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## **Public policy and projects: the impact of *intra*-national jurisdictional concurrency on construction disputes**

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Without conclusive settlement of disputes, uses of public sector infrastructure projects as public policy instruments might risk impeachment. With this in mind, we set out in this study to explore how public policy impacts upon the finality of dispute resolutions conducted within public sector infrastructure project spaces. We use empirical data obtained from opinion coding of 220 decided

disputes conducted in the United Arab Emirates between 1992 and 2018. Findings suggest differences in attitude among the courts in the United Arab Emirates in the interpretation and application of public policy as a basis for nullifying arbitral awards. This finding suggests that the existence of a series of parallel courts, a mixed legal jurisdiction and multiple and concurrent *intra-national* laws, combined with the intractable nature of public policy, can significantly impact upon the conclusive settlement of public sector infrastructure project disputes.

**Keywords:** Public policy, Infrastructure projects; Legal perspectives; Arbitration; jurisdictional concurrency

## 1. Introduction

### 1.1 *Bechtel*

The public policy exception is a legal doctrine which national courts (drawing on their inherent oversight and supervisory powers) may, depending on legislative provisions, choose to: (i) decline to enforce (ii) annul (that is, cancel) or (iii) set aside (replace), either the entirety or parts of an arbitral award that violates either societal norms or notions of justice, or indeed of public morality. In summary, then, the public policy exception exists to pre-empt “...*a general mischief to the public*” (Knight, 1922, p. 208).

In the United Arab Emirates (‘UAE’), one of the first reported cases where the public policy exception played a significant determining role was *Bechtel*<sup>1</sup>. More specifically, on 15 May 2005, citing the ‘public policy exception’, the Dubai Court of Cassation ratified the nullification of an arbitration award of approximately US\$25.4 million obtained by International Bechtel Company

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<sup>1</sup> International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 503/2003 [Court of Cassation]

Limited ('Bechtel') in its dispute with the Department of Civil Aviation of the Government ('the DCA') of the *Emirate* of Dubai ('Dubai').

The 2002 Bechtel award had been made by a sole arbitrator jointly appointed by both Bechtel and the DCA following a dispute which had arisen in 1999. The dispute involved a contract for project management professional services for a major Dubai theme park development with surrounding commercial and residential units. By ratifying the nullification of the arbitration award by both the Dubai Court of First Instance<sup>2</sup> and the Dubai Court of Appeal, the Dubai Court of Cassation<sup>3</sup> on face value had approved interference with a private contract. While recognising this to be an interesting area of study, we focused our study instead on how the intractable nature of public policy had set the scene for the Bechtel judgement to be representative of the existence of *intra*-national jurisdictional concurrency. What then becomes of interest is a need to understand the likely impact of such concurrency upon the finality of arbitration conducted within the public sector infrastructure project space.

In the public sector infrastructure project space, the law performs both instrumental and social functions. As relates to its instrumental function, the law provides enabling frameworks for policy implementation and delivery (Ojiako, 2019a, b). On the other hand, the social function of the law (in the context of public sector infrastructure projects) is to regulate and enforce contractual relationships (McBarnet, 1988). However, due to a lack of uniformity in terms of how legal principles are construed and enforced in different jurisdictions, the existence of such *intra*-national jurisdictional concurrency may reduce certainty over project stakeholder/contractual legal rights

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<sup>2</sup> International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 288/2002 [Court of First Instance]

<sup>3</sup> International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 503/2003 [Court of Cassation]

and obligations. This becomes problematic in view of the fact that certainty of the law is an essential element of the legal perspective of public policy.

## *1.2 Aim*

The main purpose of our study is therefore to draw upon the legal perspective of public policy to explore the ‘authoritative context’ (which we identify as public policy and jurisdictional concurrency) that impacts upon the finality of dispute resolution conducted within the public sector infrastructure project space. In the process, we seek to lift the ‘*veil of ignorance*’ (Marshall and Ojiako, 2013) that may exist among project management scholars and practitioners unfamiliar with the intimate connections between (i) the notion of public policy, (ii) the finality principle in arbitration and (iii) jurisdictional concurrency. Jurisdictional concurrency arises when a legal entity is *simultaneously* subject to different laws.

The United Arab Emirates (‘UAE’) provides a particularly interesting opportunity to explore the impact of public policy and jurisdictional concurrency on the finality of arbitration. The UAE is a sovereign and independent federal, state lying at the south east of the Arabian Peninsula, whose total land area covers approximately 32,278 square miles. The UAE consists of seven constituent *emirates* (which equate to religious and political states). These are the *Emirates* of Abu Dhabi, Sharjah, Fujairah, Ajman, Ras al Khaimah, Dubai and Umm al Quwain. The *Emirate* of Abu Dhabi (‘Abu Dhabi’) also serves as the capital of the UAE. The *Emirate* of Dubai is arguably the principal hub of commercial activity in the UAE.

Along with that of Saudi Arabia, the UAE infrastructure projects sector is the largest in the Middle East (see AECOM, 2019). It is however characterised by a high rate of project failure (Faridi and El Sayegh, 2006; Johnson and Babu, 2020). This high rate of failure has inevitably

been accompanied by large numbers of project disputes (Ojiako et al. 2018), and, consequently, by intense claims and legal activity (Mishmish and El-Sayegh, 2018; Zanelidin, 2020). Arbitration has emerged as a popular dispute resolution mechanism in the infrastructure sector's efforts to hasten dispute resolution and reduce legal costs (Seng, 2019).

Controversy has arisen with the possibility that *intra*-national jurisdictional concurrency can create a scenario where two parallel courts within the same country may frame two contradictory legal perspectives on what appear to be similar disputes. An example of such *intra*-national jurisdictional concurrency is as follows. In the Bechtel dispute, the Dubai Court of Cassation<sup>4</sup> had relied on public policy to nullify an arbitral award on the basis that there were procedural flaws in the manner within which witnesses were sworn in during the arbitral proceedings. However, in a similar decision, the Abu Dhabi Court of Cassation<sup>5</sup> found differently by ruling that it was not against public policy in the UAE for an arbitrator to depart from strict procedural rules regarding witnesses, production of evidence, and documentation. The court ruled that arbitrators were empowered to establish their own processes and procedures pertaining to, for example, the production of evidence. Process and procedures could also extend to an arbitration proceeding deciding on a point of law which is either not relevant to the dispute or which has not been cited by parties to the dispute.

To address the aim of this study, the rest of the study is structured as follows. In the next section (section 2), we provide some background on arbitration, the principle of finality and its exceptions (focusing on the public policy exception). In Section 3, we review the literature on the key foundational concepts that underlie this study; the most important being jurisdictional

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<sup>4</sup> International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai, case No. 503/2003 [Court of Cassation]

<sup>5</sup> Abu Dhabi Court of Cassation, Judgment 433/17 of 1997

concurrency. In Section 4 the research methodology (including the analysis) is presented. Findings are discussed in Section 5 while conclusions are drawn in Section 6.

## **2. Arbitration**

### *2.1 What arbitration is*

*Arbitration* is a quasi-legal process (Drahozal, 2006). It has been widely shown to provide a popular (see Seng, 2019) and effective (shorter and cheaper) means of resolving disputes within the public sector infrastructure project space (Zuckerman, 2007). Although the courts can mandate disputing parties to have their dispute settled via arbitration (Weston, 2015), a core element of the ‘*Contractual theory*’ of arbitration is that the agreement to arbitrate a dispute usually flows from a freely entered but legally enforceable promise or agreement. Furthermore, awards that emerge from arbitration proceedings should not be interfered with, as they are a result of freely entered contractual agreements between disputants (see Yu, 2004, 2005, 2008).

Arbitration remains an attractive and popular dispute resolution mechanism within the public sector infrastructure project space (see Ojiako, 2017, 2019a; Ojiako et al., 2018) in part due to its flexibility. Arbitration allows parties, within reason, not only to specify their obligations to other contracting parties, but also to specify the range of options and awards available to the arbitrator (Rosenfeld, 1985). Disputing parties can also choose to dispense with the rigid and complex rules associated with litigation. This gives the arbitrator more discretion in terms of how the proceedings are conducted. This is against the position the parties may find themselves in where the state (acting through the courts) may arrive at rulings, which are not in any disputants’ interests. Ghodoosi (2016) opines that disputants engaged in arbitration are more likely to protect their interests than when engaged in litigation in the courts. Arbitration proceedings and awards

flow from fiduciary powers (arising from the contract between the arbitrator and the disputing parties) as against judicial powers (which are constitutional powers vested in the courts) (Brekoulakis, 2019). Where there is a conflict between an arbitrator and the courts, judicial powers will supersede fiduciary powers. Judicial powers include the power of the court to render as defective and nullify an arbitration award.

## *2.2 The finality principle*

One of the key differentiating attributes of arbitration (which accounts for its popularity especially over court-based litigation) is that its proceedings and findings are expected to espouse *finality, conclusiveness and bindingness* (Abwunza et al, 2019). This is referred to as the '*finality principle*'.

In simple terms, the '*finality principle*' holds that when two or more parties freely and via a mutually voluntary and consensual legally enforceable contract, opt out of state conducted litigation and decide to utilise arbitration to articulate the nature of their social interaction (Feinman, 1989), the outcome of that process will be *final, conclusive and binding* between the parties (Abwunza et al, 2019). Thus, the '*finality principle*' stands firmly with the earlier described contractual theory of arbitration. Various national arbitration legislation such as the Federal Law No. 6 of 2018 on Arbitration (United Arab Emirates) and the Arbitration Act 1996 (United Kingdom) have been drafted in a manner that supports this principle. In effect, within these various legislations are provisions explicitly stating that arbitration proceeding outcomes (in effect, awards made by arbitrator/arbitral panels) cannot unless under exceptional circumstances be extirpated through appeals to national courts (state intervention) or other arbitral panels. In sum, the finality principle entails that once an arbitration proceeding is settled, findings are made and awards issued,

neither party will be allowed to appeal to another body for the matter to be re-heard on the same merits (Wasco, 2009). This means that the matter cannot be heard again even if an award was made based, for example, on substantiated errors of legal interpretation or fact.

There are major economic and policy benefits associated with the finality principle (Conley, 2015). For example, project stakeholders will be more secure in terms of their legal rights and obligations. This is a point discussed extensively by Veasey and Brown (2014). If disputes are not settled and major stakeholders engage in never-ending litigation, then contractual obligations are unlikely to be adhered to. This has the potential of reducing trust and increasing transaction costs because, in efforts to protect their investments, project stakeholders will be obliged to expend considerable resources in monitoring industry partners.

### *2.3 Exceptions to the finality principle*

In practice, in most jurisdictions, the grounds for challenging and nullifying arbitral awards are provided for in the applicable Arbitration Law or Act. For example, such provisions are included in South Africa (section 33 of the Arbitration Act 42 of 1965), the United States (section 10 of The Federal Arbitration Act 1925), the United Kingdom (sections 67 and 68 of The Arbitration Act 1996 (United Kingdom)) and also in New Zealand (section 12 of The Arbitration Act 1996 (New Zealand)). In the United Arab Emirates, provisions for challenging and nullifying arbitral awards are contained in Article 53 of Federal Law No. 6 of 2018 on Arbitration.

A review of the literature suggests that there are approximately six justifications that courts may rely upon to interfere with the finality principle and nullify an arbitration award. These are: where the award is: (i) marred by illegality (Gentry, 2018), (ii) complete irrational (Hayford, 1996), (iii) in violation of essence of the contract (Matter, 1998), (iv) arbitrary and capricious (Hayford,

1996), (v) manifestly disregarding of the law (Tompkins, 2018) and (vi) of public policy (Bockstiegel, 2008; Drummonds, 2012) or public order (Enonchong, 1993; Arab, 2015). Of these six special conditions upon which an arbitral award may be challenged and vacated (nullified and set aside) by the courts, public policy and/or public order has generated more interest than other legal concept (Yelpaala, 1989), a trend that continues till date, especially in the UAE (Blanke and Corm-Bakhos, 2012; Arab et al., 2019). One reason for this interest is that what is public policy and/or public order is “...*vague, nebulous, intractable, and lacks meaningful and consistent contours that can guide its definition and application*” (Yelpaala, 1989; p.380). Furthermore, public policy is variously stated in different laws, legislative pronouncements and court judgements. This makes establishing the precise meaning of public policy extremely difficult.

In the UAE, public policy is defined within Article 3 of Federal Law 11 of 1992 as “...*relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, the circulation of wealth, rules of individuals ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic sharia*”. A difficulty of this definition is that its provisions in UAE law appear very broadly defined (Almutawa and Maniruzzaman, 2014; Ojiako, 2019).

Under UAE jurisprudence, matters relating to public policy are not subject to arbitration (Sinjakli, 2001) and therefore fall under the exclusive jurisdiction of the UAE federal courts (‘Courts of the UAE’). In Table 1 (below), we show some examples of matters that may impact upon public sector infrastructure projects which have been declared as engaging public policy by the UAE courts.

INSERT Table 1 AROUND HERE

It therefore implies that as special conditions upon which an arbitral award may be challenged and vacated (nullified and set aside) by the courts, public policy orders will be cited when the courts express an unwillingness to enforce an arbitration award that is pernicious or repugnant, or which will offend or override the ability of the State to maintain political, economic, and moral and regulatory control (that is, from a public order perspective). Doing so may require a four staged enquiry by the courts, which will be focused on determining the extent:

- (i) that the subject of the arbitration contract or the arbitrator's award was not arbitrable because of public policy;
- (ii) that the award made by the arbitrator violated public policy (iii), in that the subject of the arbitration contract or the arbitrator's award was arbitrable; however, the consequence of either the arbitration contract or the arbitrators award *directly* violated public policy;
- (iii) that the subject of the arbitration contract or the arbitrator's award was arbitrable; however, the consequence of either the arbitration contract or the arbitrator's award was to *indirectly* violate public policy by providing a platform for public policy violation.

To summate, in a number of instances, arbitration has not been able to bring about finality to disputes. Instead, despite the existence of the finality principle, the conclusion of arbitration proceedings has simply been spurred towards further litigation, sometimes undertaken in multiple

jurisdictions (as in the Bechtel dispute). In the context of the UAE, another major impediment to the finality principle is the existence of *intra*-national jurisdictional concurrency (Ojiako, 2019). Before however elaborating on this point, it is perhaps important at this juncture to highlight that UAE laws do not actually refer to ‘*public policy*’ but instead refers to ‘*public order*’.

#### *2.4 Public policy or public order*

While we have utilised the term ‘*public policy*’ in our study, Article 3 of Federal Law 11 of 1992 (UAE) does not refer to public policy, instead referring to ‘*public order*’. We do acknowledge that there are intrinsic differences between the two concepts. At the core of this difference is that while public policy (which mainly applies in common law countries such as the United Kingdom, Canada and the United States – see Enonchong 1993), focuses on social equity and societal values (Hollander, 2016), the focus of public order (which mainly applies in civil law jurisdictions such as France, Egypt and the United Arab Emirates) is more on political, economic, and moral organization, regulation and control of the state (Wedel et al. 2005). In effect, public order tends to be construed from a more legalistic perspective based on economic, political and moral regulation. We provide a summary of the distinctions between the two concepts in Table 2 (below).

INSERT Table 2 AROUND HERE

However, another interpretation of the relationship between public policy and public order which is very authoritative in legal circles is the judgement of the Judicial Committee of the Privy

Council<sup>6</sup> (England & Wales) in *Evanturel v Evanturel*<sup>7</sup> where it was stated that: “...*their Lordships will treat ‘public order’ as identical with what in this country is termed ‘public policy’, although the latter is perhaps the larger of the two terms*” (p.26). This judgement therefore suggests that public order is a concept that exists within public policy. Based on this view, a number of scholars have conceptualised public policy and public order as similar and interchangeable (see Angell and Feulner, 1988; Dimitrakopoulos, 2001; Kantaria, 2012; Almutawa and Maniruzzaman, 2014; Kanakri and Massey, 2016). We adopt the same approach in this study.

### **3. The literature**

#### *3.1 Jurisdictional concurrency*

The *Bechtel* judgement represented a watershed in terms of the intersection of public policy with public sector infrastructure project delivery in that it exposed the fragile nature of arbitration (as a dispute resolution mechanism) when contextualised within *inter* and *intra*-national jurisdictional concurrency<sup>8</sup>. Thus, for example, in a seemingly fantastic series of concurrent legal wranglings, at one point, the Bechtel dispute was being heard simultaneously before the national courts of three different jurisdictions: in New York (United States), Paris (France) and Dubai (UAE). Such jurisdictional concurrency no doubt will have a negative impact on the finality principle. Ultimately, this will also negatively affect the successful implementation and delivery of public sector infrastructure projects.

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<sup>6</sup> The Judicial Committee of the Privy Council was established in 1833 as the court of last resort for all appeals across the British Empire. At present, it still remains the last court of appeal for a number of Commonwealth countries and British territories.

<sup>7</sup> *Evanturel v Evanturel* (1874) The Law Reports (Privy Council Appeals) 6 PC 1

<sup>8</sup> For example, in a reported interview, Philip Punwar (of Baker Botts LLP) suggested that there was a fear following the Dubai Court of Cassation in Judgement 503 of 2003 (*International Bechtel Co. Ltd v Department of Civil Aviation of the Government of Dubai*) that “...*when an arbitration award is issued, it will be struck down by the courts – for one reason or the other.*”

Traditionally, the notion of *jurisdictional concurrency* arises where two or more courts are deemed to be *simultaneously* empowered by either law, treaty, convention or other mechanisms to either: (i) adjudicate a specific dispute (Shelton, 1928), or to be able to (ii) directly bind the disputants (or property) or subject matter of the dispute (Hazard, 1965). There are two types of *jurisdictional concurrency*. The first of these is *inter-national* jurisdictional concurrency which occurs when two or more courts in different countries deem themselves *simultaneously* empowered to either adjudicate a specific dispute or directly bind the disputants (or property) or subject matter of the dispute. The second is *intra-national* jurisdictional concurrency, which occurs when two or more courts within the same country deem the same. Thus, in the earlier discussed Bechtel dispute, we observed the occurrence of *inter-national* jurisdictional concurrency as the national courts of three different countries (United States, France and the UAE) deemed themselves competent to simultaneously adjudicate on different facets of the Bechtel dispute. While both forms of jurisdictional concurrency do sometimes occur, the existence of *intra-national* jurisdictional concurrency is rare and one of the major intriguing peculiarities of the UAE legal framework.

Generally, on concurrency, the majority of national arbitration laws will articulate a number of points. This will include for example the extent of the primary or sole jurisdiction of its national courts (such as making determination of matters of public policy). It will also include articulating the extent of the primary or sole jurisdiction of arbitrators/arbitral panels (such as deciding on procedural matters such as the time/schedule for the hearing, the language of the proceedings and making factual findings). These laws will also likely address the extent of the concurrent or *simultaneous* jurisdiction of both the courts and the arbitrators/arbitral panels, and also the extent of the courts' supervisory powers over arbitrators/arbitral panels. However, despite

these, Onyema (2017) opines that jurisdictional matters can be particularly exacerbated where such *simultaneosity* is deemed to exist between national courts and arbitrators/arbitral panels on matters of substantive national law. One such example can be where a national court intervenes during actual arbitration proceedings, where it is deemed that the proceedings have encroached or are encroaching on the rights of third parties who are either not subject or have not subjected themselves to the jurisdiction of the arbitrator/arbitral panel (an example being where interim relief has been granted against a third party who is not a party to the proceedings). Jurisdictional concurrency also raises questions of both ‘*choice of law*’ and of ‘*forum shopping*’ which we examine next.

### *3.2 Choice of law and forum shopping*

Choice of law deals with the question of specific applicable national laws during arbitration proceedings. Choice of law can be specifically applicable, either wholly or partially, to: (i) the primary contractual obligations of each party, (ii) the arbitration clause within the contract, (iii) the arbitration proceedings and (iv) contract termination (Dagbanja, 2019).

Choice of law is a major consideration in arbitration. One view of it appears to suggest that disputants should be accorded wide discretion to determine the specific national laws that are applicable to their dispute. This perspective, however, runs counter to earlier mentioned jurisdictional theory (which emphasises complete supervisory and regulatory control by states over arbitration proceedings and awards). The alternative choice of law perspective, however, suggests that since contracts are generally localised, the natural seat of any dispute should reside within the country where the provisions of the contract are to be executed. When parties or disputes are localized, the choice of law to determine such disputes will clearly be local national laws.

However, matters are inevitably more complicated because many contracts are drawn up within a globalised project contexts.

Forum shopping occurs where disputants seek means to have a dispute adjudicated or even re-adjudicated either in its entirety or partially, before different courts or arbitrators/arbitral panels, so as to optimise chances of rulings being in their favour (Field, 2013). Since the nationality and domicile (place of registration of a contracting party) may be a determining factor in the choice of law applied to a dispute (see Schulze, 1995), the literature suggests that disputants explore/engage in forum shopping where there is either: (i) a lack of clarity on the specific law and/or jurisdiction that will govern rights and obligations of contracting parties, and/or where (ii) the effectiveness of the available dispute resolution mechanisms (including litigation) may not be deemed mutually satisfactory (Dagbanja, 2019).

### *3.4 Jurisdictional concurrency in the UAE*

The UAE operates a number of parallel courts; a federal court system ('Courts of the UAE') with the apex court being the Federal Supreme Court located in the *Emirate* of Abu Dhabi ('Union Supreme Court'), and emirate-level public courts. Matters on appeal from the Court of First Instance in Sharjah, Fujairah, Umm al Quwain and Ajman are directed to the Court of Appeal in Sharjah. The Court of Appeal in Abu Dhabi hears only matters on appeal from the Court of First Instance in Abu Dhabi. The *emirate* of Abu Dhabi, Dubai, and Ras al Khaimah are not members of the UAE federal court systems by virtue of Article 105 of the UAE constitution. Thus, these three emirates operate parallel court systems (the hierarchy of courts running from 'Court of First Instance' to 'Court of Appeal' to 'Court of Cassation'). Final appeals are directed to individual *Emirs* (Rulers) of each emirate. An appeal against the judgement of the Federal Supreme Court

located in the *Emirate* of Abu Dhabi ('Union Supreme Court') can only be directed to the Emir of Abu Dhabi who is also the UAE President. In sum, the country operates a mixed legal jurisdiction.

The UAE's operation of a mixed legal jurisdiction creates two instances of *intra*-national jurisdictional concurrency. The first of these exists between the courts of the *Emirates* of Sharjah, Fujairah, Ajman, and Umm al Quwain on one side and those of Abu Dhabi, Dubai and Ras al Khaimah on the other hand.

The second instance of *intra*-national jurisdictional concurrency relates to the existence of 'free zone' courts and arbitration centres within the UAE (see Blanke, 2018). Two such free zones within the *Emirate* of Dubai: the Dubai International Financial Courts ('DIFC') and the Dubai International Arbitration Centre ('DIAC'), operate their own court systems. These are, in effect, parallel to '*the Courts of Dubai*' (Kanakri and Massey, 2016; Qouteschat and Alawamleh, 2017). By extension, they are also parallel to the '*Courts of the UAE*'. *Intra*-national jurisdictional concurrency is underpinned by statutory provisions (Ojiako, 2019a). For example, UAE national arbitration legislation is not applicable to the free zone courts pursuant of UAE Federal Law No. 8 of 2004 regarding the Financial Free Zones. This law allows these 'free zones'<sup>9</sup> to operate civil laws independent of UAE federal laws. This arrangement is possible as companies based in Free Zones are deemed (under UAE law – specifically UAE Federal Law No. 8 of 2004 Regarding The Financial Free Zones), as if they are operating offshore. They are therefore not permitted to undertake any form of business within the 'mainland' of the UAE. If they wish to do so, then they must comply with all regulations governing the establishment of foreign businesses in the country.

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<sup>9</sup> These free zones are, in effect, 'free trade zones' and they exist in the different *emirates* within the UAE. These include the Khalifa Industrial Zone Abu Dhabi and Masdar City Free Zone and Science and Technology Park (situated within the *emirate* of Abu Dhabi), Ajman Free Zone (situated within the *emirate* of Ajman), Dubai International Academic City, Dubai Internet City and Dubai Media City (all situated within the *emirate* of Dubai), Fujairah Free Trade Zone (situated within the *emirate* of Fujairah), Ras al Khaimah Free Zone (situated within the *emirate* of Ras al Khaimah), Sharjah Airport Free Zone and Sharjah Hamriya Free Zone (all situated within the *emirate* of Sharjah), and the Umm al Quwain Free Zone (situated within the *emirate* of Umm al Quwain).

However, intra-national jurisdictional concurrency is manifest as Article 7(2) of the Dubai Judicial Authority Law. This empowers the DIFC to attach assets that are within the *Emirate* of Dubai (and not within DIFC territory). Thus, the DIFC court maintains separate but concurrent jurisdictions with, at the very least, ‘Courts of the *Emirate* of Dubai’ if not ‘Courts of the UAE’. This concurrency can be described as one between federally constituted public courts in the UAE (‘Courts of the UAE’) on one side and on the other side, ‘UAE courts’ (which includes the entire range of non-federally constituted private, courts inclusive of the free zone courts that exist in the UAE).

Having now articulated the authoritative context of the study, in the next section we draw upon empirical data to explore how jurisdictional concurrency impacts upon the finality, conclusive and binding characteristics of arbitration proceedings.

## **4. The Study**

### *4.1 Judicial opinion coding*

Responding to numerous calls for increased empirical research based upon real-world data in the diverse fields of project management (operations) (Filippini, 1997), legal studies (Bell, 2016) (and more specifically, arbitration (Drahozal, 2016a,b)), what is variously termed case content analysis or judicial opinion coding was employed. Heise (1999) identifies case content analysis or judicial opinion coding as a form of empirical legal research. In utilising judicial case content analysis, this study responds to various calls for a need to move away from legal research dominated by anecdotal and doctrinal work.

Case content analysis is a popular and flexible method of social research (Webley, 2010) involving textual analysis of *written* judicial opinions (see Sisk et al., 1998). Its flexibility derives

from the manner in which codes are selected and developed. More specifically, this flexibility arises with discretionary leeway in the interpretations and judgements of the specific researcher undertaking the study. Such text may include transcripts from interviews or legal cases (Webley, 2010) and involves separating text into short units of content (Vaismoradi et al., 2013) and then subjecting such content to systematic descriptive coding (Morgan, 1993). Such coding and categorisation will identify not only trends in used words, but also their frequency and relationships. The popularity of case content analysis derives from its wide applicability and use across a broad range of subject areas of law (Hall and Wright, 2008). Drawing from Hall and Wright (2008), judicial case content analysis can involve the following six steps: (i) identification of case selection criteria, (ii) searches within various databases (see Shapiro, 2008; Befort, 2013), (iii) identification of relevant (and reproducible) cases that fit the selection criteria, (iv) collating the *written* judgements that fit selection criteria, (v) systematic analysis of the selected cases and (vi) drawing meaning from the coding (via analysis).

## *4.2 The study*

### *4.2.1 Identification of case selection criteria*

The first step in the case content analysis involved the identification of case selection criteria. The scope of review was generally arbitration cases heard in the various ‘Courts of the UAE’ and ‘UAE Courts’.

### *4.2.2 ‘Courts of the UAE’ database search*

‘Courts of the UAE’ searches were conducted against all UAE federal courts in all seven constituent elements of the UAE. However, these were not found to be particularly beneficial. This

is partly because in some instances, cases were only being reported in Arabic language which the main researcher was unfamiliar with (this was the case for the Dubai Courts). In other instances, the web portals did not allow for general searches where the case reference number was unknown (such as the Abu Dhabi, Ras al Khaimah and Ajman Courts). No web portal seemed to exist for the courts of Umm al Quwain, Fujairah or Sharjah. ‘Courts of the UAE’ searches were conducted over three discrete periods (in February 2018, September 2018 and February 2019) in order to reduce the possibility of duplicate cases being identified.

Having exhausted searches on the portals of the UAE federal courts, additional searches were undertaken in a number of legal search engines/databases including *Kluwer Arbitration*, *Lexis Middle East Law*, *Westlaw* and *Westlaw Gulf*. Only *WestlawGulf* appeared to contain a comprehensive database of relevant cases.

Noting that the objective of the search was to capture the widest body of listed cases, suffixes such as ‘UAE’, ‘Dubai’ and ‘Abu Dhabi’ were not utilised in the search against the three keyword strings ‘arbi\*’, ‘arbitr\*’, and ‘arbitration’. Another reason for not including suffixes in the *WestlawGulf* search related to different English spellings being attributed to the constituent *Emirate* of the UAE. For example, arguably أبو ظبي (*Abu Dhabi*) could be reported as ‘Abu Dhabi’, ‘AbuDhabi’ or ‘Abu-Dhabi’. The initial search in *WestlawGulf* resulted in 374 listed court decisions of which 210 were drawn from the United Arab Emirates (UAE). The rest being from other Gulf countries such as the Kingdom of Saudi Arabia and the Sultanate of Oman. A further review of the 210 cases pointed to 34 duplicate case reports, leaving the total number of useable reported UAE cases as 176. Included in this list of 176 cases obtained from *WestlawGulf* were 6 cases drawn from the Judicial Authority of the Dubai International Financial Centre. Apart from the advantage that the obtained cases had already been transcribed from Arabic (اللغة العربية) into

English, drawing from Befort (2013), it is reasonable to argue that the inclusion of these cases in the *WestlawGulf* search engines/database is indicative of legal commentators considering the specific cases to be of significance.

#### 4.2.3 'UAE Courts' database search for 'Parallel Courts'

'Parallel' court searches were then conducted on the online website of the *Judicial Authority of the Dubai International Financial Centre (DIFC)*. As in the case of the 'Courts of the UAE' searches, searches were conducted over three discrete periods (in February 2018, September 2018 and February 2019). Searches were undertaken using five keyword strings 'arbi\*', 'arbitr\*', 'arbitration', 'public order' and 'public policy'. A total of 53 cases were identified. Searches were conducted against other 'Parallel Courts' such as Dubai International Arbitration Centre ('DIAC'), Abu Dhabi Commercial Conciliation and Arbitration Centre ('ADCCAC') and (in Sharjah) The International Islamic Centre for Reconciliation ('IICRA'). However, their websites did not appear to link to reported cases.

#### 4.2.4 Identification of relevant cases that fit the selection criteria and collation

According to Hall and Wright (2008), this step should include discussion of specific case sources and reasons for selecting them for discussion. Generally, the basis for case selection should be that these are the cases that most clearly articulate the legal dispute or phenomenon under exploration. Each transcript of the remaining 176 reported cases was examined and rated to determine whether the specific case involved public policy and arbitration nullification, or not. Some of the more frequent reasons that could have been drawn upon for elimination of specific cases were: (i) where the transcript was too brief to ascertain the focus of the case, (ii) where it was clear from reading

Public policy and projects: impact of intranational jurisdictional concurrency on construction disputes

through the transcript that the decided case had no relevance to either public policy or arbitration nullification, or (iii) where the reported case only restated UAE law. However, as the process did not reveal any cases that fell within these criteria, no cases were eliminated.

When dealing with the *DIFC* search, 9 cases were eliminated from the 53 cases earlier identified from the *Judicial Authority of the Dubai International Financial Centre* search. Elimination was primary where, on review, it was found that the case simply restated UAE law. Thus, in total, 44 cases from the DIFC search were deemed usable for the study. Final cross-checks were made to ensure there was no cross-over in terms of cases reported in either the *WestlawGulf search* or the DIFC search. From this process, a total number of 220 cases formed the core of cases to be utilised in the study, consisting of 170 UAE federal courts ('Courts of the UAE') cases drawn from the *WestlawGulf* search and 50 drawn from the *DIFC* search dealing with the parallel courts.

#### *4.2.5 Systematic analysis of the selected cases*

Of the 220 cases that formed the core of cases to be utilised in the study, the earliest case had been decided in 1992 while the latest case had been decided in 2018; a timespan of approximately twenty-six years. The selected cases had been heard in 8 different UAE Courts. A breakdown of the number of cases heard in each of the courts is shown in Table 3, below.

INSERT Table 3 AROUND HERE

Table 4 shows a cross tabulation of the '*Second-order Court Category*' codes derived from the content analysis *versus* by court decision, i.e. to nullify or not. The data shows a wide variance of incidence of '*Second-order Court Category*' codes. The code '*Jurisdiction of court*' was present

in most cases (80%), as was 'Null, void and cancelled awards' (63%). On the other hand, very few decisions contained the codes 'Appointment of arbitrators' (10%) and 'Effects and limits of agency' (13%). What this means is that 'Jurisdiction of court', which usually arises out of the existence of jurisdictional concurrency, was a major consideration in nullifications of arbitration awards before the UAE Courts.

INSERT Table 4 AROUND HERE

In our quest to explore the impact of the public policy exception on the question of nullifying prior arbitration awards by the various 'UAE Courts', we employed *Logistic regression* (Peng et al., 2002). *Logistic regression* is generally a mathematical model that is utilized to articulate the relationship between several independent variables ( $X$ ) to a dichotomous dependent variable ( $D$ ). A series of logistic regression models was conducted with the general form of the model being represented as:

$$\ln \left[ \frac{y_i}{1-y_i} \right] = \beta_0 + \sum_{j=1}^j \beta_j x_{ij} + e_i \quad (1)$$

Where:

$i$  is a case;

$y_i$  is a binary variable representing court's decision to nullify or not nullify the case;

$x_j$  are the explanatory variables, which may help us predict the court's decision; and

$e_i$  is an error term.

*Effect of Court Category:* The first logistic model examined the effect of the court category on the decision to nullify prior arbitration awards. The model was a good fit for the data [Wald Likelihood Ratio Chi-square = 30.96 ( $DF = 3$ ),  $p$ -value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.15; Max-rescaled R-Square = 0.21].

Table 5 shows the estimated effects of the different court categories. The reference category of the predictor being the *'Union Supreme Court'*. The results suggest no significant difference in the decisions made by *'Dubai Courts'* in comparison to the *'Union Supreme Court'*. On the other hand, decisions made by both the *'Abu Dhabi Courts'* and the *'DIFC Courts'* differed significantly from the *'Union Supreme Court'*. The *'Abu Dhabi Courts'* were significantly *more likely* to nullify prior arbitration awards than the *'Union Supreme Court'*. By contrast, the *'DIFC Courts'* was significantly *less likely* to nullify prior arbitration awards than the *'Union Supreme Court'*.

INSERT Table 5 AROUND HERE

*Differential Effects of Predictors across different court categories:* Next, the extent decisions made by each court can be attributed to a different reason, taking each predictor individually was undertaken. Table 6 shows the results of the effects of individual predictors within each court. The figures shown are Wald Chi-square Values ( $DF = 1$ ). The results indicate that none of the predictors was able to significantly predict *vacatur* decisions of both the *'Abu Dhabi Courts'* or the *'DIFC Courts'*. In contrast, *'Public policy'*, *'Arbitrators award'* and *'Null, void and cancelled awards'* were predictive of the decision of both the *'Dubai Courts'* and the *'Union Supreme Court'*. Additionally, *'Jurisdiction of court'* was predictive of the *'Union Supreme Court'* decision.

Using the Chi-square value as a measure of individual variables' predictive value, then '*Null, void and cancelled awards*' appears to be the most valuable individual predictor.

INSERT Table 6 AROUND HERE

Finally, multiple logistic regression models to estimate the joint effects of the predictors on the decision made by each court were conducted. Each model was conducted under the stepwise criterion (entry p-value = 0.1 and stay p-value = 0.05). In each case, the predictors that we had found to be significantly predictive as shown in Table 6 were specified as candidate variables. Multiple logistics regression models for the '*Abu Dhabi Courts*' or the '*DIFC Courts*' were not undertaken since none of the predictors were, taken individually, significantly predictive.

The multiple logistic regression model for the '*Dubai Courts*' was a good fit for the data [Wald Likelihood Ratio Chi-square = 20.56 (*DF* = 2), p-value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.46; Max-rescaled R-Square = 0.62]. Table 7 shows the estimated parameters. Both '*Public policy*' and '*Null, void and cancelled awards*' were retained in the final model as significant predictors. The estimated coefficient suggests the presence of '*Null, void and cancelled awards*' in the decision increases the probability of the case being nullified. Similarly, the presence of '*Public policy*' increases the probability of the case being nullified. The effect of '*Null, void and cancelled awards*' is stronger than that of '*Public policy*'.

INSERT Table 7 AROUND HERE

The multiple logistic regression model for the '*Union Supreme Court*' was the best fit for the data [Wald Likelihood Ratio Chi-square = 16.14 (DF = 2), p-value < 0.0001; Pseudo R-square value (Nagelkerke) = 0.54; Max-rescaled R-Square = 0.76]. Table 8 shows the parameter estimates from the multiple logistic regression model of the '*Union Supreme Court*'. As with the '*Dubai Courts*', both '*Public policy*' and '*Null, void and cancelled awards*' were retained in the final model as significant predictors.

INSERT Table 8 AROUND HERE

The estimated coefficient suggests the presence of '*Null, void and cancelled awards*' in the decision increases the probability of the case being nullified, as does the presence of '*Public policy*' although to a lesser extent.

## **5. Discussions**

### *5.1 Intra-national jurisdictional concurrency*

The research findings suggest that considerable disparities existed between the different parallel courts that formed the '*UAE Courts*' as relates to the nullification of arbitration awards that engaged public policy. Generally, the courts sitting in Abu Dhabi, that is the (i) *Union Supreme Court*, (ii) *Abu Dhabi Court of Cassation* (iii) *Abu Dhabi Court of First Instance* and the (iv) *Abu Dhabi Commercial Court* appeared *more likely* to nullify arbitration awards than courts sitting in Dubai which includes the *Dubai Court of Cassation* and the '*DIFC Courts*'. However, there were also differences in terms of a willingness to nullify these awards between the Abu Dhabi Courts ('*Courts of the Emirate of Abu Dhabi*') and the *Union Supreme Court* (which sits in Abu Dhabi).

We found that the Abu Dhabi Courts were significantly *more likely* to nullify prior arbitration awards than the Union Supreme Court.

### *5.2 Differences in legal traditions – the ‘Dubai Courts’ and ‘DIFC Courts’*

While the study found that courts within the emirate of Dubai, consisting of the ‘*Dubai Courts*’ and the ‘*DIFC Courts*’, appeared less likely to nullify prior arbitration awards (when compared to the Abu Dhabi courts), no significant differences were found to exist in terms of nullification of such awards based on different construction of public policy as construed by either the Dubai Courts or by the DIFC Courts. In effect, this study was unable to ascertain whether the differences between legal traditions (civil law as practiced in the ‘*Courts of the UAE*’ and common law as practiced in the parallel courts) had any impact on decisions to nullify arbitration awards. This situation creates a public policy ambiguity surrounding whether parallel courts bound by substantively different traditions will arrive at substantively different, inconsistent (and perhaps conflicting), decisions on the same matter. We think that they are likely to. The first reason is drawn from Kanakri and Massey (2016), who observed considerable differences in terms of how Courts of the UAE and the parallel courts (in this case, the DIFC) conducted arbitration-related proceedings. In addition, there is substantial research suggesting major (but intricate) conceptual differences between civil and common law countries in terms of how they construe public policy (Enonchong, 1993).

### *5.3 Exclusive jurisdiction and public policy*

The presence of ‘*Jurisdiction of court*’ in most of the analyzed cases suggested that this factor was *the* major consideration of the UAE Courts when adjudicating on matters that engaged public

policy. This is a particularly interesting finding by confirming that the UAE Courts will jealously guard the extent of their exclusive power to adjudicate on specific disputes, especially those that engage public policy. Greco and Meredith (2007) suggest that this attitude is not unusual, especially in countries that have experienced very rapid economic development.

The study also found that the presence of matters deemed to engage public policy significantly increased the probability of a prior arbitration award being nullified by the UAE Courts. This finding supports the view that public policy remains a sensitive matter in the UAE. Again, as in the *Bechtel* case and other cited cases, this stands as ample risk intelligence information for the public sector infrastructure project space (and more specifically, for the Professional services project manager), emphasizing that the UAE Courts will not tolerate even the slightest infringement of public policy.

The regular citation by UAE Courts of exclusive jurisdiction of the court during arbitration nullification applications suggests that the issues of jurisdiction were not discrete matters of contractual attention. It is clear from its regular appearance in nullifications applications that this matter warrants the close attention of those who are either engaged in public sector infrastructure project dispute resolution, or who are contemplating choosing the UAE as a seat of arbitration to settle public sector infrastructure project disputes.

#### *5.4 Why these differences?*

Reasons for these differences can be gleaned from prior studies. Angell and Feulner (1988) observed major disparities in terms of arbitration practice in the three largest *emirates* within the UAE; that is Abu Dhabi, Dubai and Sharjah. For example, in their study, it appeared that courts sitting in Abu Dhabi were more willing to seek to regulate how arbitration proceedings were

conducted, while courts sitting in Dubai appeared more disposed to refuse to interfere with arbitration proceedings where there are valid arbitration contracts. This implies, drawing from our earlier discussions, that arbitration practice in Abu Dhabi is dominated by '*jurisdictional theory*', whereas in Dubai, it is dominated by '*hybrid theory*'. Interestingly, Angell and Feulner (1988) also found that the courts in Sharjah would *stay*, but not dismiss such applications. There could be historical reasons for these findings. For example, Al-Muhairi (1996a) regarded Dubai as drawing upon more secular mechanisms during the establishment and organisation of its courts. It is possible that such secularism has encouraged the Dubai courts to be less willing to interfere with arbitration proceedings and awards. Drawing from the literature, it is safe to suggest that of the other *Emirates* of Fujairah, Ajman, Ras al Khaimah and Umm al Quwain, Ras al Khaimah is likely to be placed at the same spectrum of doctrinal interpretation of the *finality, conclusiveness* and *binding* nature of arbitration conducted within the public sector infrastructure project space. Luttrell (2009) had specifically suggested that entities that conduct business in the UAE might be best advised to undertake their commercial activities in either Dubai or Ras al Khaimah. Similarly, our study findings suggest that private business entities engaged in public sector infrastructure project implementation and delivery in the UAE, or those seeking to utilise the UAE as the seat of their arbitration, are best advised to select their preferred seat of arbitration as Dubai (and by implication, also Ras al Khaimah). However, this is only on the condition that their legal strategy *fully* desires the need for *finality*, as well as *conclusive* and *binding* arbitration. Conversely, private business entities engaged in public sector infrastructure project implementation and delivery in the UAE, or parties seeking to utilise the UAE as their seat of their arbitration, are best advised to select their preferred seat of arbitration as Abu Dhabi (and by implication, also Fujairah, Ajman, and Umm al Quwain). However, this is only on the condition that their legal strategy *does not*

place great value on the need for *finality*, as well as for *conclusive* and *binding* arbitration. When considered in light of earlier studies by Angell and Feulner (1988), if the legal strategy during dispute resolution conducted within the public sector infrastructure project space entails a ‘wait and see’ approach, then it may be best to select Sharjah as the preferred seat of arbitration.

## **6. Conclusions**

We set out in this paper to draw upon on the legal perspective of public policy, in order to explore how jurisdictional concurrency impacts the finality of arbitration proceedings resolutions arrived at within public sector infrastructure project spaces. In doing so, our study contributes to the developing body of literature focused on the interface between public policy and projects. Our focus on the concept of public policy is representative of its recent emergence in regular project management discourse. Three such studies: Winch and Sanderson (2015), Sanderson and Winch (2017) and Ojiako (2019), are particularly relevant. Winch and Sanderson (2015) and Sanderson and Winch (2017), for example, identified the relationship between public policy and project management as being exhibited in any of the following eight areas: (i) infrastructure gap and public policy, (ii) procurement in the public sector, (iii) project management standards and bodies of knowledge, (iv) project and programme governance, (v) maintenance and improvement of labour standards, (vi) mechanisms for handling public interest controversies, (vii) regulatory arrangements and (viii) public policy projects initiatives. In Ojiako (2019), the legal perspective of public policy was espoused setting out relevant enabling frameworks and authoritative contexts that public sector infrastructure projects require for successful implementation and delivery. While these studies offer particularly important reference points for the ongoing development of the literature, they are limited in terms of their application. For one, they are predominantly conceptual

in nature. Thus, in undertaking our empirical study, we sought to supply a more robust foundation upon which public policy and project management discourse could be developed.

The study findings raised a number of points which should be of particular interest to not only project management scholars and commentators, but also to professional services and project management practitioners. One particular point of interest is the present study illustrates considerable potential for professional services project managers to engage in more arbitration risk intelligence work and associated knowledge production. We opine that developing expertise in this area will ultimately enhance mutually beneficial knowledge transfer across the consultant - client interface (Wen et al., 2017). We do however posit that the call for arbitration risk intelligence and knowledge production does not and should not be viewed as taking project management practitioners outside the realm of their ‘normal’ professional competency. This is because the legal issues are, we would strongly suggest, not only part of project management scholarship (Bredillet, 2008), but also a key determining factor for successful implementation of infrastructure delivery (Padroth et al., 2017). All project disputes, after all, will have some operational character prior to their becoming legal in nature. Due to the complexity and ambiguities of public sector infrastructure project implementation and delivery, the consequences of any failure and resulting disputes, some working understanding of the law is also, of course, paramount for any project management professional (Padroth et al. 2017). We are aware that there is a view in the literature that the increasing prevalence of disputes in the public sector infrastructure (and construction) sector might be traced to professional services project managers inadvertently relinquishing on their crucial advisory role in the industry (see Wen et al. 2017). Increasingly, lawyers are forming the bulk of the ‘institutional’ practitioners in arbitration (Gaillard, 2015). However, professional services project managers should not necessarily allow, by disinterest or by perceived lack of

relevant skills and competencies, for lawyers to *juridify* and excessively dominate the field of Project management professional services. Rather, we would suggest that professional services project managers need to develop more awareness of the potential legal issues that are engaged in their projects, and we have advocated the crystallisation of such knowledge as this as risk intelligence. discernible through careful research. Doing so, we conclude, may place them in a much stronger (more professionally defined and more readily defensible) support function position from which to supply lawyers more professionally competent in dealing with detailed rules relating to specific disputes, with the best practical evidence-based advice on how to deal with emergent challenges.

The present study offers further theoretical and practical contributions. In terms of theoretical contributions, the study opened a new area of discourse related to the relationship between public policy and projects by specifically seeking to understand how the legal perspective of public policy is impacted by its authoritative context (jurisdictional concurrency), and how their confluence will impact on the successful implementation and delivery of public sector infrastructure projects when explored from the perspective of the need for finality in dispute resolution.

In terms of practical implications, the study is not only of relevance to project management scholars who may be interested in the legal perspective of public policy (and resultant frameworks and authoritative context), but also private business entities engaged in public sector infrastructure project disputes in the UAE and those seeking to utilise the UAE as the seat of their arbitration. Our findings suggest the existence of considerable *intra*-national jurisdictional differences in terms of how public policy is construed across national courts within the UAE. Thus, when determining the seat of arbitration within the UAE, interested parties should be mindful that there are

differences in terms of the prevailing philosophy of arbitration across the different emirates within the country.

As expected, this study was not without limitations. The first limitation of this study relates to the limited nature of searches on the portals of the UAE federal courts (as earlier highlighted, this was due partly to the main researcher's unfamiliarity with Arabic, and also because the majority of UAE federal court portals did not allow for general searches in the absence of specific case reference numbers). The second limitation of this study is that the case laws analysed were based on cases decided on the 'old' UAE Arbitration law as articulated under the relevant arbitration provisions of UAE Federal Law 11 of 1992. However, the UAE promulgated a new standalone arbitration law, Federal Law No. 6 of 2018 on Arbitration, as recently as 3 May 2018 (officially gazetted in June 2018), which became law in July 2018<sup>10</sup>. The third limitation of this study resulted from the use of written judicial decisions for case analysis. For one thing, these are retrospective in nature. More often than not, they are likely to have been formed on the basis of some implicit ideological assumptions and motivations that are unknown to the researchers. Keele et al. (2009) conducted an assessment of the impact of ideology on unpublished and published (written) judicial opinions, finding that judges in higher courts (where arbitration appeals will be heard), will base their rulings on their ideological inclinations in published (written) opinions, but not so when such opinions were not published. In effect, published (written) judicial decisions may not necessarily be reflective of the ideology or bias of judges in higher courts. Thus, one main message that emanates from Keele et al. (2009) is that scholars undertaking case content analysis of published (written) judicial decisions may actually end up not being able to glean an accurate appreciation of the unwritten reasons that influenced the minds of the decision-makers. This view

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<sup>10</sup> The study was completed in July 2018.

is shared by Frank (1932) and Boyd (2015). Frank (1932) opined that written judicial decisions are commonly significant as “...*censored expositions*” (p. 653). The fourth limitation of this study concerns its coding approach. Coding had commenced by *firstly* making reference to the pre-determined case labels (which were designated as *first-order codes*). However, earlier studies warn that the uncritical utilisation of legal databases can negatively impact on the validity of the research findings (see Shapiro, 2008). One cited limitation was that research databases sometimes label and categorise cases against a very high level of generality. Within the context of this study, the adopted coding approach therefore did have the potential to under-report the considerable amounts of public policy matters that the UAE courts have had to address in the various cases. Furthermore, a major problem with the designated *first-order codes* is that neither the *WestlawGulf* nor the *DIFC* case reports provided a tangible explanation on how each keyword (*first-order code*) was determined. The implication of this is that, in reality, one cannot be certain that all significant legal and public policy issues arising from each case were comprehensively captured.

### **Data Availability Statement**

Some or all data, models, or code that support the findings of this study are available from the corresponding author upon reasonable request.

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Table 1: UAE Public policy, as relates to public sector infrastructure projects

<b>Deemed matters of public policy</b>	<b>Court that made ruling</b>	<b>Case reference number</b>	<b>Date of judgement</b>
Taking of oath by disputants prior to giving evidence during arbitration.	Union Supreme court	225/Judicial Year 23	03/06/03
	Dubai Court of Cassation	503/2003	15/05/05
The arbitrator and/or members of the arbitration panel must sign not only the arbitration award, but also all documents consisting of the arbitration award.	Union Supreme court	118/Judicial Year 23	21/01/04
	Dubai Court of Cassation	156/2009	27/10/09
Permissibility of appeals to the courts.	Dubai Court of Cassation	273/2006	04/02/07
	Dubai Court of Cassation	228/2007	24/02/08
Attempts by any party to rely on an arbitration clause to prevent the court from proceeding with an action on the grounds of the existence of such clause.	Dubai Court of Cassation	228/2007	24/02/08
The extent to which an appeal against a judgment on cassation is allowable.	Dubai Court of Cassation	228/2007	24/02/08
The courts when ratifying an arbitration award have an absolute discretion to how they interpret the provisions of an arbitration agreement.	Abu Dhabi Court of Cassation	486/Judicial Year 2	30/10/08
The courts will not validate an arbitration award made in a foreign country if that award is contrary to UAE public policy even if the award is not contrary to public policy in the foreign country that the award originated from.	Dubai Court of Cassation	146/2008	09/11/08
The rights to opposition and to a defence during arbitration proceedings.	Dubai Court of Cassation	156/2009	27/10/09

Public policy and projects: impact of intranational jurisdictional concurrency on construction disputes

Arbitration awards made in a foreign country.	Judicial Authority of the Dubai International Financial Centre: Court of Appeal	CA 003/2011 (Claim No: CFI 26/2009)	01/05/12
The circulation of wealth, the rules of private ownership and the rights in rem and the registration rules that are gained therefrom.	Abu Dhabi Court of Cassation	477/2014 (75)	19/03/14
Matters relating to personal status.	Abu Dhabi Court of Cassation	313/2014 (129)	27/05/14
Usurious interest in consideration of the deferment of the payment of a contracted loan.	Abu Dhabi Court of Cassation	348/2010 (206)	27/10/14

Table 2: Conceptual differences between ‘*Public policy*’ and ‘*Public order*’

<b>Comparator</b>	<b><i>Public policy</i></b>	<b><i>Public order</i></b>
Where to be found	Court judgements; National policy documents.	National legislation (Murphy, 1981).
Conceptualisation	What is ‘ <i>Public policy</i> ’ is seen as vague (Sterk 1980; Yelapaala 1989; Gibson 2008).	What is ‘ <i>Public order</i> ’ is seen as vague (Bernier 1929; Lloyd 1953; Murphy 1981; Xiao and Huo 2005; Gibson 2008)
Attitude of the courts	National courts will not seek to enforce contractual agreements which are repugnant or pernicious to societal values.	National courts will not seek to enforce contractual agreements that (i) are likely to repress the interest of the public (ii) override the interest of the public, or (iii) impact upon the manner and form of the way that the state is organised or functions (Bernier, 1929).
Philosophy	Based on interpretations of societal values (Hollander, 2016).	Based on political, economic, and moral regulation; Organisation and regulation of internal societal order (Wedel et al. 2005); National perspectives and view of political order and morality (Bernier, 1929).
How it is interpreted	The national courts seek to interpret what societal values are.	The focus is on the state being able to ensure the regulation of society based

		on how it (the state) interprets what is required to ensure national harmony.
Derogation	There is freedom to derogate.	Seen as rules, thus no freedom to derogate (Kessedjian, 2007). This is because the state construes its primary function to be to maintain public order (Bewes, 1921).
Realism	Practical orientation.	Abstract orientation on the ‘ideals’ of peace, order and security.
Morality (disputed)	It is disputed in the literature as to whether morality is deemed part of public policy. In some literature, the view is that morality is part of a public policy consideration (Knight, 1922).	Any consideration of public order will include morality (Murphy, 1981).
Broadness (disputed)	Public policy is seen to be a much broader concept than public order ( <i>Evanturel v Evanturel 1874</i> ).	Public order is seen to be a much broader concept than public policy (Husserl 1938; Xiao and Huo, 2005).

Table 3: Breakdown of cases heard per Court (from the *WestlawGulf* and *DIFC* search)

<b>Court</b>	<b>Number of cases</b>
<i>Union Supreme Court</i>	51
<i>Abu Dhabi Court of Cassation</i>	48
<i>Abu Dhabi Court of First Instance</i>	1
<i>Abu Dhabi Commercial Court</i>	1
<i>Dubai Court of Cassation</i>	69
<i>Judicial Authority of the Dubai International Financial Centre: Court of Appeal</i>	12
<i>Judicial Authority of the Dubai International Financial Centre: Court of First Instance</i>	33

Public policy and projects: impact of intranational jurisdictional concurrency on construction disputes

<i>Judicial Authority of the Dubai International Financial Centre: Joint Judicial Committee of Dubai Courts and DIFC Courts</i>	5
Total	220

Table 4: Incidence of ‘Second-order Court Category’ codes in court decisions

	Present	Absent	% Incidence
<i>‘Abuse of court process’</i>	37	183	17%
<i>‘Appointment of arbitrators’</i>	21	199	10%
<i>‘Arbitrator’s award’</i>	102	118	46%
<i>‘Arbitration procedure’</i>	101	119	46%
<i>‘Determining the subject matter of the arbitration’</i>	68	152	31%
<i>‘Effects and limits of agency’</i>	28	192	13%
<b><i>‘Jurisdiction of court’</i></b>	<b>175</b>	<b>45</b>	<b>80%</b>
<i>‘Null, void and cancelled awards’</i>	138	82	63%
<i>‘The arbitration contract’</i>	59	161	27%

Table 5: Analysis of Maximum Likelihood Estimates for Court Categories

Parameter	Court	DF	Estimate	Standard	Wald	Pr > ChiSq
				Error	Chi-Square	
Intercept		1	0.4104	0.1576	6.7817	0.0092
Court Category	<i>Abu Dhabi Courts</i>	1	1.2477	0.315	15.6878	<.0001
Court Category	<i>Dubai Courts</i>	1	-0.2652	0.2323	1.3032	0.2536
Court Category	<i>DIFC Courts</i>	1	-1.3549	0.2728	24.6599	<.0001

Table 6: Effects of individual predictors on decision made within each court

Public policy and projects: impact of intranational jurisdictional concurrency on construction disputes

Predictor	<i>Abu Dhabi Courts</i>	<i>Dubai Courts</i>	<i>DIFC Courts</i>	<i>Union Supreme Court</i>
'Public policy'	1.6	12.8**	0.0	5.4*
'Abuse of court process'	3.1	0.0	0.6	0.6
'Appointment of arbitrators'	0.0	2.1	0.0	0.0
'Arbitrators award'	0.1	4.8*	2.5	4.0*
'Arbitration procedure'	1.6	2.0	1.0	0.0
'Determining the subject matter of the arbitration'	0.7	1.8	0.0	0.2
'Effects and limits of agency'	0.0	1.5	0.0	0.6
'Jurisdiction of court'	0.2	0.4	0.0	4.9*
'Null, void and cancelled awards'	0.0	23.6**	0.0	16.8**
'The arbitration contract'	0.0	1.9	0.0	0.0
* p-value < 0.05				
** p-value < 0.01				

Table 7: Analysis of Maximum Likelihood Estimates for *Dubai Courts*

Parameter		DF	Estimate	Standard	Wald	Pr > ChiSq
				Error	Chi-Square	
Intercept		1	0.6568	0.4611	2.029	0.1543
'Null, void and cancelled awards'	Absent	1	-1.5217	0.3703	16.8846	<.0001
'Public policy'	No	1	-1.3761	0.4764	8.3423	0.0039

Table 8: Analysis of Maximum Likelihood Estimates for *Union Supreme Court*

Parameter		DF	Estimate	Standard	Wald	Pr > ChiSq
				Error	Chi-Square	
Intercept		1	1.8282	0.7665	5.6893	0.0171
'Null, void and cancelled awards'	Absent	1	-2.431	0.6269	15.0396	0.0001
'Public policy'	No	1	-1.3719	0.6948	3.8994	0.0483