Nael v Niamh Bank [2024] DIFC CA 015

JANUARY 09, 2025 COURT OF APPEAL - JUDGMENTS

Claim No: CA 015/2024

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE

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

IN THE COURT OF APPEAL
BEFORE H.E. CHIEF JUSTICE WAYNE MARTIN, H.E. JUSTICE MICHAEL BLACK KC AND H.E. JUSTICE ANDREW MORAN

BETWEEN

NAEL

Claimant/Respondent

and

NIAMH BANK

Defendant/Appellant

Hearing :	**10 December 2024**
Counsel :	Mr Rupert Reed KC and Gregor Hogan instructed by Primecase, for the Respondent/Claimant Mr Tom Stewart Coats instructed by Holman Fenwick Willan, for the Appellant/ Defendant
Judgment :	**9 January 2025**

JUDGMENT OF THE COURT OF APPEAL

UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 25 October 2024 in ABR-020-2022 granting permission to appeal on all grounds

AND UPON Hearing Counsel for the Appellant and Counsel for the Respondent on 10 December 2024 before H.E. Chief Justice Wayne Martin, H.E. Justice Michael Black KC and H.E. Justice Andrew Moran

IT IS HEREBY ORDERED THAT:

1. The appeal is dismissed.

2. The parties shall exchange written submissions on interest and costs within 7 days of the date of this Judgment. The Court shall undertake an immediate assessment of any costs claimed by a party in relation to all costs not the subject of a previous Order and therefore the written submissions should be accompanied by a written statement of the costs in accordance with Rules 38.34 and 38.35 of the Rules of the DIFC Courts.

3. The parties may respond in writing within 7 days of receipt of the written submissions.

Issued by:
Delvin Sumo
Assistant Registrar
Date of Issue: 9 January 2025
At:3pm

H.E. Chief Justice Wayne Martin:

I agree with H.E. Justice Michael Black KC.

H.E. Justice Michael Black KC:

INTRODUCTION

1. This is an appeal by the Defendant, Niamh Bank (the **"Bank"**) against the Order of H.E. Justice Shamlan Al Sawalehi (the **"Judge"**) dated 1 August 2024 whereby he refused to set aside an Order dated 30 October 2023 recognising an arbitral award dated 18 July 2022 (the **"Award"**) in favour of the Claimant, Nael (the **"Employer"**) made with the permission of the Judge dated 25 October 2024.

2. In this Appeal, the Court shall consider the ambit of the public policy ground for refusing enforcement and recognition of an arbitral award embodied in Article 44(1)(b)(ii) of the DIFC Arbitration Law (the **"Law"**). A typographical error appears to have crept into a number of documents on the Court file (including the Grounds of Appeal and reflected in the Permission to Appeal) whereby the Article was referred to as 44(1)(b)(vii). There is no such Article in the Law but no confusion has arisen. Article 44(1)(b)(ii) provides:

> "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]:
>
> …
>
> if the DIFC Court finds that:
>
> …
>
> the enforcement of the award would be contrary to the public policy of the UAE."

FACTUAL BACKGROUND

3. In October 2018, the Employer entered into a contract with a building and engineering contractor (the **"Contractor"**) for the infrastructure works of a large public project. Under the terms of the contract the Contractor was required to procure a number of guarantees or bonds from a bank, the Bank. In June 2019, the Employer and the Contractor entered into a contract for further works. Further guarantees and bonds were required, which were procured from the Bank. For ease of reference, the guarantees and bonds are referred to in this judgment as **"the Guarantees"**.

4. The parties to the Guarantees were the Bank and the Employer. The Guarantees were subject to the laws of Dubai outside the DIFC but contained arbitration clauses naming the DIFC-LCIA as the supervising institution and the DIFC as the seat.

5. Each of the Guarantees was expressed to be irrevocable and on-demand. On 1 October 2020, the Contractor announced that it was entering into a form of insolvency. The Employer immediately terminated the Contractor's employment under the two construction contracts and made demand under the Guarantees.

6. The Bank contested its liability under the Guarantees and gave notice of arbitration under each of them. The arbitrations were consolidated into a single arbitration. A remote hearing took place on 20-22 December 2021. The Arbitral Tribunal rejected the Bank's denial of liability and on 18 July 2022 issued the Award it which it awarded that:

(a) The Bank's claims in their entirety fell within the scope of the Tribunal's jurisdiction;

(b) The Employer's demands were valid;

(c) The Bank shall pay AED 160,722,046 to the Employer plus simple interest at the rate of 4% above the Bank's official lending rate from 1 October 2020;

(d) The Bank shall pay the Employer's legal costs in the sum of AED 1,746,806.25 and arbitration costs in the sum of AED 362,292.84 plus simple interest at the rate of 1% above the Bank's official lending rate.

7. No steps were taken to challenge the Award. The Bank would undoubtedly have been advised that any challenge enjoyed little or no prospect of success. Instead, on 20 July 2022, the Bank wrote to the *"Head of the Liquidation Procedures Trustees Group"* (the **"Trustees"**) of the Contractor stating (in translation from the Arabic):

"With reference to the above subject, and whereas the completion percentage of these projects has exceeded 95%, and the Experts' Committee assigned by the court has begun the mandate of reviewing these projects.

Therefore, please urgently obtain a decision from the esteemed bankruptcy judge to suspend the liquidation and disbursement of the following guarantees:

[sets out details of the Guarantees]

Lest the owner of the project might submit a request to liquidate such

Guarantees."
[emphasis added]

8. The letter was of course misleading in that it failed to inform the Trustees that: first, the Employer had already requested liquidation of the Guarantees; and secondly, that the Employer's right to do so had been confirmed by a duly appointed arbitral tribunal after a contested hearing.

9. Having thus been misled, the Trustees made application to the Dubai Bankruptcy Court (apparently via an online portal on 20 July 2022) in the following terms (in translation from the Arabic):

"Subject: A request to suspend the liquidation of letters of guarantee issued by [the Bank] based on a request by [the Contractor] as part of preserving the rights of the companies subject of this bankruptcy application and not burdening the bankruptcy with more debts that are not due and with reference to the attached letter issued by [the Bank] for the guarantees issued by the aforementioned bank in favour of [the Employer] on behalf of the company subject of this bankruptcy application [the Contractor], whose data can be recapitulated in the table attached herein:-

Whereas the percentage of the Debtor Company's completion of its work in that project has exceeded 95% - therefore, liquidating those guarantees wholly or partially becomes incorrect, prejudicing the rights of Debtor Company and burdening the bankruptcy with debts that are not due for payment. Accordingly, and to preserve the rights of the Debtor Company, we humbly request the Honourable Court to grant permission for the following:-

- Permission be given to suspend the liquidation of the letters of guarantee issued by [the Bank], whose details are set out in the above table, for a period of 3 months, subject to renewal.

- The matter be referred to the engineering expert committee appointed by the court (Project Experts Committee) formed by the Honourable Court to consider and study that project and draw up a detailed report thereon - up to determining the entitlement of the beneficiary of such guarantees to liquidate value thereof in whole or in part. In the second instance, determining the value due for liquidation, as well as determining the dues of the Debtor Company owed by the owner of the project and settle the account between them."

10. On 21 July 2022, the application was granted.

11. On 9 December 2022, the Employer issued an Arbitration Claim in the DIFC Courts seeking recognition and enforcement of the Award. The Bank asserted that the Award was *"a nullity"*. On 10 January 2023, the Bank challenged the jurisdiction of the DIFC Courts. On 14 February 2023, the Employer made a cross-application for security in the amount of the Award.

12. In the meantime, on 11 January 2023, the Trustees made further application to the Dubai Bankruptcy Court in which it was noted that on 8 December 2022 an Engineering Projects Committee appointed by the court reported to the court that an amount of AED 152,562,366.57 was due from the Employer to the Contractor, that the project had been completed 100% and that the Employer was the one who had breached its obligations. The application continued:

> "Whereas it has come to our attention that **the employer is initiating a request for liquidating the value of the banking guarantees, subject of this request and the previous request, through the Dubai International Financial Centre courts** avoiding the proper way characterised by following up with the bankruptcy court, taking into account that the report of the Engineering Projects Committee concluded that there are amounts owed by the employer in favour of the contractor.
> Hence, with that said and in order to preserve the rights of the companies that are the subject of the present bankruptcy request, and **for fear that the employer may submit a request to liquidate these guarantees, which would harm the creditors**, we urgently request that - the previously issued decision - be extended which decision suspended the liquidation and disbursement of the guarantees subject of this request for a period of six months or until the end of the dispute about it between the contractor or the employer, knowing that the details of such guarantees by which the previous request was made dated 20/07/2022 are as follows;
> [sets out details of the Guarantees]"
> [emphasis added]

13. Again, the Dubai Bankruptcy Court was misled. It was the Award confirming the Bank's liability under the Guarantees that was being sought to be enforced in the DIFC Courts, not the liquidation of the value of the Guarantees. In fairness, it is not clear whether the Trustees knew or understood the true position.

14. On 11 January 2023, the Dubai Bankruptcy Court directed that permission was given to suspend the liquidation and disbursement of the Guarantees for six months or until the meritorious dispute between the company, subject of the procedures and the Employer, comes to an end.

15. In the DIFC Courts, on 27 April 2023 the Judge dismissed the Employer's application for security. On 12 July 2023, the Judge also dismissed the Bank's challenge to the jurisdiction of the DIFC Courts.

16. On 13 July 2023, the Dubai Bankruptcy Court order was extended by a further 6 months on the application of the Trustees to *"order the suspension of the liquidation and encashment of the guarantee [sic] for six months due to the fear that the project owner may apply for the liquidation of the following guarantees …"*, again, *"due to the fear that the employer apply for the liquidation of these guarantees which will cause harm to the creditors"*. Further extensions were granted on 15 December 2023, 20 May 2024 and 7 November 2024.

17. On 30 October 2023, the DIFC Courts ordered that the Award be recognised as binding within the DIFC and enforced in the same manner as a judgment or order of the DIFC Courts. Accordingly, judgment was entered in terms of the Award.

18. The Bank applied to set aside the judgment on 14 November 2023. The application was heard on 31 January 2024 and rejected in a judgment dated 1 August 2024 (the **"Judgment"**).

THE JUDGMENT

19. The Judge noted that the grounds of the Bank's application were that the DIFC judgment enforcing the Award was inconsistent with a judgment rendered by the Dubai Bankruptcy Courts on 21 July 2022 and should be set aside on public policy grounds under Article 44(1)(b)(ii) of the Law.

20. The Judge held that the application failed *in limine* as the Dubai Bankruptcy Court decision did not impact the enforcement of the Award, nor were there any provisions within the Award that could confer an obligation on the debtor.

21. He accepted that the recognition and enforcement of an award may be denied on public policy grounds. It seems implicit in his short judgment at paragraph [26] that he regarded there to be a *"high threshold test"* in order to *"trigger a public policy defence". He found that "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 [the Contractor] is not a party to the Award and their insolvency proceedings have no bearing on the debt obligations raised within."*

PERMISSION TO APPEAL

22. The Bank applied to the Judge for permission to appeal on 12 September 2024 on the following grounds:

(a) If the Judge held in the Judgment that a defendant to a DIFC enforcement claim could not in principle rely on Article 44(1)(b)(ii) of the Arbitration Law as a defence to enforcement in circumstances where the making of a DIFC Court order enforcing the Award would impose obligations on the defendant which are inconsistent with those imposed on the defendant by an order of the Dubai Courts, the Judge erred in law in so holding;

(b) The Judge erred in law in holding that the interaction between the order of the Dubai Courts dated 15 December 2023 and the DIFC Order of 30 October 2023 did not give the Bank a defence to the recognition and enforcement of the Award under Article 44(1)(b)(ii) of the Arbitration Law. In particular:

i. The Judge erred in law at paragraph 25 of the Judgment when he held that the decision of the Dubai Courts dated 15 December 2023 *"does not impact the enforcement of the Award, nor any provision within the Award that could confer an obligation on the debtor"*. It is respectfully submitted that this was incorrect since (a) it is the public policy of the UAE to avoid inconsistent orders of courts within the UAE (particularly between courts within the same Emirate), and (b) there was a conflict between the obligations imposed by the relevant orders in that the order of the Dubai Courts prohibited the Bank from making payment pursuant to the Guarantees and the DIFC Order required the Bank to make payment pursuant to the Guarantees; and

ii. The Judge erred in law at paragraph 26 of the Judgment when he said that *"the matter of inconsistent judgments … does not apply here as [the Contractor] is not a party to the Award and their insolvency proceedings have no bearing on the debt obligations raised therein"*. It is not relevant to the public policy defence (a) that there was not an exact identity of parties to the two orders, or (b) that the Dubai Court order arose within [the Contractor's] bankruptcy proceedings. Instead, the relevant issue is simply whether the Dubai Court order and the DIFC Order imposed inconsistent obligations on the Bank.

23. The Judge gave permission to appeal on all grounds on 25 October 2024. He held that *"it is necessary to grant permission to appeal as both sides have presented submissions that have a real prospect of success and compelling reason to reconsider."*

DISCUSSION

Preliminary

24. It is surprising that the Judge gave permission to appeal in respect of Ground 1 as it is evident that he did not hold that a defendant to a DIFC enforcement claim could not in principle rely on Article 44(1)(b)(ii) of the Arbitration Law as a defence to enforcement in circumstances where the making of a DIFC Court order enforcing the Award would impose obligations on the defendant which are inconsistent with those imposed on the defendant by an order of the Dubai Courts. On the contrary, at paragraph [26] of the Judgment he held that *"The matter of 'inconsistent judgements', [is] normally relevant,"* but on the facts the Contractor was not a party to the Award and the insolvency proceedings had no bearing on the award-debt. It is to be noted that the Bank stated in its skeleton argument at paragraph 38 that the Judge appeared to accept that *"inconsistent judgments"* might in principle trigger the public policy defence to recognition and enforcement. Notwithstanding, it repeated Ground 1 in the next paragraph. There was however no further development of the Ground in the skeleton argument nor in oral submissions.

25. The real points of the appeal are captured by Ground 2:

(a) Is it the public policy of the UAE to avoid inconsistent orders of courts within the UAE (particularly between courts within the same Emirate)?

(b) If so, may inconsistent judgments or court orders amount to grounds for refusing recognition or enforcement of an arbitral award on the basis that the enforcement of the award would be contrary to the public policy of the UAE withing the meaning of Article 44(1)(b)(ii) of the Law?

(c) Did the order of the Bankruptcy Court and the Order of the DIFC Courts on 30 October 2023 amount to conflicting judgments?

i. Did the order of the Bankruptcy Court and the Order of the DIFC Courts on 30 October 2023 amount to conflicting judgments?

a. there was not an exact identity of parties to the two orders, or

b. the Dubai Bankruptcy Court order arose within the Contractor's bankruptcy proceedings?

ii. Is the relevant issue simply whether the Dubai Bankruptcy Court order and the DIFC Order imposed inconsistent obligations on the Bank (if that is the case)?

(d) Should the Judge have discharged the Order of the DIFC Courts of 30 October 2023 on the grounds that enforcement of the Award would be contrary to the public policy of the UAE withing the meaning of Article 44(1)(b)(ii) of the Law?

Public Policy of the UAE

26. This Court noted with approval in Lachesis v Lacrosse [2021] DIFC CA 005 (29 December 2021) the words of H. E. Deputy Chief Justice Omar Al Mheiri in Case No. ARB-009-2019, at paragraph [24], *"…this commercial and civil Court will rarely be in a position to make findings related to the public policy of the UAE without the assistance of expert evidence…."*. This is undoubtedly correct where there is a dispute between the parties as to what might be the public policy of the UAE. There will however be cases where expert evidence is unnecessary because either the public policy is both obvious and has been recognised in previous cases (for example, the public policy against bribery and corruption) or the parties are in agreement.

27. In the present case, it is not in dispute that any state (or Emirate) with the potential for conflicts of jurisdiction would wish to avoid those conflicts and the risk of inconsistent judgments. The DIFC Courts have stated as much in *Five Holding Limited v Orient UNB Takaful PJSC* [2021] DIFC CFI 027 (4 August 2021), per H.E. Justice Wayne Martin (as he then was) at [44]:

> "Inconsistent or contradictory judgments by the same or different Courts in a single jurisdiction create uncertainty and bring the system of justice in that jurisdiction into disrepute. The existence of inconsistent or contradictory judgments is one of the triggers of a conflict of jurisdiction. However, the exercise of jurisdiction over the same dispute by different Courts can also result in oppression to the parties as a result of multiplicity of proceedings with all their burdens of time and cost."

28. The DIFC Courts have repeatedly stated that the sources of public policy are usually found in the system of laws governing public matters (Fiske v Firuzeh [2014] DIFC ARB 001 (13 July 2015), [41] per H.E. Justice Ali Al Madhani), *"the fundamental principles of law or morality or justice"* (Muzama v Mihanti [2022] DIFC ARB 004 (8 February 2023), [88] per H.E. Justice Shamlan Al Sawalehi) and *"the most basic and explicit principles of justice and fairness" (Lucineth v Lutina Telecom Group Ltd* [2019] DIFC ARB 005 (8 August 2019), [13] per H.E. Justice Shamlan Al Sawalehi).

29. The mischief identified by H.E. Justice Wayne Martin in Five Holding contravenes basic or fundamental principles of justice and fairness, and indeed, it appears to be common ground between the parties, that the UAE (in common with other federal states) enjoys a system of laws designed to avoid conflicts of jurisdiction and the risk of inconsistent judgments. At the Federal level, Articles 99(7) and (8) of the UAE Constitution empower the Union Supreme Court to resolve conflicts of jurisdiction between both Federal and Emirati courts and between the courts of different Emirates. Within Dubai, the issue is addressed by Decree 29 of 2024, *Concerning the Judicial Committee for Resolving Conflicts of Jurisdiction between the Dubai International Financial Centre Courts and Judicial Entities in the Emirate of Dubai* ("Decree 29"), which established the Conflicts of Jurisdiction Tribunal ("CJT") (as its name suggests) to resolve jurisdictional conflicts. The Employer points out that the CJT only has power where the proceedings are between the same parties when determining which judgment to be enforced, but that is immaterial when identifying the public policy to avoid inconsistent judgments.

30. Thus, the provisions of the UAE Constitution and Dubai Decree 29 embody, and seek to address, a public policy of the UAE to avoid conflicts of jurisdiction and inconsistent judgments.

31. Is there a difference between conflicting judgments and conflict between a court order and a judgment? I will revert to this point below in the context of the present case.

Inconsistent Judgments or Orders as Grounds for Refusing Recognition or Enforcement of an Arbitral Award

The Disputed Issues

32. There is a greater difference between the parties whether inconsistent judgments or court orders can amount to grounds for refusing recognition or enforcement of an arbitral award on the basis that the enforcement would be contrary to the public policy of the UAE. I do not understand the Employer to be saying that conflicting judgments can *never* give rise to a public policy defence but that, not only will such circumstances be exceptional, they are also confined to conflicting judgments of courts with concurrent jurisdiction. The Bank interprets public policy more broadly. The Bank speaks of *"conflicting orders of courts of the same State"* and submits that a local public policy is more likely to justify refusal of recognition and enforcement if it is one that would be recognised in most developed legal systems. The Employer says that approach ignores the fact that the ground is already occupied by legislative machinery (itself the product of the UAE's public policy to establish separate legal regimes in Freezones) rendering resort to broad public policy otiose.

33. The Employer's primary point is therefore that, if and insofar as there is a conflict, it is not to be managed through Article 44 of the Law but (within Dubai) by Decree 29.

34. The Employer's second point is that even if the conflict prima facie falls within the Court's discretion under Article 44, the jurisdiction should only be exercised in rare and exceptional cases.

Decree 29 v Article 44 of the Law

35. The functions of the CJT are set out in Article 4 of the Decree 29:

> "The Judicial Committee will have the duties and powers to:
>
> 1. determine the competent Judicial Entity having jurisdiction over any claim or application in respect of which a conflict of jurisdiction arises between the DIFC Courts and any of the Judicial Entities;
>
> 2. determine the enforceable judgement in the event of delivery of conflicting judgements by the DIFC Courts and any Judicial Entity in respect of claims that involve the same litigants and subject matter; and
>
> 3. exercise any other duties or powers assigned to it by the Ruler or the Chairman."

36. The Employer submits:

> (a) DIFC Courts and the non-DIFC Dubai Courts may come to different conclusions on questions of law and policy and a party may be subject to different obligations depending on whether their case is adjudicated in or outside of the DIFC;
>
> (b) There are two principles of public policy - first, to avoid conflicts of jurisdictions and the risk of inconsistent judgments, and secondly, to establish a common law system of law and procedure in the DIFC as a parallel jurisdiction in the Emirate of Dubai;
>
> (c) In narrow circumstances, those two principles may conflict leading to contradictory orders;
>
> (d) That the management of those competing public policy considerations ought to be dealt with by the exercise of the DIFC Court's discretion under Article 44 of the Arbitration Law is wrong because –
>
> > i. any discretionary decision is open-textured and would leave parties unable to predict with certainty which Court will ultimately be found to have jurisdiction or have made the "correct" order:
> >
> > ii. the Ruler of Dubai has already established a specific and regulated mechanism for resolving such disputes, namely the CJT:

iii. there is no role for the application of the public policy defence in Article 44(1)(b)(ii) of the Law as a mechanism for resolving potential conflicts of orders and jurisdiction as between the DIFC and the non-DIFC Dubai Courts. That is a task for the CJT.

37. The Employer's submissions are unpersuasive for the following reasons:

(a) The Law is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended) (the "Model Law"). It is suggested in the Employer's skeleton argument that the Law implements the DIFC's obligations under the New York Convention. Article 42(1) of the Law states that *"For the avoidance of doubt, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards the DIFC Court shall comply with the terms of such treaty"*. Notwithstanding doubts expressed in The DIFC Courts' Practice, 2nd Edition, paragraphs 4.14 and 4.16 based on Lahela v Lameez [2020] DIFC CA 007 (referenced at footnote 28 to the Employer's skeleton argument), I consider that the DIFC Courts are bound to give effect to the New York Convention by reason of Article 42(1) of the Law (a point not addressed in Lahela);

(b) The New York Convention expressly provides at Article V(2)(b) that *"Recognition and enforcement of an arbitral award may … be refused if … The recognition or enforcement of the award would be contrary to … public policy …"* In *Egan v Eava* [2013] DIFC ARB 002 (29 July 2015), Justice Sir Anthony Colman (as he then was) held at [40] that *"Article 44(1)(b) of the Arbitration Law when it refers to 'the public policy of the UAE' must be construed as consistent with Article V2(b) of that [New York] Convention"*. Thus, the Law introduces the terms of the New York Convention into DIFC law;

(c) I am reinforced in my view by the refusal of Justice Sir Richard Field in *YYY Limited v ZZZ Limited* [2017] DIFC ARB 005 (17 November 2019) to enforce a decision of the Dubai Court of Cassation on the ground that the decision was made in breach of the New York Convention notwithstanding a reference to the Joint Judicial Committee. It is implicit in Sir Richard's decision that the DIFC Court's obligation to comply with the New York Convention takes precedence over the enforcement of a decision of the domestic courts inconsistent with the New York Convention. *A fortiori*, it cannot be right that the DIFC Court's obligation to comply with the New York Convention in relation to the application of the UAE's public policy to avoid inconsistent judgments has been abolished in its entirety by a side-wind with the establishment of the CJT;

(d) As the Employer notes, the CJT's jurisdiction is limited to cases where the parties to the conflicting judgments are the same. The ground is therefore not fully occupied, and the Court therefore cannot be precluded from addressing cases where there are conflicting judgments albeit there is no identity of parties;

(e) In terms of the hierarchy of juridical norms, the Chief Justice observed during the course of argument that *"there are public policies and there are public policies"*. The Employer presses the Court that it is only violation of a state's basic principles of morality and justice that could justify refusing to recognise or enforce an arbitral award on public policy grounds (see paragraphs 44ff. below). If only breach of the most fundamental tenets of public policy will trigger the defence, *ex hypothesi*, it must be the lower-level considerations of civil procedure (viz., the appropriate tribunal to determine conflicts of jurisdiction) that yield, not the other way round;

(f) If Decree 29 were the sole permissible procedure for resolving conflicts of jurisdiction it would also mean that the DIFC Courts would be precluded from making anti-suit or anti-enforcement injunctions (in respect of which a considerable jurisprudence has recently developed in England in the context of Russian sanctions). Justice Sir Richard Field made the wider point in YYY at paragraph [83]: *"the DIFC Court is the court of the seat and therefore the supervisory court whilst the arbitration is in progress and recognition of the [Dubai Court of Cassation] Decision would disable this Court from carrying out this very important function"*. While in the present case the arbitration is now at the stage of enforcement of the Award, the same logic remains. The DIFC Courts still have important functions to exercise, for example, the determination of challenges to the award itself or to enforcement, and the protection of the integrity of the arbitral process from collateral attack;

(g) It is the *gravamen* of the Employer's case that the mere existence of Decree 29 precludes a party from ever raising a public policy defence under Article 44(1)(b)(ii) of the Law on the grounds of conflicting judgments. That cannot be right not least because there may be no reference by a party to the judgments to the CJT.

38. The Employer's first point, namely that within the Emirate of Dubai, if and insofar as there are conflicting judgments that may be grounds to refuse to enforce an arbitral award, the conflict may not be managed through Article 44 of the Law but must be managed under Decree 29, is wrong. In other words, the DIFC Courts are not precluded (in an appropriate case) from refusing recognition or enforcement of an arbitral award on the grounds that the enforcement of the award would be contrary to the public policy of the UAE to avoid conflicting judgments by reason of the mere existence of the procedure under Decree 29.

Threshold Requirements

39. Article 1 of the New York Convention provides that the Convention applies to *"the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"*. The draughtman of the Law recognised that the DIFC Courts would be called upon to recognise and enforce awards not only made in other states but also within the DIFC and other jurisdictions within the state of the UAE by the inclusion of the words *"irrespective of the State or jurisdiction in which it was made"* when defining an arbitral award to be enforced in Articles 42 and 44 of the Law. It therefore follows that when considering enforcement of awards made within the DIFC and the UAE the principles governing enforcement of awards made in different states under the New York Convention equally apply.

40. The United Kingdom Privy Council sitting on appeal from the Court of Appeal of the *British Virgin Islands in Cukurova Holding A.S. v Sonera Holding B.V.* [2014] UKPC 15 stated at paragraph [34] that *"The general approach to enforcement of an award should be pro-enforcement"* following the well-known US case of *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) and citing with approval the judgment of H.E. Justice Sir Peter Gross (when sitting as a Judge of the English Commercial Court) in *IPCO (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep 326, [11]:

> "… there can be no realistic doubt that section 103 of the Act [the English equivalent of Article 44] embodies a pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself …"

41. The editors of *Redfern & Hunter: Law and Practice of International Commercial Arbitration* 7th ed., at §§ 11.55 to 11.59 list a number of factors governing the recognition of enforcement of awards under the New York Convention which they observe are of crucial importance to the recognition of enforcement of awards under Model Law-based arbitration laws, noting that the provisions of the Model Law are almost identical to those set out in the Convention. The grounds for refusal to recognise or enforce an award in Article 44(1) of the Law precisely mirror those set out in Article V of the Convention subject only to the changes necessary to "localise" the provisions to the DIFC.

42. Among the factors identified by the editors is that even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement. The language is permissive, not mandatory. In particular: *"the intention of the New York Convention and of the Model Law is that grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively. As a leading commentator on the Convention has stated: 'As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly' (van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law International, 1981) pp. 267-8)"*.

43. Professor van den Berg's words have influenced the approach of the courts in a number of jurisdictions, for example in *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999.

44. This is the general approach to any challenge to recognition or enforcement. The public policy ground for refusal of recognition or enforcement is, if anything, even more narrowly construed. The *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* at page 183 states:

> "Courts which had to define the appropriate standard of review under paragraph (1)(b)(ii) supported a restrictive interpretation of the defence. 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 part of the arbitral tribunal."

45. These words derive from the judgment in *Corporación Transnacional de Inversiones* commenting on an earlier Ontario judgment in Robert E. Schreter v. Gasmac Inc., Ontario Court, General Division, Canada, 13 February 1992, [1992] O.J. No. 257.

46. *Redfern & Hunter* note (§ 11.120) that decisions and legislation from different parts of the world show a readiness to limit (sometimes severely) the public policy defence to enforcement. Like the United Kingdom Privy Council, many of the decisions in different jurisdictions refer back to the *Parsons & Whittemore* case. In that case, the court was confronted by an argument that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the respondent's state) and the United States had been severed. The court rejected this argument and referred to the *'general pro-enforcement bias'* of the New York Convention. It held that the Convention's public policy defence should be construed narrowly, and that enforcement of foreign arbitral awards should be denied on this basis only *"where enforcement would violate the forum state's most basic notions of morality and justice"*.

47. In IPCO Sir Peter noted at paragraph [31]:

> "… considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution … The reference to public policy in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards…"

48. Commentators have emphasized that the public policy defence is exceptional. Gaillard and Bermann in *The UNCITRAL Secretariat Guide on the New York Convention (2017) observed that "Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based."* They refer to *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd.*, Federal Court, Australia, 23 March 2012, [2012] FCA 276 where Foster J held at paragraph [105] that, *"it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement" and to Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, Court of Final Appeal, Hong Kong, 9 February 1999, [1999] 2 HKC 205 in which Bokhary J PJ stated:

> "Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection."

49. In *UNCITRAL Model Law on International Commercial Arbitration - A Commentary* (Bantekas et al, eds) (2020) it is said:

> "**2.9.1.1 Public Policy** The public policy exception under article 36 of the Model Law is often discussed, but in reality, rarely successfully invoked. As already noted, article 36 of the Model Law is 'closely modelled' on the equivalent provision under the Convention….
>
> The high threshold has been explained in numerous judgments. For example, in one American case, the court held that the public policy exception should only apply 'where enforcement would violate the forum state's most basic notions of morality and justice'. This emphasis on fundamental principles was also adopted by the Court of Appeal in Singapore.
>
> … there are from time to time aids to interpretation: for example, section 7 A of Australia's International Arbitration Act 1974 states that enforcement would be contrary to public policy if 'the making of the award was induced or affected by fraud or corruption' or if 'a breach of the rules of natural justice occurred in connection with the making of the award'.
>
> The exceptional nature of the public policy exception is further reflected by the paucity of occasions where the exception has been upheld. National courts have consistently interpreted this exception narrowly.
>
> …
>
> **2.9.1.3 Procedural Grounds** The public policy exception is perhaps more commonly raised in relation to alleged procedural problems (sometimes it must be said as a 'last ditch' attempt to derail recognition and enforcement)."

50. The Employer points out that the Bank has not been able to take the Court to any decision of any court in any Model Law jurisdiction in which the public policy ground for refusing to recognise or enforce an award has been relied upon, let alone been successful, by reference to a stated public policy of avoiding inconsistent judgments, and still less a decision of any Court of the UAE. In written submissions, the Employer identified two cases (one from the Southern District of New York and another from Spain – see paragraphs 51 and 52 below) where the point had been raised but had failed. In oral submissions, the Employer did identify reference in *The UNCITRAL Secretariat Guide to two "rare instances"* where a public policy defence succeed on the grounds that the award conflicted with previous judgments of the courts of the forum: *Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd*., Supreme People's Court, China, 2 June 2008, [2008) Min Si Ta Zi No. 11; *Ciments Francais v. OAO Holding Company Siberian Cement, Istanbul Cimento Yatirmlari*, Highest Arbitrazh Court, Russian Federation, No. VAS-17458/11, 27 August 2012. The Employer pointed out that in those cases the conflict in each case was with a decision of the enforcing jurisdiction.

51. The Employer went on to underline that among the examples given in the Guide by way of contrast to cases where the public policy challenge had failed was where it was claimed that the award conflicted with judgments handed down by the courts of a *foreign country*: *Telenor Mobile Communications AS v. Storm LLC*, District Court, Southern District of New York, United States of America, 2 November 2007, 524 F. Supp. 2d 332.

52. The Employer also pointed to a case where the Spanish Supreme Court held that court proceedings commenced in the enforcing state *after* arbitration proceedings were well under way would not justify refusing enforcement of an award on public policy grounds. Otherwise, a *defendant* could initiate subsequent court proceedings in order to delay enforcement: Tribunal Supremo (*Fashion Ribbon Co., Inc. v. Iberband S.L*., decided 2003), YCA XXX (2005), 627 (at 629) (Supreme Court, Spain).

53. These international principles have informed DIFC law. The exceptional nature of the public policy defence and the concomitant hight threshold necessary to establish the defence have recognised in a number of cases: see *Banyan Tree Corporation Pte Ltd v Meydan Group LLC* [2013] DIFC ARB 003 (2 April 2015) per H.E. Justice Omar Al Muhairi (as he then was) at paragraph [43] and H.E. Justice Shamlan Al Sawalehi in Lachesis v Lacrosse [2020] DIFC ARB 005 (22 March 2021), at paragraph [37] citing an unreported decision of H.E. Deputy Chief Justice Omar Al Muhairi which referenced the words of the Second Circuit of the United States Court of Appeals in *Parsons & Whittemore*.

54. In Lucineth v Lutina [2019] DIFC ARB 005 (8 August 2019) at paragraph [13] H.E. Justice Sir Jeremy Cooke cited the words that appear at paragraph 44 above. He added, *"Not every infringement of mandatory law amounts to a violation of public policy but without any such infringement it is hard to see how any question of public policy can arise unless the Award is contrary to the essential morality of the state in question or discloses errors that affect the basic principles of public and economic life"*. Sir Jeremy's decision was followed by H.E. Justice Shamlan Al Sawalehi in *Muzama v Mihanti* [2022] DIFC ARB 004 (6 February 2023) at paragraph [93].

Did the order of the Bankruptcy Court and the Order of the DIFC Courts on 30 October 2023 amount to conflicting judgments?

55. While it may have been unnecessary in the present case for the Court to have had the benefit of expert assistance when identifying the public policy of the UAE, the same cannot be said in relation to the status and effect of the order of the Dubai Bankruptcy Court. Without such assistance (whether by way of submission or evidence), the Court has struggled to understand whether there is any conflict at all between the order of the Bankruptcy Court and the Order of the DIFC Courts on 30 October 2023.

56. In particular, the absence of expert assistance has disabled the Court from consideration of the Bank's submission that it matters not that there is no identity of the parties between the Dubai Bankruptcy Court order and the Judgment, all that matters is that there is an inconsistency.

57. It is the Bank's case that there was a conflict between the obligations imposed by the relevant orders in that the order of the Dubai Courts *prohibited* the Bank from making payment pursuant to the Guarantees whereas the DIFC Order *required* the Bank to make payment pursuant to the Guarantees [original emphasis]. It asserts that the Judge was wrong to focus on the fact that the Contractor was not a party to the Award, what matters is that the two orders imposed inconsistent obligation on the Bank on a close analysis of the wording of the respective orders.

58. It submits that properly understood the Dubai Court orders sought to prohibit payment under the Guarantees when they suspended the *"liquidation"* of the Guarantees. In contrast, the DIFC Order enters judgment in terms of the Award and the Award expressly directs that the Bank shall pay the Employer the amount of the Guarantees.

59. Leaving aside (for the moment) that the Dubai Court orders appear to have been procured by mispresenting to the Trustees (and through them to the Dubai Court) that Guarantees had yet to be called and failing to disclose that their validity had already been confirmed not only in the forum chosen by the Bank, but also in arbitral proceedings initiated by the Bank, it is unclear how or why the Dubai Court orders are binding on the Bank or the Employer.

60. It is unclear whether the Dubai Court orders are directed to the Bank or the Employer. The Bank claims that it is prohibited from making payment, but the orders were made on the basis of the fear that *the Employer* would enforce the Guarantees (see paragraphs 12 and 16 above). The likelihood would appear to be that the orders were directed to the Employer. The Bank concedes that the Employer is not a party to the bankruptcy proceedings (Transcript, 10 December 2024, page 8). How the orders might bind the Employer has not been explained. Counsel for the Bank suggested that the orders might take effect *"in rem"* as against the rights and obligations under the Guarantees. In the absence of expert evidence or authority for the proposition, that can only be speculation.

61. There was some unprofitable debate on a point raised by the Employer as to whether the rights under the Guarantees had "merged" in the Award so as to extinguish the rights under the Guarantee. Not only (again in the absence of expert evidence or authority) must there be considerable doubt that the common law doctrine of merger applies in the UAE outside the DIFC, the issue is irrelevant. It is irrelevant because this Court is concerned with the enforcement of the Award and the real issue is whether the Dubai Court orders properly understood conflict with enforcement of the Award. In other words, can an order suspending the liquidation and encashment of the Guarantees be interpreted as prohibiting the Bank from honouring an award following an arbitration in which it freely participated in another jurisdiction?

62. Expressed in those terms the suggestion would appear to be fanciful. First, whether or not there has been a merger of the causes of action in respect of the Guarantees as might be understood by a common lawyer (which may in any event only be the case where there is a judgment not an arbitral award – see *Telfair Shipping Corporation V. Inersea Carriers S.A. (The "Caroline P")* [1983] 2 Lloyd's Rep 351, 353 col. 2), the words of the Dubai Court orders do not on their face purport to restrain enforcement of the Award.

63. Secondly, it is unarguable that the Dubai Bankruptcy Court would have jurisdiction to suspend the enforcement of an arbitration award in the DIFC made in an arbitration seated in the DIFC.

64. Thirdly, on a plain reading of the Dubai Court orders in the context of the applications by the Trustees, it appears that they are not directed at the Bank but the Employer in seeking to restrain the Employer from making demand under the Guarantee. As a matter of fact, the orders were too late because demand had already been made. As a matter of law, there is at least doubt as to whether Dubai Bankruptcy Court had jurisdiction over the Employer to make the orders and no basis for jurisdiction has been demonstrated. As the Employer points out, it is not a party to the bankruptcy proceedings nor had any opportunity to make submissions to the Dubai Court.

65. Fourthly, if contrary to the foregoing, the Dubai Court orders can be interpreted as prohibiting the Bank from making payment under the Guarantees and that prohibition extends to honouring the Award, there is at least doubt as to whether Dubai Bankruptcy Court had jurisdiction over the Bank to make the orders and no basis for jurisdiction has been demonstrated.

66. Finally, and perhaps an over-aching point, had the Bank been honest and open with the Dubai Court in disclosing the existence of the Award, it is to be doubted that the Dubai Court would have made the orders in the terms it did, or at all. It may be assumed that had the Dubai Court been aware of the Award, it would have made an order in materially different terms and may indeed have recognised the binding nature of the Award.

67. The burden of proof under Article 44 is on the party resisting recognition and enforcement (*Banyan Tree Corporate Pte Ltd v Meydan Group LLC* [2013] DIFC ARB 003 (2 April 2015) at [26]; Lachesis v Lacrosse [2020] DIFC ARB 005 (22 March 2021) at [37]). The Bank has not satisfied the burden of establishing that the Bank was subject of conflicting judgments from the Dubai and DIFC

Courts.

68. One point taken by the Employer is that the Dubai Bankruptcy Court order was a temporary suspensive order not a judgment and therefore cannot amount to *"a conflicting judgment"*. It is unnecessary for the disposal of this appeal to determine the issue and it is preferable to leave the issue to be determined on another occasion after fuller argument, given the potential effect on the Court's jurisdiction to grant interim anti-suit and anti-enforcement orders.

Should the Judge have discharged the Order of the DIFC Courts of 30 October 2023?

69. If the Bank is correct and the Dubai Bankruptcy Court's orders, properly interpreted, do prohibit payment under the Award so as to conflict with Order of the DIFC Courts of 30 October 2023, would that justify the refusal of recognition or enforcement under Article 44(1)(b)(ii) of the Law?

70. In order to answer that question, it is necessary to understand the commercial reality. If one were to accept that a temporary suspensive order might amount to "a conflicting judgment" for the purposes of the public order defence, since the Award was made the only question has been merely one of timing. While the Guarantees are subject to non-DIFC Dubai law there is no reason to assume any difference between Dubai law and common law on this point (especially given Dubai law's doctrine of unjust enrichment) – thus where a beneficiary makes claim under an unconditional bond or guarantee, while it would be entitled without more to payment, in the absence of clear words to the contrary (which may possibly be regarded as constituting a penalty), there will be an accounting exercise at a later stage. If it is found that the amount received by the beneficiary exceeds the loss sustained, the surety will be entitled to recover the overpayment.

71. If, as the Bank alleges, the Employer is a net debtor of the Contractor, the Bank would be entitled to recover the overpayment from the Employer.

72. Both parties seek to formulate competing public policy considerations and suggest divergent ways in which they should be resolved in addressing the point made by the Chief Justice during oral argument, namely that there is a hierarchy of norms all of which fall broadly under the rubric of "public policy" but clearly some are more fundamental than others to the *"fair and orderly administration of justice"* (*per Cockerill J in Alexander Bros Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm), at [71]).

73. In the present case, it is necessary to weigh a public policy of compliance with temporary orders that have the effect of delaying but not extinguishing rights, against the public policies (1) that Bank and other financial institutions who issue unconditional on-demand engagements should honour them and (if permissible) argue later, and (2) that arbitral awards should be enforced save in the most exceptional circumstances.

74. When one properly understands the nature of the Dubai Bankruptcy Court's orders (assuming their validity and effectiveness) the highest public policy consideration to which they could be said to give rise is the desirability of compliance with suspensory orders designed to avoid the commencement of further proceedings. That pales into insignificance when compared to the proper functioning of the system of unconditional on-demand engagements and of the international regime for the enforcement of arbitral awards. The latter truly "affect the basic principles of public and economic life" (per H.E. Justice Sir Jeremy Cooke paragraph 54 above), the former by comparison, does not. While it is desirable to avoid circularity of proceedings, that cannot justify either an attack on the principle of *pacta sunt servanda*, nor the extinguishment of a right to enforce an otherwise valid arbitral award.

75. The allegation of a conflicting judgment or order in the present case does not come close to satisfying the criteria for refusing to enforce the Award. While it cannot be said that a direct conflict between a final judgment of one court of the UAE with the final judgment of another enforcing an arbitral award can never give rise to a public policy defence against enforcement, that is far from the present case. At its highest and on the most favourable interpretation to the Bank's case, enforcing the Award notwithstanding the temporary order of the Dubai Bankruptcy Court cannot be said fundamentally to offend the most basic and explicit principles of justice and fairness, or the UAE's most basic notions of morality and justice. That would be to confer on mere inconvenience to the Bank an extraordinary significance. Further, there is no suggestion of any infringement of any mandatory law – absent contravention of the essential morality of the state, a condition that Sir Jeremy Cooke considered necessary albeit not necessarily sufficient (paragraph 54 above).

76. Finally, even if all other matters were found in the Bank's favour, the Court would still possess a discretion whether or not to refuse recognition or enforcement of the Award. The Judge did not have to consider discretion on his findings. Had he been obliged to do so he might have considered that the Bank issued unconditional on-demand Guarantees but instead of honouring the demands as long ago as 8 October 2020, on 12 October 2020 the Bank commenced arbitration proceedings that were dismissed by the Tribunal who noted that the Bank failed to produce any authority in support of its submissions which were unhesitatingly rejected.

77. The Bank made no attempt to challenge the Award, instead within 2 days of being notified of the Award, on 20 July 2022 it mounted a collateral attack on the Award by misleading the Trustees into making the application to the Dubai Bankruptcy Court on a false basis. The Dubai Bankruptcy Court's order was thereafter renewed for two and a half years apparently without the Bank taking any steps to resolve the matters on which the order was allegedly based.

78. Meanwhile on 9 December 2022, the Contractor sought recognition and enforcement in the DIFC Courts. This was met by an application by the Bank on 10 January 2023 disputing the jurisdiction of the DIFC Courts on the basis that the Award was not an "award" within the meaning of Article 42 of the Arbitration Law. The challenge was inevitably dismissed on 12 July 2023 and 30 October 23 the Court recognised and enforced the Award.

79. The Bank applied to set aside the Order on 14 November 2023. This was the first occasion on which the public policy point was raised notwithstanding that the original recognition and enforcement application was made on notice. There was a hearing on 31 January 2024 and the challenge was dismissed by the Judgment dated 1 August 2024.

80. The Judge would have been entirely justified in dismissing the Bank's application on discretionary grounds alone. The Bank has clearly embarked upon policy of delaying payment under the Guarantees by whatever means it can, including misleading the Trustees and the Dubai Courts and (as Bantekas et al put it at paragraph 49 above) raising the public policy exception as a *'last ditch'* attempt to derail recognition and enforcement – a mischief recognised by the Spanish Supreme Court in *Fashion Ribbon Co., Inc. v. Iberband S.L.* (see paragraph 52 above).

81. The Judge therefore did not err in refusing to discharge the Order of 30 October 2023.

SUMMARY AND CONCLUSIONS

82. It is accepted that there is a public policy in the UAE to avoid conflicts of jurisdiction and conflicting judgments of the courts of the Federal, Emirati and Freezone systems.

83. The submission that within the Emirate of Dubai, if and insofar as there are conflicting judgments that may be grounds to refuse to enforce an arbitral award, the conflict must be managed under Decree 29, is rejected. The DIFC Courts are not precluded (in an appropriate case) from refusing recognition or enforcement of an arbitral award under Article 44(1)(b)(ii) of the Law on the grounds that the enforcement of the award would be contrary to the public policy of the UAE to avoid conflicting judgments.

84. The refusal of recognition or enforcement of an arbitral award under Article 44(1)(b)(ii) of the Law on the grounds that the enforcement of the award would be contrary to the public policy of the UAE is an exceptional discretionary remedy constrained within narrow bounds by the principles derived from the pro-enforcement policy embodied within the New York Convention and Model Law.

85. Recognition or enforcement of an arbitral award under Article 44(1)(b)(ii) of the Law may only be refused on public policy grounds where: recognition or enforcement of the award would fundamentally offend the most basic and explicit principles of morality, justice and fairness; or the award discloses intolerable ignorance on the part of the arbitral tribunal affecting the basic principles of public and economic life; or recognition or enforcement of the award, or the award itself, involves an infringement of mandatory law constituting a serious violation of public policy.

86. Turning to the present case:

(a) The Bank has failed to establish the existence of conflicting judgments;

(b) Further or alternatively, even if the orders of the Dubai Bankruptcy Court amount to conflicting judgments, the public policy favouring compliance with those orders when properly understood must be compared with and is outweighed by the public policy underpinning economic life that banks and financial institutions should honour unconditional on-demand engagements and the

international public policy that arbitral awards must be recognised and enforced save in exceptional cases;

(c) Further or alternatively, even if the order of the Dubai Bankruptcy Court amounts to a conflicting judgment, enforcement of the Award would not fundamentally offend the most basic and explicit principles of morality, justice and fairness. Nor does enforcement of the Award involve an infringement of mandatory law constituting a serious violation of public policy;

(d) Further or alternatively, the Judge would have been entirely justified in dismissing the Bank's application on discretionary grounds alone;

(e) In the circumstances, the Judge did not err in refusing to discharge the Order of 30 October 2023 and the Bank's appeal is dismissed.

INTEREST AND COSTS

87. The parties are to exchange written submissions on interest and costs within 7 days of the date of this Judgment. The Court will undertake an immediate assessment of any costs claimed by a party in relation to all costs not the subject of a previous Order and therefore the written submissions should be accompanied by a written statement of the costs in accordance with Rules 38.34 and 38.35 of the Rules of the DIFC Courts.

88. The parties may respond in writing within 7 days of receipt of the written submissions.

89. Finally, the Court expresses its gratitude to Counsel for their industry and comprehensive submissions.

H.E. Justice Andrew Moran:

I agree with H.E. Justice Michael Black KC.

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