

# A Financial broker is an agent with commission acting under Fiduciary duty

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Trading in securities in the UAE is subject to the provisions of many federal laws including most prominently: (a) the Federal Commercial Transactions Law (Law No. 18 of 1993), (b) the Emirates Securities and Commodities Authority and Market Law (Law No. 4 of 2000) and (c) the UAE Central Bank Law (Law No. 10 of 1980) and its amendments.

In the following judgment, the Dubai Court of Cassation classified the relationship between a Brokerage Agency and the investor as an agency created via agreement subject to the general statutory provisions governing bilateral contracts, and the provisions governing commercial agencies set out in the UAE Commercial Transactions Law.

## **Facts of the case**

The claimant (a licensed financial brokerage company) brought a claim before the Dubai Court of First Instance against the defendant, an individual who had entered into a trading agreement with the claimant.

The claimant had opened up an account on behalf of the defendant with the Dubai Financial Market (DFM). Transactions were performed by the claimant on behalf of the defendant for which the latter was receiving his profits directly.

An outstanding balance accrued in the defendant's account. The claimant notified the defendant and several meetings were held. The defendant did not however settle his account.

The claimant requested the Court to appoint a court accredited expert in the field of financial trading to determine the amount owed to the claimant by the defendant, and further requested the court to order the defendant to pay the amount concluded by the expert in his report.

The defendant filed a counterclaim requesting the court to appoint an expert in the field of financial trading to review his account with the claimant and to (i) exclude all transactions executed in contradiction to the DFM regulations; and (ii) to determine the losses and damages resulted from such irregularities. The defendant further requested that the court order the claimant to pay the amounts determined by the expert's report.

## **Procedural History**

The Court appointed a banking expert specialized in the field of trading securities and bonds who concluded that the loss suffered by the defendant (which amounted to AED 42 million) was due to the market conditions at the given period of time and the sharp drop in the prices of the shares and securities traded by the claimant at that period.

The expert also concluded that due to this loss, a sum of AED 14 million was owed by the defendant to the claimant.

After the submission of the expert's report the claimant requested the Court to adjudicate the amount concluded by the expert. The defendant however requested that the Court appoint a tripartite committee of experts specializing in the field of trading securities and bonds to reevaluate the matter and investigate the case again.

The Court of First Instance, before adjudicating the case, returned it to the previously appointed expert to investigate the defendant's objections. The Court further ordered the expert to examine all telephonic orders and instructions issued by the defendant to the claimant.

After submitting the expert report, the Dubai Court of First Instance rendered its judgment ordering the defendant to pay the claimant, with interest, the amount determined by the expert's report.

The defendant appealed before the Dubai Court of Appeals which upheld the appealed judgment and dismissed the case. The claimant consequently challenged the appeal court's judgment before the Dubai Court of Cassation.

### **The Court of Cassation**

The defendant argued that the First Instance judgment was flawed because it relied on conclusions of the expert which were based on presumptuous grounds. The expert based his conclusion on his examination of the defendant's account statements with the claimant, but without confirming that the orders had been executed on the instructions of the defendant.

The defendant's objections to the expert's report were:

1. In his report, the expert referred to several transactions found in the defendant's account statement which were said to have been executed following written instructions by the defendant. However copies of these instructions were not provided to the expert. The expert assumed that these transactions were performed on the instruction of the defendant and so concluded that the defendant was liable for the losses sustained as a result.
2. The expert stated in his report that a number of transactions were based on oral orders issued by the defendant over the telephone, and which were recorded on a CD that the court requested the expert to examine. The expert did not examine the CD, but nonetheless proceeded to rely on it as evidence that the defendant issued such orders.
3. The expert referred to the defendant's acknowledgment of receiving the transaction statements and the invoices from the claimant, as well as the defendant's acknowledgment of some of the transactions, as proof for the validity of all transactions executed by the claimant.

The expert in his report acknowledged that the claimant contradicted DFM regulations by failing to keep on file a copy of all written instructions by its customers.

For the above reasons the defendant contested the expert's conclusion and argued that the appealed judgment should be overturned since it was not based on valid reasoning.

The Court of Cassation agreed with the defendant and whilst explaining its decision made a number of comments clarifying the relationship between brokers and their investors:

1. A financial brokerage agreement is a bilateral contract binding to its parties, and it does not require a specific form to be valid.
2. The financial broker is an agent acting on behalf of the investor when executing transactions in relation to the purchase or sale of stocks and bonds.
3. In order for all obligations and rights resulting from these transactions to be valid and binding on the

principle (i.e. the investor), the broker must act in good faith within the limit of his authority to bind the principal. This is based on Articles 202 and 229(2) of the UAE Federal Commercial Transactions Code. The agent is under a fiduciary duty to act in the best interest of the principal. If the agent acted otherwise, such transactions will not bind the principal.

4. The general rule is that the opinion of an expert is one of the elements of proof in the action and the court may appoint an expert to examine and provide his opinion in technical issues. The trial court may adopt conclusions of the expert in his report if the court is satisfied by the reasoning in it.
5. In this case, the lower court erred in its reasoning because it relied in its judgment on the conclusions of the expert's report which were flawed for the reasons detailed by the defendant.

The Dubai Cassation Court therefore overturned the judgment.

## **Conclusion**

The Court of Cassation in this case classified the relationship between a financial brokerage agent and an investor as an agency agreement that creates a fiduciary relationship between the parties by virtue of which the agent must execute transactions within the limits of the principal's instructions and not exceed them unless specific conditions apply. If the broker does exceed his instructions then those transactions will not be binding on the investor.