

Dubai Court Rules on Liability of Banks in Relation to Faxed Authorizations

Naief Yahia - Partner, Head of Litigation - Dubai - Litigation / Construction and Infrastructure
n.yahia@tamimi.com - Dubai International Financial Centre

Zane Anani
z.anani@tamimi.com - Dubai, UAE

This article discusses Dubai Court of Cassation judgment 562 of 2016 that specifically addresses the enforceability of a fax indemnity documents signed by the bank's customers and whether a bank will be held liable for any damage sustained by the customer as a result of an incorrect bank transfer sent via facsimile.

In this case, we successfully represented a bank (the Bank/Defendant) against the bank's customer (the Claimant) who alleged that the Defendant wrongfully transferred a sum of money from the Claimant's account based on a forged letter instructing the Bank to make the transfer that was sent by facsimile. The Claimant argued that it did not issue or send instructions to the Defendant requesting such transfer. The Claimant argued that the Defendant should have, prior to approving the transfer, verified the signature, as required by UAE Central Bank regulations, by making a call to the Claimant's signatory as a safeguard against fraud, which the Defendant failed to do. In this case, the court held that the indemnity contained in the fax indemnity document (signed by the customer) could be applied because the Bank had not committed fraud or gross error. In order to invalidate an indemnity or limitation of liability, it must be established that there was an act (by the other party) of fraud or gross mistake. In this case, there was no fraud or gross negligence giving rise to liability.

Court of First Instance

The Claimant brought commercial action 430 of 2016 against the Defendant (the Bank) before the Dubai Court of First Instance seeking judgment against it for damages incurred due to the Defendant's breach of the banking customary practice. The Claimant also sought for the appointment of a Forensic Laboratory to perform forensic analysis of the signature of the wire transfer request based on the specimen signature the Claimant had given the Bank for their records.

The Court of First Instance dismissed the Claimant's claim on 14 March 2016 on the basis that the Bank did not act negligently in processing the transfer and that the Bank acted on the instructions they received from the Claimant via facsimile, and that the Claimant's authorization included a bank disclaimer. The Court of First Instance found no proof of any fraud or gross error as to engage the Bank's liability and accordingly dismissed the claim.

Court of Appeal

The Claimant appealed in Commercial Appeal 430 of 2016 and on 14 June 2016, the Court of Appeal dismissed the appeal and upheld the ruling of the Court of First Instance. The Claimant appealed further against the judgment to the Dubai Court of Cassation.

Court of Cassation

In the appeal filed by the Claimant against the Court of Appeal judgment, the Claimant argued that the purported fax letter pursuant to which the transfer was made was fake and was not issued by its authorized signatory and that the Claimant's authorization to the Bank does not dispense with the verification procedure. The fact that the bank processed the transfer without verifying the fax and its

source constituted (they argued) gross error giving rise to liability.

The Court of Cassation dismissed the Claimant's appeal, explaining that:

- Three elements are necessary to engage a bank's liability in relation to its banking activity: a proven case of negligence (breach of contract) against the bank in relation to the aggrieved; damage; and a causal link between the two. A contractual disclaimer may be applied unless the debtor has committed fraud or gross error. A bank may, in a banking services contract, agree that it shall be excluded, during the term of the contract, from liability for error. The burden is upon the bank to prove that the customer had accepted the disclaimer.
- According to the fax indemnity document signed by the Claimant, the latter agreed to bear all risks and damages arising as a consequence of the Defendant acting on any instruction received by the Defendant via facsimile. The Defendant had sent the Claimant a notification advice to their email once the transfer was sent on 19 August 2013. The particulars entered on the wire transfer request were accurate details pertaining to the Claimant's account which they must maintain and protect as confidential information. The passport number of the Claimant's authorized signatory was entered as given in the declaration of acceptance of facsimile instruction and the account number, the account holder and all other fields were entered accurately. There was no error in the information provided to the Defendant and the request was signed inside the box marked "Authorized Signatory". Hence, there was no fraud or gross negligence giving rise to liability and the entire contention was baseless. Based on the foregoing, the appeal was dismissed accordingly.

Comment

This Court of Cassation's judgment provides an assurance to banks who still accept wire transfer instructions via facsimile. In the past, we have seen a number of judgments where the Dubai Courts held that banks are liable for potential fraud or forged fax instruction especially if the Claimant establishes that the facsimile was not sent from the Claimant's facsimile machine. However, banks need to make sure that all the information contained in the fax instructions are accurate and match its records. In addition, for the avoidance of any doubt, banks' employees need to verify the signature to the best of their ability based on the specimen signature of their customers. It is pertinent to note that the Dubai Court in this judgment did not deal with the slight mismatch between the signature in the fax instruction letter and the specimen signature form as this is normally done with cheque related cases. In this case, the bank did not have the original of such fax instruction letter.

In summary, the Court of Cassation will uphold these types of limitation of liability clauses when it comes to banking transactions as long as it is not contrary to public policy, specific statutory mandatory provisions or excludes liability for fraud, gross error or deliberate misconduct.