Murabaha Contracts

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A commercial action was filed by an individual resident (“the Claimant”) against a PSC company in Dubai (“the Defendant”).

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The Claimant requested the Court to:

- Order the Defendant to annul a Murabaha contract, concluded on 2 June 2009 and amounting to AED 17,209,775;
- Direct the Defendant to re-pay AED 651,775, representing the first installment of the purchase price stipulated in the Murabaha contract ;
- To direct the Defendant to return the original cheque (dated 14 May 2008) issued for the remaining
  balance (AED 16,588,000) (Balance) of the purchase price.

The Claimant expressed his willingness to assign to the Defendant all the shares that had previously been transferred by the Defendant into the Claimant’s account with another company through a finance loan concluded previously on 20 September 2005.

In June 2009, the Defendant submitted a reply memorandum requesting the Court to dismiss the Claimant’s case as the facts presented by the Claimant were not correct. The Defendant followed this by filing a counterclaim on 14 July 2009 wherein it requested the Court to direct the Claimant to pay the Balance plus 9% interest from the due date until full payment.

The basis of the Defendant’s counterclaim can be summarized as follows:

In 2005 the Claimant had applied for a finance loan to buy some shares valued at AED 12 million. The Defendant contended that the Claimant signed a finance facility offer, which prescribed that finance installments and profits were to be paid on a bi-annual basis. The Defendant submitted that in light of these conditions it had granted the Claimant the requested finance but that the latter failed to pay the due amount as agreed previously.

The Claimant requested renewal of the Murabaha contract for another term with the amounts due rescheduled. The Defendant accepted the Claimant’s request and on 8 May 2007 it renewed the Murabaha contract; granting the Claimant a new payment schedule. Accordingly the Claimant paid the first due installment, amounting to AED 651,775, and issued a cheque for the Balance. The Defendant contended that the Claimant failed to pay the remaining outstanding amount and had instead proceeded and initiated legal proceedings.

As part of its case, in October 2009 the Defendant submitted a settlement agreement (“the Agreement”) to the Court which had been previously executed by both parties. The Agreement contained an acknowledgement by the Claimant that he had previously concluded a Murabaha Agreement with the Defendant amounting to AED 16,558,000. The Claimant acknowledged further in this Agreement that the Murabaha Contract expired 11 months prior to execution of the Agreement, and that due to his liquidity problems, had failed to pay the Balance. The Defendant contended that because of his liquidity problems, the Claimant had requested the Defendant to re-schedule payment of the Balance through 16 cheques amounting to AED 1,000,000 each, with the first cheque to be due upon the expiration of one year from the date the Agreement was concluded.

Court of First Instance
On 18 November 2009 the Court of First Instance appointed an accountant expert specialized in Islamic Finance to investigate the matter. On 14 February 2010 the Court referred the case to the Special Judicial Committee established by Decree No. 61/2009.

The Special Judicial Committee established by Decree No. 61/2009. On 5 April 2010 the appointed expert submitted his report to the Committee. The expert concluded that the Claimant received an amount of AED 11,879,204.80 out of AED 12M facility limits under the first Murabaha made on 20.09.05 and had received the sum of AED 3,290,774 out of the facility limit granted to him under the Share Sale and Purchase Contract dated 09.02.06.

The Claimant argued the following points before the Committee:

- The Murabaha Contract was an adhesive contract;
- The finance loan obtained by the Claimant was void because it deprived him of the opportunity to manage his shares as the trading activities were carried out by a financial intermediary appointed by the Defendant.
- The Murabaha Contract was not compliant with Islamic principles because it did not specifically identify the goods
  which were the subject of the Murabaha contract.

The Claimant argued that one of the requirements of a Murabaha instrument is that the goods purchased by the bank are specified.

In dismissing the Claimant's argument that the Murabaha Contract was a contract of adhesion the Committee outlined the three essential characteristics of such contracts:

- The contract must relate to an essential product or service indispensable to consumers who cannot obtain the essential product or service except by acquiescing to the terms of the contract;
- One of the parties retains a monopoly over the product or service or faces limited competition in supplying the product or service; and
- The supplier of the products or services offers it to consumers on a "take it or leave it" basis where consumers have neither a choice in negotiating the terms nor an opportunity to decline.

The Committee's determination
The Committee determined that the purchasing and trading of shares did not qualify as essential products indispensable to the Claimant, who was under no obligation to contract with the Defendant in this regard.

The Claimant's argument that he had been deprived of the opportunity to manage his shares was also dismissed by the Committee. The Committee held that the arrangement whereby a third party appointed by the Defendant was responsible for managing the Claimant's shares was not akin to gambling or betting and did not entail harm to the Claimant.

The third defense, which related to the alleged non-compliance with Islamic finance principles of the subject Murabaha was rejected by the Committee. The basis for the rejection was that an Islamic Bank, which concludes a Murabaha with a party, is permitted to charge a percentage on the increase in the price (i.e. the increase in the original price of the merchandise specified in the Murabaha) as compensation for the damages the Bank incurs due to a default in payment. The

Committee held that this was in accordance with the Islamic principle of no harm and no reciprocated harm, “la Darar wa la Darar” and would not be considered as Usury (Rebaa) or Tawaruq (cash procurement).

Accordingly, the Committee ordered the Claimant to pay to the Defendant the Balance, plus legal fees. The Committee noted that the Claimant had not, at any stage during the proceedings, actually disputed that the Balance was owed to the Defendant.