

Al Tamimi & Company wins one of the largest Commercial Disputes before the Dubai Courts

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The Court also dismissed the counterclaim filed by National Bank of Umm Al Quwain (the “Bank”) against GIH which sought compensation amounting to nearly AED 1.442 billion representing its damages as a result of GIH’s breach of the memorandum of understanding (MOU) which provided that GIH would acquire a 20% stake in the Bank pursuant to an increase of the Bank’s capital.

The Bank had considered the initial payment of USD 250 million a fixed deposit and requested that GIH pay the balance of payment pursuant to the terms of the MOU. The Bank argued that the MOU and its attachments constitute a valid and binding contract between the parties, not the subscription agreement (which had not been signed). The subscription agreement is only part of the execution of the contract. The Bank argued that it had fulfilled its contractual obligations to date whereas GIH refused to sign the subscription agreement in breach of its obligations.

The Court of Appeal held that pre-contractual negotiations, requests and communications (such as the MOU in this case) are formalities with no legal effect, being preparations in anticipation of a contract. It is therefore important that the negotiations produce an agreement containing the essential terms of the contract. Negotiations are only a presumption of intent, which, like all other presumptions raised in proceedings, would be applied at the discretion of the trial court.

The proceedings

The proceedings in question commenced before the Dubai Courts on 24.02.09 and progressed from the Court of First Instance to the Court of Appeal. The Court of Appeal returned the matter to the Court of First Instance again on 25.11.09. After a counterclaim was filed, the Court of First Instance ruled in favour of GIH on 19.07.10. However, GIH wanted interest to be calculated from the request for the refund of the deposit in accordance with Article 78 of the Federal Commercial Transactions Law, not from the date the action was filed in the courts, and an appeal was registered under number 746-2010. The Bank also appealed and the Court of Appeal ruled, on 25.04.11, in favour of GIH by awarding interest from the 3 December 2008 (the due date) while dismissing the Bank’s appeal. The Bank then appealed to the Dubai Court of Cassation which returned the matter to the Court of Appeal.

The Dubai Court of Appeal reached the same conclusion, ordering on 21.05.12 that the Bank refund the full amount of USD 250 million plus 9% interest from the due date of 03.12.08 until paid.

The claim was pursued under Articles 371, 372 and 373 of the Commercial Transactions Law with emphasis on Articles 257 and 265 of the Civil Transactions Law. The provisions are highlighted below:

According to Articles 257 and 365 (1) of the Civil Transactions Law, the basic principles in contracts is the consent of the contracting parties and the obligations they have agreed to as set out in the contract. If the wording of a contract is clear, the parties should not depart from it by way of interpretation to ascertain the intention of the parties. In this case, Clause 3 of the MOU explicitly states that the Bank and GIH shall conclude a subscription agreement once the Bank completed all formalities and legal matters preceding that agreement. Thereafter, GIH should have paid the subscription amount to the Bank. As a result, only when the subscription agreement is signed does GIH become bound to perform its obligation to pay the

amount agreed upon. This is a precondition to the performance of the agreement.

Article 371 of the Commercial Transactions Law:

1- A bank cash deposit is a contract by which one person delivers a sum of money, by any means of payment, to the bank which undertakes to return it upon request or according to the agreed conditions.

2- The bank shall acquire ownership of the deposited money and it shall be entitled to dispose of the money thereof for the needs of its own activity with an obligation to return its like to the depositor. Return of the money shall be in the same currency as that deposited.

Article 372 of the Commercial Transactions Law:

1- Save where otherwise agreed, the deposit must be returned upon demand and the depositor may at any time dispose of the balance or any part thereof.

2- This right may be made conditional upon the serving of prior notice or the expiry of a specific time limit

Article 373 of the Commercial Transactions Law:

Save where the deposit is intended for investment, a deposit shall be considered a debt and clearance may be effected between a deposit and a debt owed to the bank by the depositor. Any agreement to the contrary shall be null and void

Article 257 of the Civil Transactions Law:

The basic principle in contracts is the consent of the contracting parties and that which they have obligated themselves to the contract

Article 265 of the Civil Transactions Law:

1- If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties

2- If there is scope for interpretation of the contract, an enquiry shall be made into the mutual intentions of the parties without stopping at the literal meanings of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence that should exist between the parties in accordance with the custom current in dealings

Summary

As codified in Articles 371, 372, 373 of the Commercial Transactions Code, a general rule in banking operations is that a bank deposit is a contract whereby one party delivers a sum of money, by any means of payment, to a bank which undertakes to return such sum upon demand or in accordance with pre-agreed conditions. The bank shall acquire ownership of the deposited money and shall be entitled to dispose of the money, with an obligation to return it to the depositor upon demand or the expiration of an agreed upon time limit. Such deposit shall be considered a debt owed by the bank.

The main claim and the counterclaim in this case together exceed AED 2.5 billion which makes this claim one of the largest ever filed in the Dubai Courts.

Al Tamimi & Company has now filed an application for provisional attachment against the Bank's assets after the Court of First Instance decision in order to secure its client's entitlements as awarded in the judgment. The Dubai Court of First Instance confirmed the attachment pursuant to Articles 254 and 255 of the Civil Procedure Law.