

Abu Dhabi Court: Choice of Law may not be a choice

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The jurisdiction of the UAE courts is regulated by Law No. 11 of 1992 (the “Civil Procedure Law”). Articles 20, 21 and 24 of the Civil Procedure Law provide for original jurisdiction and power to the UAE courts to accept and hear any dispute in defined circumstances. These Articles are characterized as Public Order provisions and any agreement contrary to them dealing with foreign law and jurisdiction is void.

Lawyers, across the GCC, are often advising on commercial transactions that must take the laws of multiple jurisdictions into account.

Recently, the Abu Dhabi Court of Appeal handed down a decision in once such transaction that has serious implications for transactions with a potential UAE nexus that are based on documentation governed by foreign law and selecting foreign courts.

Using several articles of the Civil Procedure Law the court took original jurisdiction based on a promissory note given by a party with an Abu Dhabi address that was ancillary to a transaction with multiple GCC parties and governed by English law. In taking such jurisdiction, the court also applied UAE law to the promissory note, notwithstanding the parties’ express intent to be governed by English law and subject to English jurisdiction. The analysis of this case follows.

Background

Party A and Party B entered into a Master Agency Agreement for the sale of commodities covered by an agency contract (the “Agreement”) whereby Party A appointed Party B to act as its agent for the purpose of investing Party A’s money in purchasing commodities from suppliers on a COD basis then selling them to purchasers for immediate delivery on a deferred payment basis on the terms and conditions set out in the Agreement.

Claim

Party A brought legal action before the Abu Dhabi Court of First Instance against Party B seeking judgment against Party B for USD 33 Million or its UAE Dirham equivalent of AED 121 Million along with an order for court fees, costs and advocate’s fees.

Facts of the Claim

On several dates, Party B was given certain amounts of money under the terms of the Agreement and purchased international commodities from different suppliers on behalf of Party A then sold them on its behalf to itself on the basis that payment would be made to Party A at its offices in the UAE. As a result, Party B executed four promissory notes in favour of Party A of total value USD 33 Million.

Party B defaulted on its installments due to Party A which resulted in the acceleration of payments under the Agreement.

A few weeks later, Party A served Party B with a notice of acceleration under the Agreement and requested immediate payment for all investment transactions involving the promissory notes.

Party A filed an application for the provisional attachment of Party B's assets and accordingly the court issued an order directing the provisional attachment of all Party B's funds in banks in the UAE up to the amount of USD 33 Million or its UAE Dirham equivalent.

Party A holds promissory notes in the amount of the debt which were due and payable at its UAE offices.

Abu Dhabi Court of First Instance

Abu Dhabi Court of First Instance ruled in favour of Party A by ordering Party B to pay, to Party A, the sum of USD 33 Million or its UAE Dirham equivalent at the date of payment while confirming a prima facie provisional attachment up to the amount of the award, together with costs and minimal advocate's fees.

Party B subsequently appealed to the Abu Dhabi Court of Appeal.

Abu Dhabi Court of Appeal

Party B requested the Court to reverse the decision of Abu Dhabi Court of First Instance on the following grounds:

- Error in the application and interpretation of the law. Party B submitted that the UAE Courts have no jurisdiction over the matter. In addition, Party B noted the parties' contractual agreement to English law and jurisdiction except to the extent it may conflict with Islamic Sharia.
- Because Jurisdiction is matter of public policy and Party B may raise a plea as to jurisdiction at any stage of the proceedings, the court was requested to declare of its own motion that it had no jurisdiction in the matter.
- The Statement of Claim did not indicate an address or domicile for Party B in the UAE and gave it's address as Al Khobar, Saudi Arabia, meaning that Party B is a foreign company with no domicile or residence in the UAE giving nexus for UAE Courts to be vested with jurisdiction.
- The action does not concern property in the UAE but relates to the performance of an agency contract outside the UAE in the Kingdom of Saudi Arabia.
- The UAE Courts have no jurisdiction over the matter pursuant to Articles 20 and 21 of the Civil Procedure Code and that the Agreement was performed in Saudi Arabia where Party B is domiciled.
- The Court dismissed Party B's argument and in doing so, ruled in favour of Party A according to the following facts and interpretation of Articles 20, 21 and 24 of the Civil Procedure Code:
- The Court noted the provision for English law and English jurisdiction in the Agreement signed between Party A and Party B. The provision provides that: "This Agreement shall be governed by and executed and performed in accordance with English law except to the extent that it may conflict with the provisions and principles of Islamic Sharia and the parties hereby submit to the jurisdiction of the English courts for the purposes of any proceedings arising out of or relating to this Agreement."
- The Court noted that the four promissory notes state that "the sum payable hereunder is payable to Respondent/ Abu Dhabi Islamic Bank of P.O. Box [x], Abu Dhabi at your offices in the UAE"

The Court opined as follows:

Jurisdiction is part of public policy and is an attribute of sovereignty, UAE Courts are necessarily excluded from hearing cases involving property abroad but otherwise retain original jurisdiction in the situations described in Articles 20 and 21 of the Civil Procedure Code and any agreement contrary to Articles 20 and 21 dealing with foreign jurisdiction is void as per Article 24 of the Civil Procedure Law.

ARTICLE 20 PROVIDES:

"With the exception of actions in-rem concerned with real estate abroad, the courts have the power to hear actions brought against UAE citizens and against ex-patriates having an address or place of residence in the country."

ARTICLE 21 PROVIDES:

"The courts have the power to hear an action against a foreigner with no address or place of residence in the country in the following circumstances:

- If he has an elected address in the country.
- If the action relates to assets in the country or to a citizen's estate or to a legacy made in the country.
- If the action relates to an obligation concluded or executed or to be executed in the country or to a contract to be legalized in the country or to a death occurring in the country or to a bankruptcy declared in a court of the country.
- If the action is brought by a wife with an address in the country against a husband who previously had an address in the country.
- If the action relates to support in respect of a parent, wife, minor, child in guardianship, affiliated child or personal or financial guardianship, if the party requesting support, the wife, minor or child in guardianship has an address in the country.
- If the action is concerned with the registration of births, marriages and deaths and the plaintiff is a citizen or an alien with an address in the country, where the defendant has no known address abroad or where national law must apply in the action; 7. If one of the defendants has an address or a place of residence in the country."
- Based upon the jurisdiction given to the UAE Courts under Article 20 of the Civil Procedure Code, except for actions in rem concerning real property abroad, UAE Courts shall hear actions brought against UAE citizens and aliens who maintain domicile or a place of residence in the UAE.
- This general principle of jurisdiction specifies the circumstances in which UAE Courts have jurisdiction. Under Article 21 of the Civil Procedure Law, the UAE Courts shall have jurisdiction to hear proceedings against an alien who maintains no domicile or residence in the UAE in the following cases.
 - if he has elected domicile in the UAE;
 - if the proceedings concern property in the UAE, inheritance accruing to a citizen or an estate opened therein; and
 - if the proceedings involve an obligation that was made, performed or was supposed to be performed in the UAE, a contract to be attested in the UAE, an event that occurred in the UAE or bankruptcy declared by a UAE Court.
- According to Article 21, UAE courts have jurisdiction to hear proceedings against an alien who maintains no domicile or residence in the UAE if the proceedings involve an obligation that was made, performed or was supposed to be performed in the UAE.
- The four promissory notes in question confirm that they are payable at Party A's offices in the UAE noting that Party A's head office is in Abu Dhabi. The place of performance is accordingly Party A's premises in Abu Dhabi. Therefore, the Agreement which states that the performance of the contract shall be governed by English law contradicts the international jurisdiction of the UAE Courts and is void according to the aforementioned Article 24 of the Civil Procedure Law. Party A may therefore bring the instant action before an appropriate court within Abu Dhabi's independent court system, including the Court of First Instance, against Party B as an alien who maintains no domicile or residence in the UAE as per the exclusion under Article 21/3. Since jurisdiction in the matter belongs to the Abu Dhabi Court of First Instance, appeal was dismissed.

ARTICLE 24 PROVIDES:

"Any agreement contrary to the provisions of this section is a nullity".

Based on the points outlined above, the Abu Dhabi Court of Appeal decided to admit the appeal in form and, on the merits, to dismiss the appeal and uphold the appealed decision with court fees, costs and minimal advocates' fees.