

Abu Dhabi Court of Cassation gives Guidance on Omission Applications

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In Abu Dhabi Court of Cassation Omission Application Decision 1 of 2016 (issued on 17 November 2016), the court held that the essence of Article 139 is that the court must have, through its own mistake or inadvertence, completely omitted to determine a request for substantive relief, leaving the request to remain undecided (by an explicit or implicit ruling) and pending before the court. An omission application is not subject to any of the statutory time limits for appeal and can be availed at any time. In addition, the Applicant's acceptance of the partial judgment by proceeding to enforce the ruling made in its favour does not in itself indicate its acquiescence to the ruling and waiver of the requests for relief on which the Court made no ruling. Al Tamimi represented the Claimant in the appellate courts.

Background

By a standard contract for works between the Defendant and a consortium comprising the Claimant and a Turkish company, the consortium was commissioned to build and construct a mall. Errors between the Defendant and Consultant delayed the execution of the project until the Defendant arbitrarily terminated the contract without good cause and liquidated two performance bonds.

The Claimant brought Commercial Action No. 278-2011 against the Defendant seeking judgment against him for AED 300m. This amount represented the cost of works undertaken by the Claimant, additional expenses incurred, compensation for damage suffered as a result of termination of contract, unlawful deductions made from the Claimant's payments, payments the Claimant made to the Consultant and Subcontractors, interest, and compensation for loss and damage.

The Defendant filed a counterclaim to reserve his right to claim compensation for damages suffered.

Court of First Instance

The Court of First Instance appointed an expert committee for a specific mandate. After receiving the expert report, the Court of First Instance dismissed the main action on the basis of it being premature and dismissed the counterclaim.

Court of Appeal

The Claimant appealed in Appeal No. 867-2012, as did the Defendant in Appeal No. 891-2012. The Court of Appeal appointed a tripartite expert committee for a specific mandate.

After receiving the expert committee's report, the Court of Appeal upheld the Court of First Instance decision. The Court of Cassation overturned the Court of Appeal's ruling and sent the matter back for consideration by a differently constituted panel. The Court of Appeal (on remand) then quashed the Court of First Instance Decision with respect to the decision made on the main action (to dismiss the case as

being premature) with remand to the Court of First Instance for further consideration.

Court of Cassation

The Claimant appealed in Commercial Appeal No. 424-2015, as did the Defendant in Commercial Appeal No. 483-2015 and, after joining the two appeals, the Court of Cassation, on 24 November 2015, dismissed the Defendant's appeal. With respect to the Claimant's appeal, the Court of Cassation overturned the Court of Appeal's ruling and quashed the Court of First Instance decision and ordered the Defendant to pay the Claimant a sum of AED 72m.

Omission Application

The Claimant filed an application stating that the Court of Cassation omitted to award the Applicant certain substantive relief in Cassation Appeal No. 424-2015, namely 12% interest on the sum awarded (AED 72m) from the date of withdrawal of the project and liquidation of the bonds until satisfaction had been made. The application further stated that the Court of Cassation omitted to award costs, bank interest and penalties arising from the liquidation of the bonds from the date of liquidation until satisfaction had been made, which, at the date of filing the Cassation Appeal stood at AED 15m. The application further noted that the Court of Cassation omitted to award AED 5.5m as moral damages in connection with the liquidation of the bonds.

The Defendant argued that the Claimant had forfeited its right to file the omission application by proceeding to enforce the ruling.

Court of Cassation's Decision

The Court of Cassation held that:

- The Defendant's arguments were not well founded. An omission application is not subject to any of the statutory time limits for appeal and can be availed at any time. Omission means the claim for relief remains pending before the court. Acceptance which would bar an appeal must conclusively denote acquiescence to the ruling and waiver of the right of appeal. While acceptance barring appeal may be implicit, it must be conveyed by an act or step that plainly denotes acquiescence and the intent to waive the right of appeal beyond doubt or the possibility of interpretation. The Claimant's acceptance of the partial judgment by proceeding to enforce the ruling made in its favor does not of itself indicate its acquiescence to the ruling and waiver of the requests for relief on which the Court of Cassation made no ruling. Since the record is devoid of any indication that the Claimant has explicitly or implicitly accepted the Court's omission of certain requests for relief, the plea is baseless.
- Article 139 of the Civil Procedure Law states: *"If the court omits to determine part of the substantive relief, it shall, upon request by a concerned party, consider and determine such relief after giving notice to the other side. The ruling shall be subject to the rules of appellate procedure which apply to the original ruling"*. The essence of this provision is that, for Article 139 to apply, the court must have, through its own mistake or inadvertence, completely omitted to determine a request for substantive relief so as to cause the request to remain undecided (by an explicit or implicit ruling) and pending before the court. The court that failed to decide the request will be competent to decide the application to rule on the substantive relief that was overlooked. Such court may be a court of first instance, a court of appeal or a court of cassation. In the latter case, the rules of (cassation) appellate procedure shall be followed when filing the application before the Court of Cassation. Furthermore, the overlooked relief must be substantive relief to which a right had been clearly and conclusively asserted before the court, either in the statement of claim or as an incidental claim. It is also necessary that the request for relief remain pending before the court until the issuance of a final ruling concluding the whole controversy since it is the final prayer for relief that must be taken into account.
- In this case the Claimant did not clearly and conclusively assert, among the substantive relief sought at first instance, a right to costs, bank interest and penalties arising from the liquidation of the bonds from the date of liquidation until satisfaction has been made. Nor did the Claimant assert a right to recover

moral damages in connection with the liquidation of the bonds. Moreover, the statement of appeal the Claimant filed in Appeal No. 867-2012 and the brief detailing its grounds for appeal did not include those two requests for relief. Accordingly, the Court of Cassation cannot be said to have omitted to rule on them, regardless of the Claimant's assertion in the statement of claim that the Defendant should be ordered to pay all the interest up to 31 December 2010. This request does not of itself conclusively indicate a request that the Defendant pay the costs and bank interest and penalties in connection with the liquidation of the bonds, particularly given that the amount in question is described in the statement of claim as being bank interest the Claimant received from banks to execute the contract works.

- As for omitting to rule on the claim for arrears interest on the sum awarded, Articles 76, 88, 90 of the Commercial Transactions Law confirm that if a commercial obligation involves a sum of money of known value at the time the obligation arose and the debtor delays payment of it, the creditor shall be entitled to claim interest on the debt at the rate stated in the contract, up to a maximum of 12% interest, or, if no interest rate was agreed in the contract, at the market rate prevailing at the time of the transaction. Under Article 6(8) of the Commercial Transactions Law, property-related activities for which the contractor undertakes to supply materials or manpower are considered commercial activities if practiced as a profession. Therefore, arrears interest on debt arising from the practice of such activities accrues from the due date pursuant to Article 90 of this law, if claimed by the contractor. The Claimant's final brief includes a claim for 12% interest on the claim amount from 31 December 2010 until the actual payment date. The Applicant maintained this claim until the date of issue of the ruling which concluded the controversy. The Court of Cassation ordered the Defendant pay a sum of AED 72m representing payments due to the Claimant under a contract for property-related work which does not state a rate of interest on arrears. Since the Claimant has not furnished proof of the market interest rate prevailing at the due date of the payments being claimed, the Court assess interest at 5% per annum on the judgment amount of AED 72,229,409 from the date of termination of the contract until satisfaction has been made.

As a result of the Omission Application, the Defendant was ordered to pay the Claimant approximately AED 18m in addition to the amount of the previous ruling.

Comment

This judgment highlights that in the event of an omission, it is always the claimant's right to make an omission application and it is never too late for the Court of Cassation to look into the merits of a case if a request was overlooked (provided the Court of First Instance had previously reviewed the case). The case also highlights the importance of properly pleading a case – although the Court acknowledged that the Claimant was entitled to claim interest, it only awarded interest from 31 December 2010 because the Claimant had neglected to claim for interest that had accrued prior to this date when filing its claim.