

# The right to retain a deposit in Dubai

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The difference has important consequences because in the event the transaction is not perfected, a deposit may be forfeited if the parties so agree (under Article 148 of the Civil Code) but an advance may be claimed back.

## Facts of the Case

The Claimant had agreed to buy a consignment of saffron from the Respondent. An initial amount of AED 326,000 was paid by the Claimant by way of a deposit, but there was a fall in the price of saffron. The parties tried to renegotiate the agreement using a lower price, but the Claimant withdrew from the bargain. The Claimant then filed a claim for the return of the initial amount paid, claiming that it had been an advance on the payment and that, since the deal had not been finalized, the money should be returned.

The Respondent argued that it had been agreed that the initial sum paid was a deposit, and that by renegeing on the deal this had been forfeited by the Claimant, pursuant to Article 148 of the UAE Civil Code:

## Article 148

- Payment of earnest money shall be regarded as evidence that the contract has become final and irrevocable unless the agreement or custom are to the contrary.
- If the two parties agree that the earnest money shall be forfeited in the event of renegeing, each of them shall have the right to renege, and if the person who has paid the money reneges he shall lose it, and if the person receiving it reneges, he shall pay over double that amount.

## Court of First Instance

The Court of First Instance appointed an expert and after receiving his report, the court ordered that the Respondent should return the advance to the Claimant with interest at the rate of 9%.

## Court of Appeal

The Respondent appealed (in Commercial Appeal No. 701 of 2013). The Court of Appeal heard witnesses for the parties.

The Court of Appeal held that it was clear in the case that the amount paid to the Respondent by the Claimant was a deposit paid towards the deal. The Claimant had stated in his statement of claim that the sum paid in installments was a deposit and the Claimant's witness had attested to this fact. The Respondent's witnesses stated that the parties had agreed that the sum paid by the Claimant shall be forfeit should the Claimant renege or not follow through with the purchase. The Claimant had reneged on the purchase due to a fall in prices without any fault on the part of the Respondent. The Claimant had filed the claim even though it had agreed with the Respondent to purchase the consignment at a lower price

Since the Claimant had reneged on the deal, he forfeited the deposit he had paid. Therefore, the claim had

no proper basis and was to be dismissed.

### **Court of Cassation**

The Claimant appealed to the Court of Cassation. The Claimant argued that the original invoice supported his claim that the payment was a deposit that was refundable. Furthermore, there was nothing on record to indicate the parties' agreement to consider the deposit paid towards the purchase price as a non-refundable penalty for reneging on the contract. The Claimant also argued that the Court of Appeal decision was based on a procedural irregularity, since the Respondent called a man and a woman to testify, which is contrary to Sharia rules.

The Court of Cassation dismissed the appeal.

In its judgment the Court of Cassation explained that the purpose and character of a deposit is determined by reference to the manifest intent of the parties. The trial court is to interpret such intent from the facts and circumstances of the case in order to conclude whether the sum paid is to be considered a deposit in a final agreement, or a deposit subject to forfeiture in the event of reneging (i.e. not final as the deposit is the consideration for the right to resile from the contract). The trial court has full discretion to interpret the facts and weigh the evidence and documents produced in evidence. On article 148 of the UAE Civil Code, the Ministry of Justice's commentary provides that "the rules relating to the forfeiting and restoration of earnest money/deposits are not rules of damages, but are part of the contractual intention of the parties....If the contract proceeds, the earnest money/deposit will be accounted for in the price to be paid."

On the issue of testimony, the Court of Cassation dismissed the Claimant's argument as according to Articles 35 and 36 of the Law of Proof in Civil and Commercial Transactions, testimony is permitted in commercial matters whatever the value of the transaction as long as the testimony does not contradict written evidence. It is well established in the UAE and consistent with previous rulings of the Court that the Law of Proof in Civil and Commercial Transactions does not subject testimony to any restriction on the composition of witnesses testifying to a particular fact or set of facts. In other words, the number of witnesses or their gender are not factors that need to be taken into account with respect to testimony. In this case, the Sharia rules on testimony did not apply as the subject of the case was purely commercial.

The Court of Appeal held that it was clear in the case that the amount paid to the Respondent company by the Claimant was a deposit paid towards the deal and that it was subject to forfeit in the event the Claimant reneged on the deal. The Claimant had reneged and so had forfeited the amount paid.

### **Conclusion**

This judgment highlights that a party may have the right to retain a deposit even in the absence of any loss being suffered. Whether a deposit has this purpose and character is to be determined by the intent of the parties and it is for the trial court to interpret such intent from the facts and circumstances of the case and to conclude whether the parties agreed that the deposit would be subject to forfeiture.