

**JUDGMENT : Mr. Justice Teare :** Commercial Court. 27<sup>th</sup> November 2008.

### Introduction

1. This is an application by the Defendant for an order staying the proceedings which have been commenced in this Court by the Claimant. It was not so described in the Application Notice but it is common ground that that is the order sought by the Defendant. The stay is sought on two grounds; firstly, that the Claimant is obliged by contract to sue in the United Arab Emirates (the UAE) and there are no strong grounds for not enforcing that contract and, secondly, that the UAE is clearly and distinctly the more appropriate forum for the determination of the claim and justice does not require that this court should refuse to grant a stay.
2. The Claimant is a company incorporated in Dubai in the UAE. The Defendant is a bank incorporated in Abu Dhabi in the UAE. It has a branch in Dubai where the Claimant held a US dollar bank account. It is common ground that, although there was no express choice of proper law, the proper law of the contractual banking relationship between the parties is that of the UAE. Clause 9 of the contract provided as follows:  
*"The Bank and the Customer submit to the jurisdiction of the Civil Courts of the United Arab Emirates but without prejudice to the Bank's general right to take proceedings, where necessary, in any court wheresoever."*
3. The factual basis of the claim sought to be made in this court is that the Defendant, in March 2002, failed or refused to comply with the instructions of the Claimant to transfer a sum of US\$1.6m. from the Claimant's account in Dubai to an account in London in the name of Emir8 Petroleum PLC ("Emir8"), a company in which the Claimant held shares. The sum of US\$1.74m. had been paid into the Claimant's account in Dubai from the Lebanon on the instructions of a Kazakhstani company. The sum was not transferred to Emir8 by the Defendant because, on 25 March 2002, the Defendant had received instructions from the Central Bank of the UAE to place the sum in a suspense account pending satisfactory explanation from the Claimant as to the source of the funds. Those instructions were given in the context of the money laundering laws of the UAE. On 20 July 2002 the Attorney General of Dubai placed a lien on the sum. Subsequently, in April 2005, the Dubai Court of First Instance ruled that money laundering offences had been committed but in May or June 2005 the Appeal Court allowed an appeal from that decision. The sum of US\$1.74m. was eventually released to the Claimant in September 2005.
4. In the meantime, so it is alleged, the operations and cash flow of Emir8 had been affected by the non-payment of the sum of US\$1.6m. leading to a liquidity crisis causing it to enter a creditor's voluntary liquidation in March 2004. The Claimant's case is that it has lost the value of its shares in Emir8, almost US\$6m.
5. The causes of action to be relied upon by the Claimant are in contract and in tort. The contractual cause of action is a complaint that the Defendant failed or refused, in breach of contract, to comply with the Claimant's instructions. It is said that the Defendant, having received information from the Defendants as to the source of the funds, ought to have transferred the funds to Emir8 before the lien was placed on them in July 2002. There are two causes of action in tort, one alleging breach of a duty of care and the other alleging breach of a duty under the UAE money laundering statute. Both of those causes of action, like the contractual cause of action, focus upon the Defendant's failure to transfer the funds in question before the lien was placed on them in July 2002.
6. The Claimant commenced proceedings before this court on 20 March 2008, almost 6 years after the intervention by the UAE authorities in 2002. The Claimant was able to establish jurisdiction in this court as of right because the Defendant carries on business in London through a branch and so service was effected upon the Defendant at that branch, shortly before the expiry of the 4 month time limit for such service.

### The jurisdiction clause

7. It is submitted on behalf of the Defendant that the jurisdiction clause, so far as it affects the Claimant, is an exclusive jurisdiction clause in the sense that it binds the Claimant, if it wishes to sue the Defendant, to do so in the courts of the UAE. By contrast it is submitted on behalf of the Claimant that the clause is not an exclusive jurisdiction clause. It is said that whilst both parties have agreed that if one party brings proceedings in the courts of the UAE the other will submit to the jurisdiction of the courts of the UAE yet both parties retain their right to bring proceedings against the other wherever they can found jurisdiction.
8. The words used in the phrase *"The Bank and the Customer submit to the jurisdiction of the Civil Courts of the United Arab Emirates"* are capable of meaning that the bank and the customer agree that they will submit disputes concerning their banking relationship to the jurisdiction of the Civil Courts of the UAE. But they are also capable of meaning that the bank and the customer agree that if one commences proceedings against the other concerning their banking relationship in the civil courts of the UAE the other will submit to the jurisdiction of those courts, leaving untouched the parties' right to commence proceedings elsewhere if they are able to do so. However, the clause must be construed as a whole. The clause ends by saying: *"but without prejudice to the Bank's general right to take proceedings, where necessary, in any court wheresoever."* This indicates that the draftsman has addressed the question of proceedings concerning the banking relationship being brought in other jurisdictions and has expressly provided that the bank may do so. No mention is made of the customer being able to do so. In my judgment the obvious inference to be drawn from that omission is that, properly construed, the jurisdiction clause was intended to oblige the customer to commence proceedings concerning its banking relationship in the courts of the UAE but not to oblige the Bank to do so. The customer's general right to do so was prejudiced. The bank's general right to do so was not prejudiced. That is the meaning which, in my judgment, the clause would convey to a reasonable person in the situation of the parties at the time they entered into their banking relationship.

9. I was referred to *Austrian Lloyd Steamship Company v Gresham Life Assurance Society* [1903] 1 KB 249. That case concerned a life assurance policy which provided that "For all disputes which may arise out of the contract of insurance, all the parties interested expressly submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters". It was held by the Court of Appeal that those words meant that the parties mutually agreed that if any dispute arose under the contract it shall be determined by the Courts of Budapest. I am not convinced that that case gives much assistance since the clause, though similar to the clause which I must construe, is not identical. At any rate there is nothing in that decision which suggests that the construction of the jurisdiction clause which I favour is wrong.

#### **Strong reason**

10. I have therefore concluded that the Claimant was contractually bound to commence proceedings concerning his banking relationship with the Defendant to the civil courts of the UAE. That being so the burden lies upon the Claimant to show that there is a strong reason for not enforcing the exclusive jurisdiction clause by granting a stay; see *El Amria* [1981] 2 Lloyd's Rep.119 at pp.123-124 per Brandon LJ and *Donohue v Armco Inc.* [2002] 1 Lloyd's rep. 425 at pp.432-433 per Lord Bingham.
11. Counsel for the Claimant did not expressly address the question of "strong reason" because, for forensic reasons, he preferred to submit that the jurisdiction clause, properly construed, was not an exclusive jurisdiction clause and then to address the question whether the Defendant could establish that the UAE was a jurisdiction which was clearly and distinctly the more appropriate forum for the resolution of the Claimant's claim. However, it is plain from the evidence placed before the Court that the Claimant maintains that there was strong reason for not enforcing the jurisdiction clause. Firstly, it is said that the Claimant's loss was sustained in England. It maintains that it lost the value of its shares in Emir8, a company incorporated here, as a result of the wrongful actions of the Defendant. That was a strong connection with this jurisdiction. Secondly, it is said that there were other connections with this jurisdiction. Thirdly, it is said that the applicable law of the claim in tort was English law. Fourthly, it is said that the quality of justice in this jurisdiction is (as it was put by counsel in his Skeleton Argument) "significantly superior to that which would be obtained in the UAE" in the light of (a) the failed criminal proceedings in the UAE, (b) the Bank's perceived political interrelationship with the UAE state and (c) the absence of a developed insolvency or commercial law in the UAE. As a result the Claimant "does not believe that it will receive a fair trial in the UAE."

#### **The Claimant's loss**

12. The loss which is claimed by the Claimant was sustained in this jurisdiction. I accept that that is a strong connecting factor with this jurisdiction. Moreover, to the extent that proof of loss and causation is in issue, as may well be the case, the relevant evidence, both oral and documentary, will be in England. However, the prospect that loss might be sustained outside the UAE is unlikely to have been a circumstance which could not have been foreseen when the parties entered into their banking relationship. The Claimant is a major shareholder in Emir8 and the latter operated from London as a leading bulk supplier of refined petroleum products. The Defendant is likely to have had knowledge of the business activities of the Claimant, its customer. I therefore do not regard the fact that loss was sustained in England as a strong reason for not enforcing the exclusive jurisdiction clause; for the importance of foreseeability in this context see *British Aerospace PLC v Dee Howard Co.* [1993] 1 Lloyd's Rep. 368 at pp.376-377 per Waller J. and *Metro v CSAV* [2003] 1 Lloyd's Rep.405 at pp.410-411 per Gross J.

#### **Other connecting factors**

13. It was said that there were other connecting factors. Indeed, it was said there were 46 such factors. These included advances from the Claimant to Emir8 via the Defendant in June 2000, the Claimant's letter before action in 2004 and a legal opinion concerning the Claimant's right to recover in Emir8's liquidation. I was wholly unpersuaded by the list of 46 connecting factors that the Claimant's claim was predominantly connected with London. The only solid connecting factor with London is that the Claimant's alleged loss occurred there. I should mention that it is alleged that US\$1.6m. of the funds in question were in fact transferred to Emir8's account in England and then "clawed back" to the UAE following the instructions of the Central Bank. There is, however, little if any evidence that they were so transferred. On the contrary, there is evidence from the Defendant that the funds remained in the UAE at all material times. In any event even if the allegation be true the transfer is a tenuous connection with London because the funds were alleged to have been paid and clawed back over a period of just three days.

#### **The applicable law of the tort**

14. There is a dispute as to whether the applicable law of the claims in tort is that of the UAE or of England. This depends upon the application of sections 11 and 12 of the Private International Law Act 1995. The general rule is that the applicable law is the law of the country in which the events constituting the tort occur. Where those events occur in different countries the applicable law for a cause of action in respect of damage to property is the law of the country where the property was when it was damaged. In any other case it is the law of the country in which the most significant element or elements of those events occurred. Section 12 allows for the general rule to be displaced where it appears from a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under the general rule and the significance of any factors connecting the tort with another country that it is substantially more appropriate for the applicable law for determining the issues arising in the case to be the law of the other country.

15. Counsel for the Claimant submitted that the claim in negligence was a cause of action in respect of damage to property and the property in question, the Claimant's shares in Emir8, was in England. Alternatively the most significant element, namely, the Claimant's loss, occurred in England.
16. I am not persuaded that the claim in tort is properly described as a cause of action in respect of damage to property. Rather, it is a cause of action in respect of an alleged negligent failure to transfer a sum of money (also said to be a breach of statutory duty) which is alleged to have caused the Claimant to suffer loss, namely, the loss of the value of its shares in Emir8 when Emir8 went into liquidation. It is said that those shares have been "damaged" in the sense that the rights they conferred have been "curtailed and their value cancelled by the insolvent liquidation process". I am not persuaded that the curtailing of rights and cancellation of value constitutes "damage" to the shares. The rights conferred by shares are well known. They provide little protection to their owners in the event of a liquidation and will cease to exist when the company is dissolved. When events act upon shares in a predictable manner in accordance with the rights they confer their owners may suffer economic loss but the shares and the rights they have conferred have not been "damaged". The value of the rights conferred by shares was always going to be minimal in the event of a liquidation brought about by insolvency.
17. Nor am I persuaded that the most significant element of the events constituting the tort occurred in England. Obviously the loss is a significant element but so are the events which are alleged to have caused that loss. The alleged negligence occurred in the UAE against the backdrop of the UAE's money laundering laws. The alleged breach of statutory duty directly concerns a UAE statute. In my judgment, looking at the matter in the round, and making the required "value judgment" (see *Morin v Braham & Brooks* [2004] 1 Lloyd's Rep. 702 at paragraph 16 per Mance LJ) it seems to me that the most significant element or elements of the events constituting the tort occurred in the UAE. I therefore consider that the applicable law of the tort is that of the UAE.
18. In this context I was referred to *Anton Durbeck v Den Norske Bank* [2006] 1 Lloyd's Rep. 93 and *Langlands v Hambros* [2007] EWHC 627. However, I derived no assistance from them because in judging significance much must depend on the facts of each particular case.
19. If I am wrong in concluding that the Claimant's shares in Emir8 were not damaged and that the most significant elements of the alleged torts occurred in the UAE I would nevertheless have concluded, after making the comparison of factors required by section 12 of the Act, that it was substantially more convenient for the applicable law for determining the claims in tort to be that of the UAE. Firstly, it is common ground that the applicable law of the contract between the parties is that of the UAE. Secondly, the factual enquiry necessitated by both the claims in contract and the claims in tort is the same, namely, the circumstances in which and the reasons why the Defendant did not transfer the funds in question to Emir8 between 25 March 2002 and 20 July 2002. Thirdly, where there is a contract governing the relationship between parties the contractual claim will be the primary claim even though there may also be liable in tort on the same facts. Fourthly, where the applicable law of the contract is that of the UAE and the Defendant's actions have to be assessed in the context of the UAE money laundering legislation the courts of the UAE are best placed to determine the dispute notwithstanding that the applicable of the tort is or may be that of England.
20. It was suggested on behalf of the Claimant that the money laundering issues in the UAE have now been effectively resolved in its favour. I am not persuaded that they have been. The question whether officers of the Claimant were guilty of money laundering offences has been resolved but the effect of an instruction to the Defendant by the Central Bank of the UAE where a breach of the money laundering regulations is suspected has not been determined. I therefore consider that the courts of the UAE remain the best placed to determine the claims of the Claimant against the Defendant notwithstanding the determination of the criminal charges in favour of the officers of the Claimant.
21. If, contrary to my decision, the applicable law of the alleged torts were that of England I would not regard that circumstance, on its own or coupled with the fact that the alleged loss occurred in England, as a strong reason for not enforcing the exclusive jurisdiction clause. My reasons for not doing so would be those set out in paragraphs 19 and 20 above.

#### Quality of justice and a fair trial

22. In *El Amria* (supra) Brandon LJ said that one of the relevant factors to be taken into account is whether the claimant would be prejudiced by having to sue in the foreign court because he would be unlikely to get a fair trial for political or other reasons. However, later cases (concerning applications for a stay on the grounds of *forum conveniens* rather than on the grounds that there is an exclusive jurisdiction clause) have made it plain that any such allegation should not be made and will be rejected unless there is clear and cogent evidence to support it; see *The Abidin Daver* [1984] AC 398 at p.411 per Lord Diplock, *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] 1 AC 460 at p.478 per Lord Goff and *Dornoch Limited and others v The Mauritius Union Assurance Company Ltd.* [2005] EWHC 1887 (Comm) at para.97 per Aikens J. A mere belief, however genuinely held, by a claimant or his legal advisers that it would be to his advantage to pursue an action in England rather than in another jurisdiction is insufficient to justify the refusal of a stay unless the belief is supported by objective evidence; see *The Abidin Daver* at p.411 A per Lord Diplock.
23. In the present case the alleged complaints fell into two categories. The first consisted of complaints that the relationship between the authorities in the UAE and the Defendant was such that a fair trial was unlikely. The second consisted of complaints that the law of the UAE was undeveloped with regard to insolvency and economic loss.

24. The complaint of an unfair trial was made by the Claimant's solicitor and by an Egyptian lawyer who has been employed as a legal consultant in Dubai since 2001. The Claimants' solicitor stated that the Claimant will not receive a fair trial in the UAE courts due to "*commercial and political bias*". He stated that the Defendant is able to prevent or hinder commercial activity by foreign-controlled companies for "*non-commercial geopolitical reasons*" and that the Defendant is not likely to be held to judicial account in the UAE. The legal consultant made similar observations. These are very serious allegations but they were not, in my judgment, supported by clear and cogent evidence.
25. By contrast, the outcome of the money laundering allegation in the UAE would suggest that the Claimant is likely to get a fair trial in the UAE. The Court of Appeal allowed an appeal from the decision at first instance that officers of the Claimant had committed money laundering offences. This outcome shows that the courts of the UAE are willing to disagree with a prosecutor's charges brought against the officers of the Claimant. It suggests that the Claimant is likely to get a fair trial in the UAE. The fact that the court of first instance reached a different conclusion from the appellate court hardly supports the Claimant's fears. Many decisions at first instance are reversed on appeal in this jurisdiction. It would be eccentric to conclude, on that account, that a fair trial at first instance was unlikely.
26. The complaint that the law in the UAE with regard to insolvency is undeveloped is also supported by the same solicitor and consultant. However, I am not persuaded that it is undeveloped. There is a UAE Companies Law (Federal Law No.8 of 1984 as amended by Federal Law No.15 of 1998) which specifically addresses the dissolution and liquidation of companies (see Chapter 10) and the UAE Code of Commercial Practice (Federal Law No.18 of 1993) contains a section on company bankruptcy (articles 801-806). But in any event it was not explained why insolvency in the law of the UAE is relevant. Neither the Claimant nor the Defendant is or was insolvent. Insolvency is only relevant to Emir8. That company is English and subject to the English law of insolvency. I was wholly unpersuaded that the courts of the UAE would not be able to understand the reasons why Emir8 went into liquidation. As to the UAE law in relation to economic loss I was again not persuaded that it is undeveloped. There was no attempt to explain in what sense it is undeveloped save by asserting that it was "*rudimentary*". By contrast the evidence from the Defendant's solicitor (on advice from his firm's offices in Dubai and Abu Dhabi) is that the UAE has a Civil Code (Federal Law No.5 of 1985) which deals with damages and liability.
27. For these reasons I have reached the clear conclusion that there are no strong reasons for not giving effect to the exclusive jurisdiction clause by granting a stay. It follows that the Defendant is entitled to the stay it seeks.

**The alternative basis for a stay; *forum conveniens***

28. In case I am wrong in my construction of the jurisdiction clause I shall consider the Defendant's alternative basis for a stay, namely, that the Claimant's claim may be tried more suitably for the interests of the parties and the ends of justice in the courts of the UAE. Since jurisdiction has been founded here as of right the burden lies upon the Defendant to show that the courts of the UAE are clearly and distinctly a more appropriate forum than this court for the determination of the Claimant's claim; see *Spiliada Maritime Corp.v Cansulex* [1987] 1AC 460 at pp.476-478 per Lord Goff.
29. There is no dispute that the courts of the UAE would have jurisdiction to hear the Claimant's claim. There is however a dispute as to whether the UAE is clearly and distinctly a more appropriate forum than England and as to whether there were reasons why justice demanded that the Defendant's claim for a stay should be refused.
30. The jurisdiction clause (even if its only effect is to prevent one party from challenging the jurisdiction of the courts of the UAE if the other party sues in those courts) shows that the parties have agreed that the courts of the UAE are, at least, an appropriate forum; *Akai Pty. Ltd.v People's Insurance Co. Ltd.* [1998] 2 AER (Comm) 33 at p.40 per Moore-Bick J. That is also suggested by the following factors:
  - i) Both the Claimant and the Defendant are incorporated in the UAE.
  - ii) The Claimant's bank account with the Defendant was at the latter's branch in Dubai in the UAE.
  - iii) The funds which are the subject of the claim were in the Defendant's bank in the UAE.
  - iv) The reasons why the Defendant did not transfer the funds in question as instructed by the Claimant are connected with the money laundering laws of the UAE.
  - v) The courts of the UAE are best placed to decide whether the Defendant, in the context of the UAE money laundering laws, wrongly refused to transfer the funds in question to Emir8 before the Attorney General of Dubai placed a lien on them. That is because they can be expected to have a familiarity with and understanding of those laws.
31. Those circumstances are powerful reasons in support of the Defendant's submission that the courts of the UAE are clearly and distinctly the more appropriate forum for the determination of the Claimant's claims. It may be added that the contractual banking relationship between the parties is governed by the law of the UAE and that the proper law of the Claimant's tort claim is also that of the UAE. However, neither party has explored whether there are in reality, in the context of this case, any material differences between the law of the UAE and the law of England.
32. The only substantial connection with England is that the Claimant's alleged loss was sustained in England and that the evidence in relation to that loss is in England. The question therefore is whether that circumstance is sufficient to cause the Defendant to be unable to establish that the courts of UAE are clearly and distinctly a more appropriate forum. In my judgment it is not sufficient. The natural forum for the resolution of this dispute, that is,

the forum with which the dispute has the most real and substantial connection, is the UAE. The dispute is between a bank and its customer both of whom are incorporated in the UAE. It concerns a failure or refusal by the bank to follow the instructions of its customer given to a branch of the bank in the UAE. The bank's reasons for not following those instructions concern the money laundering laws of the UAE. The chief executive of the Defendant and the manager of the branch in Dubai who will have material evidence to give are in the UAE. In my judgment those factors show that the courts of the UAE have the most real and substantial connection with the Claimant's claim notwithstanding that the loss claimed by the Claimant was sustained in England where the evidence concerning that loss can be found. They show that the courts of the UAE are clearly and distinctly the more appropriate forum,

33. If, contrary to my view, the law of England is the applicable law of the alleged tort I would remain of the view that the courts of the UAE are clearly and distinctly the more appropriate forum, essentially for the reasons which I have expressed in paragraphs 19 and 20 above.
34. There being a more appropriate forum, it remains to consider whether the Claimant can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The Claimant says there are, namely, that the quality of justice in the UAE is inferior and that it believes that it will not receive a fair trial in the UAE. I have already explained why they have failed to establish their case objectively by cogent evidence.
35. It follows that I would also have granted a stay had I concluded that the jurisdiction clause was not an exclusive jurisdiction clause.

**Conclusion**

36. The Claimant's proceedings in this court should be stayed.

David Chivers QC (instructed by Stockinger Solicitors) for the Claimant  
John Taylor (instructed by Simmons and Simmons) for the Defendant