court.

63. By contrast, the expression "public policy" is used in a very different context in Article 3 of the UAE Civil Code and is used only in the context of the domestic laws of the UAE.

64. The Judge was correct to draw a distinction between the meanings properly given to the expression when used in these differing contexts. In particular, he was correct to observe that in the context of Articles 41 and 44 of the Law, the Court will only conclude that an award will be set aside or recognition or enforcement refused on the grounds of public policy if the award is "contrary to the essential morality of the State" or "discloses errors that affect the basic principles of public and economic life" or "fundamentally offends the most basic and explicit principles of justice and fairness".

65. As already noted, Mr Al Zarooni's observations with respect to the enforceability of the award in the UAE outside DIFC are enigmatic and apparently contradictory. It is however clear that he did not address or consider whether enforcement of the award would be contrary to the public policy of the UAE in the manner identified in the cases dealing with public policy in the context of the international instruments from which the Law is derived. Nothing in his report suggests that enforcement of the award in the Courts of the UAE outside DIFC would "fundamentally offend the most basic and explicit principles of justice and fairness". In the absence of evidence, it seems extremely unlikely that an order that parties found to have been in breach of an agreement should, in accordance with the express provisions of that agreement, purchase the shares of the innocent party could ever be characterised as fundamentally offensive to basic principles of justice and fairness merely because a register of shareholders is maintained by the company and lodged with the corporate regulator from time to time.

Conclusion

66. For these reasons the Judge was correct to dismiss the application to set aside the orders for recognition and enforcement, essentially for the reasons which he gave. The appeal must therefore be dismissed.

Costs

67. The Appellants do not challenge the proposition that costs should follow the event and that they should be ordered to pay the Respondent's costs of the appeal. However, it is contended that the Statement of Costs filed shortly prior to the hearing of the appeal is excessive, including a claim for 6 hours attendance at hearing, when in fact the hearing went for less than an hour, and also on the basis that the other hours claimed are excessive.

68. The Court has considered these submissions. The rates claimed by the Respondent's lawyers are within the average hourly rates identified in Registrar's Direction No. 1 of 2023. The total professional hours claimed in this Statement of Costs, excluding the hearing, is around 53 hours spread amongst five different lawyers. Given the history, complexity and potential importance of the case, these hours do not appear excessive to the Court. However, as was conceded, the time anticipated for the hearing, was much longer than was in fact required, and the costs claimed must be reduced on that account. The Court will therefore allow the Respondent's costs in the amount of AED 195,000.