

Judgment: The question of the Court's jurisdiction when multiple jurisdictions are involved

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The issue of the UAE Courts jurisdiction is frequently a concern when multiple jurisdictions are involved in one dispute. In the March 2011 edition of Law Update, an analysis of an Abu Dhabi judgment was provided ('Abu Dhabi Court: Choice of law may not be a choice.')

SUMMARY

A local bank in Abu Dhabi brought an action against its agent to recover money invested by the agent on behalf of the principal. Money was invested in purchasing commodities from suppliers, which was then sold on to purchasers on a deferred payment basis.

After purchasing the commodities for itself, the agent executed four promissory notes in favour of the local bank.

The agent defaulted on its installments which resulted in the acceleration of payments. The agent was unable to pay as a result of serious financial problems it was facing.

The local bank filed an application for the provisional attachment of the agent's assets in the amount of the debt. The local bank also held promissory notes in the amount of the debt which were due and payable and established the debt.

The Court of First Instance ordered the agent to pay the full amount claimed and confirmed the provisional attachment order.

The agent appealed the decision and argued, amongst other issues, that the UAE courts did not have jurisdiction to hear the matter as the governing law clause in the Agency contract provided that all disputes be referred to the English courts and that the promissory notes were incomplete and did not comply with the requirements set out under the Commercial Code (Federal law no. 18 of 1993).

The Court of Appeal dismissed the agent's appeal and confirmed that the UAE courts had jurisdiction to hear the matter pursuant to Articles 20-23 of the Civil Procedure law (Federal Law no. 11 of 1992) and that the promissory notes complied with Article 592 of the Commercial Code (Federal Law no. 18 of 1993).

CLAIM

The local bank (the "Claimant") brought an action before the Abu Dhabi Court of First Instance against the agent (the "Defendant") to claim USD 32,980,134 or its equivalent in UAE Dirhams and filed an attachment order of the Defendant's assets in the amount of the debt.

It was maintained that on 08.11.04, the Claimant, as Principal, entered into a master agency agreement (the "Agreement") with the Defendant, as Agent, for the sale of the commodities covered by the Agency Contract. On 28.10.08, the Defendant was paid a substantial amount of money under the terms of the Agreement and the Defendant purchased international commodities from a trading company on the Claimant's behalf then sold them on Claimant's behalf to itself (Defendant) on the basis that payment would be made at Claimant's offices in the UAE on 27.10.09

and that Claimant's profit would be an agreed amount. After purchasing the commodities for itself, the Defendant executed four promissory notes in favour of the Claimant, the total value of which amounted to US\$ 32,980,134.

The Defendant defaulted on its installments which resulted in the acceleration of payments under Clause 8 of the parties' Agreement. The Defendant quickly ran into serious financial problems during the past period not only in the UAE but across the GCC. Central banks in several GCC countries had stopped dealing with the Defendant's group. The UAE Central Bank issued a circular authorising banks in the UAE to set-off outstanding payments against the value of facilities granted to the Defendant and not grant them any further facilities. On 28.07.09, the Claimant gave the Defendant notice of acceleration under Clause 8 of the Agreement and requested immediate payment for all investment transactions involving the promissory notes.

The Claimant received a reply from the Defendant on 09.08.09 confirming that the Defendant had received said notice and that it was facing financial difficulties and had set up a creditors committee to pursue debt collection. On 20.12.09, the Claimant filed an application for the provisional attachment of Defendant's assets and the Court issued an order directing the provisional attachment of all the debtors' shares in the Defendant's company and its funds in banks in the UAE up to the amount of US\$ 32,980,134.7 or its UAE Dirham equivalent. Given that the Claimant held promissory notes in the amount of the debt which were due and payable at its UAE offices, the debt was established. The Claimant had attached the Defendant's assets on 22.12.09.

THE COURT OF FIRST INSTANCE

The matter progressed to the Court of First Instance. The Claimant and Defendant were represented by their respective lawyers. The Defendant's lawyer filed a response denying the claim entirely and rejecting the photocopies of the exhibits. The Claimant's lawyer filed a memorandum enclosing originals of the exhibits such as the original Agency Contract and copies of remittance advices in addition to the original promissory notes in question. The Defendant filed a memorandum and commented on the original documents in which it denied that the signature on the Agency Contract and the promissory notes was that of the late director of the Defendant's group, claiming that it was forged, and requested that the documents be referred to a crime lab. Claimant filed a memorandum of comments in response to the Defendant's points.

On 23.05.10, the Court of First Instance ordered the Defendant to pay, to the Claimant, the sum of US\$ 32,980,134.7 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 AED 200 in advocate's fees.

COURT OF APPEAL

The Defendant was not satisfied with the lower Court's decision and appealed on 20.06.10 in Appeal No. 758-10 requesting that the appeal be admitted in form and, on the merits, that the lower Court's decision be reversed and the action dismissed for lack of prima facie evidence. The Defendant argued that the Claimant be compelled to produce the original account opening form for the Defendant and that the form, together with the Agency Contract and four promissory notes, be forwarded to the crime lab to verify the signature, in response to its defence and assertion that it was unaware of the purported signature of the late director on its behalf. The Defendant argued that it has permission to proceed with a forgery claim and the case file be referred to forensics. The Defendant requested as an alternative that the case be referred to a banking expert specialising in Islamic banking who would visit the Claimant's premises in order to investigate any actual dealings between the parties, the documents filed by the Claimant and the contracts Claimant alleges exist between the parties, the purpose of the promissory notes, the amounts owed by the Defendant, the validity of amounts and the extent of their conformity to the total value of the promissory notes. The

expert would also be called upon to investigate the purchase and sale contracts the Defendant had allegedly executed and their validity and the resulting dealings as well as all other documents filed in the proceedings with a view to arriving at the truth concerning the parties' relationship and determining whether or not the claim was valid. The Defendant appealed on the following grounds:

1) Error in the application and interpretation of the law

The Defendant asserted that the UAE Courts had no jurisdiction in the matter. In addition to the parties' agreement on English law except to the extent it may conflict with Islamic Sharia under Clause 10(3) of the Agency Contract supporting Claimant's claim for the value of the promissory notes, the Contract provides that "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," and Clause 10(1) states that the Agreement shall be governed by and executed and performed in accordance with English law except to the extent that it may conflict with Islamic Sharia.

Jurisdiction is part of public policy and the Defendant may raise a plea as to jurisdiction at any stage of the proceedings and the Court would declare of its own motion that it has no jurisdiction in the matter. Additionally, the Statement of Claim shows no address or domicile for the Defendant in the UAE and provides an address in Saudi Arabia which means that it's a foreign company with no domicile or residence in the UAE. Therefore, the UAE can not be vested with jurisdiction. Furthermore, 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 Defendant pleaded that the UAE Courts do not have jurisdiction in the matter pursuant to Articles 20 and 21 of the Civil Procedure Law and that the contracts were performed in Saudi Arabia where the Defendant is domiciled

2) Photocopies of exhibits

Defendant rejected photocopies of all of Claimant's exhibits and requested that the Claimant be compelled to produce the originals of those copies which it claimed were inaccurate or not issued. Defendant argued that the copies cannot be admitted as evidence against it and the copies lacked probative value.

3) Erroneous Reasoning in respect of the signature

The lower Court failed to examine the Defendant's defence and its plea of ignorance and denial of the purported signature of Defendant's Director, particularly on the four promissory notes which all bear a signature purporting to be that of the late director but do not bear the Company's original seal or even a copy thereof.

4) Forgery

Defendant categorically and explicitly maintained that the content and signatures and seals on the documents supporting the claim are forged and that the documents should be referred to forensics

5) Prejudice to the right of defence

The Court of First Instance rejected the Defendant's request to see the original documents thereby prejudicing its right of defence

6) Erroneous Reasoning with respect to the Defendant's acknowledgement of the debt

The Court of First Instance erred in finding that Defendant had acknowledged the debt and the amounts claimed for Claimant in its reply to Claimant's notice requesting payment of the claims upon which the Court relies

7) Lack of evidence

The Defendant sought dismissal of the claim for lack of prima facie evidence and argued that the promissory notes supporting the claim lacked probative value and are incomplete, fictitious, and inadmissible as evidence and that the amounts claimed are invalid while continuing to assert its arguments and maintain that it did not acknowledge the alleged Agency Contract purportedly issued thereby or the promissory notes in the amounts being claimed. Even if these documents were valid, which the Defendant did not concur, the Defendant argued that the claim is invalid and devoid of any legal basis. The amounts allegedly remitted to the Defendant are markedly different to the amounts claimed. The purchase and sale contracts allegedly executed by the Defendant did not bear any signature or seal that can be attributed to the Defendant who, to confirm and clarify the legal irregularities in the relationship and dealings, asked that the matter be referred to the Supreme Authority for Bank Supervision attached to the Ministry of Islamic Affairs & Awqaf. The promissory notes were incomplete and contrary to commercial legislation as they do not include the place where they were made. The Claimant was therefore in breach of Article 593 of the Commercial Code as they had to present the promissory notes to the Defendant in order to be marked as sighted.

8) Request for an Expert

Defendant sought the appointment of an expert in the proceedings specialising in Islamic banking and transactions in order to determine the nature of the relationship between the parties and review the case documents, including the promissory notes and the Agency Contract, and examine all the issues which the Defendant wanted to put before the expert.

COURT OF APPEAL

The Court of Appeal dismissed the appeal on the following basis:

1. The UAE Courts have jurisdiction in the matter.

Turning to the provisions in the Agency Contract signed between the Defendant and the Claimant dealing with law and jurisdiction, Clause 10 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 four promissory notes state that "the sum payable hereunder is payable to Claimant, Abu Dhabi at your offices in the UAE"

Since international 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 jurisdiction in the situations described in Articles 20 and 21 of the Civil Procedure Law and any agreement contrary to Articles 20, 21, 22 and 23 dealing with international jurisdiction is void.

Based upon the international jurisdiction given to the UAE Courts under Article 20 of the Civil Procedure Law, except for actions in rem concerning real property abroad, the 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 the courts have jurisdiction. Under Article 21 of said Law, the courts shall have jurisdiction to hear proceedings against an alien who maintains no domicile or residence in the UAE in the following cases:

- a. If he has elected domicile in the UAE;
- b. If the proceedings concern property in the UAE, inheritance accruing to a citizen or an estate opened therein;
- c. 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 the said Article, 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 Claimant's offices in the UAE noting that Claimant's head office is in Abu Dhabi. The place of performance is accordingly Claimant's premises in Abu Dhabi. Therefore, Clause 10 of the Agency Contract 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. The Claimant may therefore bring the instant action before an appropriate court within Abu Dhabi's independent court system, including the Court of First Instance, against the Defendant 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 belonged to the Abu Dhabi Court of First Instance, the plea was without basis or merit and was dismissed.

2. As to the second head under which Defendant rejected the copies of the documents and argued that they must therefore be held to have no probative value.

The Defendant rejected the copies of the documents in its reply to the Statement of Claim. Claimant filed the originals of the documents, namely the Agency Contract and the four promissory notes concerning the claim. Defendant again rejected the copies of the documents even though the originals were produced. The Court of First Instance based its decision on the original documents, not the copies, so this argument was disregarded.

3. As regards the third and fourth arguments that the Court failed to address the Defendant's plea of ignorance and denial of the purported signature of its Director, on the four promissory notes which do not bear the Company seal and request that the Agency Contract and four promissory notes be referred to the crime lab in response to its claim of forgery.

Article 23 of the Law of Evidence provides that a party claiming forgery shall bear the onus probandi and Article 24 of said Law provides that if the person against whom an exhibit testifies denies his script, signature, stamp, or thumbprint, or if the heir or successor denies having knowledge that the exhibit was issued by the person from whom he received the title, while the other party holds onto the exhibit, and if the facts and documents are not adequate to satisfy the court as to the authenticity of the script, signature, stamp or thumbprint, the court shall order an enquiry by signature matching, testimony or both.

Article 28 of said Law states that forgery may be claimed at any stage of proceedings. The party making this claim shall specify all parts in which the alleged forgery took place together with the evidence and the investigative proceedings by which he requests that his claim be proven. In this connection, he shall present a memorandum to the court or shall record said evidence in the minutes of hearing. If the claim is relevant to the dispute, but the facts and documents of the case are not enough to satisfy the court as to whether the instrument is genuine or forged and it considers the investigation requested to be relevant and permissible, it shall order an investigation through matching or testimony or both.

The Defendant had not specified the parts in which the alleged forgery took place or provided supporting evidence. The Court considered the claim to be irrelevant to the dispute and the facts and the Claimant's exhibits are sufficient for it to reach a decision. The plea was accordingly dismissed.

4. With respect to the fifth argument that the Defendant had not seen the original documents which had been filed, namely the four promissory notes because the Court refused to let it see them.

The Defendant rejected the copies of the documents. The Claimant filed the original four promissory notes and provided the Defendant with copies thereof. The Court is obliged to compare the copy with the original when an objection is raised regarding the admissibility of the copy. With the original on file, the copy received by the party is sufficient and the argument was disregarded.

5. With regard to the sixth and seventh arguments that Defendant did not acknowledge the debt as stated in the appealed decision and that Claimant failed to substantiate the claim and that the promissory notes lacked probative value and were incomplete and fictitious, was also dismissed.

It was clear that the Claimant, after sending an urgent special notice to the Defendant on 28.07.08, proceeded on 10.09.09 to send the Defendant notice regarding payment under the promissory notes requesting, on the basis of the Agency Contract, for the sale of commodities dated 08.04.08 to make an immediate payment under the promissory notes which were the same promissory notes involved in the proceedings and have the same value as those promissory notes.

The Defendant replied on 09.08.09 to the notice it had received from Claimant. The reply stated that difficulties arose within the financial unit of the Defendant Company including the financing, development and investment arms of the Company and that they are collecting, reviewing and assessing information on financial obligations and the future outlook for the Company's financial unit. The Defendant requested the Claimant to work with the creditors committee to approve the issues.

In this letter, the Defendant did not deny dealing with the Claimant or the amount of the claim evidenced by the four promissory notes in question which confirmed the Defendant's contradictory stance of denying the four promissory notes while accepting them.

Concerning Defendant's assertion that the promissory notes were incomplete, Article 478 of the Commercial Code stated that commercial papers are bonds written according to forms specified by law, representing a right, the subject of which is a certain amount of money, due for payment at sight or after a fixed or determinable time. They are commercially negotiable and customarily acceptable as an instrument of payment instead of money.

According to Article 481 of said Law, the promissory note is a commercial paper under which its maker undertakes to pay a certain amount of money at sight or at a specified or determinable date to the beneficiary

Article 591 of said Law specifies the particulars of the promissory note and Article 592 of said Law states that a note shall be considered a promissory note even if it does not contain any of the particulars including the place of making in which case it shall be deemed to have been made at the place indicated next to the maker's name or at the place where he actually signed the note.

The four promissory notes in question contained all the particulars listed in Article 591 and are considered commercial paper. Hence, Claimant had the right to demand payment of the value of the notes and the Defendant was required to make such payment. Claimant had requested Defendant by notice dated 28.07.09 and further notice dated 10.09.09 to pay the value of the four promissory notes which meant that the documents filed, including the four promissory notes, constituted sufficient prima facie evidence of the claim in the absence of counter evidence from

Defendant. Defendant's argument regarding the four promissory notes had no basis in fact and law and the sixth and seventh grounds were dismissed.

6. As to the eighth head under which the Defendant requested the appointment of an expert specialising in Islamic banking and transactions to investigate specific issues namely the case documents, including the promissory notes and the Agency Contract which it claimed were incomplete and contrary to legal requirements, pointing out that it never acknowledged any relationship with the Claimant and contested all the contracts, documents and promissory notes as forged. This argument was also dismissed.

Outcome

The issues the Defendant wanted to put before the expert were legal issues that fell within the competence and duties of the court. The issues did not fall within the competence of the expert whose work was based on scientific and technical principles. The Court addressed all the legal issues and considered expertise to be unproductive to the proceedings because the Claimant's exhibits were sufficient to prove the claim which it based on the four promissory notes (which were proper commercial paper). The request for expertise and the Appeal were therefore dismissed and the appealed decision was upheld.