

Assignment of rights in the United Arab Emirates

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Following the previous article entitled “Assignments in the United Arab Emirates” (published in the November issue of the Law Update) explaining the general conditions and requirements of a valid assignment in the UAE, this article outlines the prevailing jurisprudence with respect to assignment of rights in the UAE.

Given the absence of a separate legal regime for an assignment of rights under UAE law, UAE Courts have decided cases on assignment of rights based on existing commercial common practices and comparative law. In the following Dubai Court of Cassation case, the Courts are guided by the provisions of the UAE Civil Code relating to ‘assignment of debts / obligations’ in determining the validity of an ‘assignment of right’.

Dubai Court of Cassation Case No. 188/2006 Issued on 13th March 2007

Claim

A civil action was filed before the Dubai Court of First Instance by a commercial bank (the “Bank”) against a corporate borrower (the “Borrower”) for non-payment of the latter’s obligations under a term loan facility.

Facts of the Case

The Bank granted a term loan facility for the amount of AED7,469,602.09 to the Borrower under the terms of a facility agreement (“Facility Agreement”). Subsequently, the Borrower defaulted on its installment payments. This prompted the Bank to declare an acceleration event pursuant to the terms of the Facility Agreement and making the full amount of the loan immediately due and payable. The Borrower was served a notice of acceleration but failed to settle the outstanding amount of the loan.

Hence, an action was filed in the Court of First Instance for collection.

Court of First Instance

The Court of First Instance ruled in favour of the Bank and ordered the Borrower to settle the full outstanding amount plus interests from due date until actual receipt of payment, together with costs and minimal advocate’s fees.

The Borrower consequently appealed the decision to the Court of Appeal.

Court of Appeal

On appeal, the Borrower argued, inter alia, that the Court of First Instance failed to determine the correct amount outstanding under the Facility Agreement.

The Borrower alleged that the Court of First Instance failed to appreciate that the right of the Borrower to receive payments under a contract in relation to a certain project (“Receivables”) was assigned in favour of the Bank. It was claimed by the Borrower that since the Bank had been assigned the right over the Receivables, the amounts pertaining to the said Receivables should have been deducted from the

outstanding amount of the loan. Further, it was asserted that the amount of Receivables assigned to the Bank was reflected on the Borrower's book of accounts and, therefore, should have been considered by the Court of First Instance when it rendered its decision as to the judgment amount.

The Court of Appeal did not find merit in the allegations and upheld the decision of the lower court in toto, hence, the Borrower brought the action to the Court of Cassation.

Court of Cassation

The Court of Cassation ruled that no assignment of right had been perfected between the parties.

The Court held that an assignment of right takes place by agreement between the obligee (assignor) and another party to whom the obligee transfers its right (assignee) as against the obligor. An assignment in that respect is a contract between the assignor and the assignee, which must satisfy all of the necessary elements including consent, subject matter and cause.

It is settled law that in order for a contract to be concluded, there must be a corresponding offer and acceptance, and the link between them. What is meant by an offer is an offer whereby the person who makes it conclusively expresses his intention to enter into a specific contract, in such a way that if it is accompanied by acceptance, the contract will be concluded. The exchange of offer and acceptance should indicate mutual consent of the parties.

The Court referred to Article 1109 (1) of the Civil Code which requires consent of the parties for an assignment to be valid.

Article 1109 (1) states that:

"In order for an assignment to be valid, there must be consent of the transferor and the transferee, and the creditor."

In this case the Court held that whilst there was an intention on the part of the Borrower to assign its rights over the Receivables, the consent of the Bank (as assignee) to the assignment was not present.

The Court held further that in order for an assignment to be valid the requirement of Article 1113 of the Civil Code should be met.

Article 1113 provides that:

"In addition to the general conditions, the following conditions must also be satisfied in order for an assignment to be valid:

a. It must be completed and dependent on no condition other than an appropriate or customary condition, nor must any future contract be dependent on it;

b. The performance thereof must not be deferred to an unknown future date;

c. It must be limited in time to a specific time limit;

d. The property transferred must be a known debt which is capable of being satisfied;

e. The property transferred to the transferee in a restricted transfer must be a debt or specific property which cannot be compounded, and both types of property must be equal in type, amount and description; and

f. It must not involve any conditional or substantial additional consideration in favour of any of the parties, and the assignment shall be unaffected by such additional consideration agreed upon after the assignment was made, and it shall not be payable."

The Court held that in order for an assignment of right to be valid, the subject matter of the right should be specified as to type and amount. In addition to the general conditions, the property assigned must be a debt of known amount, and capable of being substituted. This means that the subject matter of the assignment, which is the property assigned, must be particularised as to type and amount. Where the property consists of money, it must be of a specified amount, failing which the assignment is void.

Assuming that there had been a valid assignment of right, the Court ruled that there was no proof that payments were indeed made by the third party contractor (being the counterparty to the original contract) to the Bank.

In light of the above, the Court of Cassation upheld the findings of the lower courts in dismissing the claim of the Borrower that an assignment of right had been granted in favour of the Bank as security for the obligations under the Facility Agreement.

Conclusion

The Court of Cassation in the foregoing case made a significant point in relation to Article 1113(d) of the UAE Civil Code as applied to assignment of rights. For an assignment of right to be valid and enforceable, the type and quantity of the assigned right (arising from a contract; payment obligations or receivables) should be certain and identifiable, and where the assigned right relates to a sum of money, the amount should be fixed at the time of execution of the assignment agreement. The same is equally applicable where the right being assigned relates to receivables at some future date.

With the foregoing decision, it should be noted that where the right consists of a sum of money, certainty in the subject matter of the assignment lies not only upon the relevant contract (under which such right is being assigned) being identifiable, but also for that sum of money to be fixed at the time of perfecting the assignment.

In taking an assignment of right as a form of security, parties should bear in mind the important components constituting a valid assignment in the UAE including the present position on the matter as clarified by this case.