IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 153

Suit 1611/1990

Between

Shaikh Faisal trading as Gibca

… Plaintiff

And

Swan Hunter Singapore Pte Ltd

… Defendant

GROUNDS OF DECISION

Conflict of Laws — Choice of law — Contract; Contract — Illegality and public policy

Version No 1: 29 Oct 2026 (23:45 hrs)

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Shaikh Faisal trading as Gibca v Swan Hunter Singapore Pte Ltd

[1994] SGHC 153

Suit 1611/1990
Chao Hick Tin J
30 May 1994

1 Cur Adv Vult

2 This is an action by an agent for the recovery of commission. The plaintiff was at all material times operating in the United Arab Emirates (UAE) as an agent for overseas contractors and suppliers. The defendants, a Singapore company, were and are engaged in the business of, inter alia, naval shipbuilding. The defendants were previously known as Vosper Naval Systems Pte Ltd and Vosper-QAF Pte Ltd.

3 Before the plaintiff had any business relationship with the defendants, he had dealt with a company known as Vosper Pte Ltd, another Singapore company which went into receivership and was later wound up. In a sense, Vosper Pte Ltd was the link that brought the parties together. More will be said about this shortly.

4 **Facts**

5 The agency agreement between the plaintiff and the defendants was reached sometime in late June, early July 1986. This is evidenced particularly in two letters dated 20 June and 8 July 1986 from the defendants to the plaintiff. However, in view of the issues raised, I think it may be necessary for me to trace briefly how the parties became involved with each other.

6 It was in October 1984 when the plaintiff was formally appointed as the consultant of Vosper Pte Ltd within the UAE to promote the sales of craft designed and built by that company. The appointment was for a term of 12 months, which term could be extended by mutual consent. It would appear that the relationship continued until Vosper Pte Ltd went into receivership. Eventually the company was wound up in February 1986.

7 The receivers of Vosper Ptd Ltd sold the assets of the technical and design division of the company to QAF, a large diversified public listed company based in Singapore. QAF in turn incorporated a company called Vosper-QAF Pte Ltd, the defendants, to carry on the previous marine activities of Vosper Pte Ltd.

8 On 24 March 1986, one Brian Morrison (who was previously with Vosper Pte Ltd), the managing director of the defendants, informed the plaintiff that the defendants were taking over the marine business of Vosper Pte Ltd. The letter ended by saying that the defendants were `particularly interested in continuing our activities in the UAE and pursuing enquiries current at the time of Vosper Pte Ltd`s liquidation ...`

9 On 10 June 1986, the plaintiff advised the defendants that he was expecting `an enquiry for three landing craft to come out` and that he would arrange for the tender enquiry to be sent to the defendants.

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10 On 20 June 1986, one Roger Cooper, the projects manager (sales) of the defendants, wrote to the plaintiff. After introducing the work and services the defendants could offer, Cooper went on to state:

> *We hope to visit Abu Dhabi next month and in this connection, I shall be grateful if you will advise the best time for such a visit to maximize effectiveness and meet the relevant people.*

11 Finally, we look forward to receiving the tender documents for the three landing craft as you informed us in your telex no 35721 of 10 June and also to discussing this with you and the customer during our forthcoming visit.

12 On 25 June 1986, the plaintiff notified the defendants by telex that he had despatched the documents for the landing craft by DHL. The defendants were also told that the closing date for tender was 4 July 1986.

13 On receipt of the documents for the tender, the defendants telexed the plaintiff on 27 June 1986 to enquire why the period given for tender was so brief. They also asked whether it would be an open or closed tender and what the state of the competition was. It ended with the request:

> *Let us know as soon as possible when you have arranged all relevant meetings for our visits, and give dates to enable us to plan our itinerary.*

14 On 30 June 1986, the plaintiff telexed the defendants to explain why the time remaining for tender was so brief. This was because the UAE Armed Forces General Headquarters (GHQ) thought that Vosper-QAF Pte Ltd was the same as Vosper, London, and thus did not invite Vosper-QAF Pte Ltd to tender. When the plaintiff became aware of the misunderstanding he managed to restore the defendants` name onto the invitation list. The plaintiff ended the message by advising the defendants as follows:

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> *Please correspond directly with Director-General Purchasing, PO Box 2501, Abu Dhabi, UAE. Since the closing date is 4 July 1986, I believe the purchasing will accept your bid by 12 July 1986. Please send your offer directly to the purchasing via DHL.*

15 On the same day the defendants telexed the Director-General Purchasing of GHQ asking for an extension of time to 14 July 1986 for the submission of the tender. By a separate telex the defendants informed the plaintiff of the same and requested the latter to use his best endeavours to assist in obtaining an extension. The next day, 1 July 1986, the plaintiff replied asking the defendants to make their submission as soon as possible. The plaintiff also informed the defendants that GHQ would `usually accept bids one week to ten days after closing date.`

16 On 8 July 1986, the defendants wrote to the plaintiff in these terms:

> *Please find enclosed one copy of our proposal ref: BFMM/RNC/DN/SE1817/A & B for the supply of 2 x Landing Craft/to the UAE. This is in response to their tender ref: DGP/NG/84/1362A/30 dated 23 June 1986.*

17 The proposal was couriered direct to DGP by DHL forwarding airbill no 88361906 dated 7 July 1986.

18 We discussed and agreed, an agency commission of 10% of the contract value of the project has been included for GIBCA should you be successful in obtaining this business.

19 We look forward to a successful conclusion to this business and shall be grateful if you will keep us fully informed of developments.

20 It may be appropriate for me at this juncture to make this observation. In the light of the events as outlined above, there is no doubt that the plaintiff was appointed an agent in relation to the proposed sale of two landing craft by

the defendants to GHQ. There was clearly an agreement to pay the plaintiff a commission of 10% of the sale price of the landing craft. The letter of the 8 July 1986 confirmed that. It is not in dispute that the agreed commission was subsequently reduced to 8%. However, what is in dispute is whether there was a further agreement between the parties to reduce the commission from 8% to 71/2%. More will be said about this aspect later.

21 Reverting to the events, the tender submitted by the defendants was unfortunately routed to a wrong department of GHQ. It should have gone to the technical committee. When the plaintiff became aware of that he managed to have the tender redirected to the correct body.

22 Thereafter from time to time the defendants would make inquiries of the plaintiff as to the state of the tender and the plaintiff would enlighten the defendants of the same. By October 1986 the defendants were informed that they were one of four short-listed tenderers and that they would soon be asked to make a presentation. The defendants were pleased to hear that and asked the plaintiff for advice on strategy and for information on who their competitors were.

23 On 27 October 1986, following an advice from the plaintiff, the defendants telexed the Director-General Purchasing, GHQ, indicating that they would like to visit UAE to make a presentation on their tender and to have a technical discussion. On 4 November 1986 the Director-General Purchasing eventually accepted the offer on condition that it was without obligation. At about mid-November 1986, three officials of the defendants went to see the technical committee at GHQ. They were TT Durai, deputy chairman; Brian Morrison, the managing director; and Roger Cooper, projects manager (sales).

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The staff of the plaintiff met the three officials on arrival and attended to their hotel accommodation and visa requirements.

24 It was clear that the defendants were pleased with the meeting at UAE and with the arrangements made by the plaintiff so much so that on their return to Singapore Roger Cooper wrote a letter of appreciation. He also specifically thanked one David Bernard, who was a staff of the plaintiff.

25 On 9 December 1986, a very important memorandum was issued by His Highness Sheikh Khalifa bin Zayed Al Nahyam, the Deputy Supreme Commander (DSC) of the UAE Armed Forces, to the Under-Secretary of the Ministry of Foreign Affairs. It was marked `confidential` and it reads:

> *Subject: Arms purchases for the armed forces*
>
> *With due consideration to the public interest and with a view to securing proper procedures for the purchase of armament items of various kinds for our armed forces.*

26 You are kindly requested to advise the accredited ambassadors to the UAE whose countries manufacture and produce military equipment of various kinds of our desire to deal directly through their respective governments but without any other party as agent, mediator, distributor, representative or advisor for the companies and plants which produce military equipment, combat vehicles, weapons of various kinds and their ammunition, battle ships, aircraft and all such other electronic equipment and appliances, whether such party was a citizen or an alien, and that purchase operations should be under the supervision and guarantee of their governments.

27 Our instructions to this effect have been passed to the chief of staff, armed forces, to ensure compliance with the foregoing in dealing with the above subject matter.

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28 We hope that their excellencies the ambassadors will comprehend the explicit purpose of this procedure to maintain cordial relations with their respective governments.

29 I shall hereinafter refer to the contents of this memorandum as either `the directive` or `the prohibition`.

30 It should be noted that the existence of this memorandum was not known to the parties until well after the tender had been successfully secured by the defendants in November 1987. Shaikh Khalid (PW1), the managing director of the plaintiff, said that he first saw it in 1990. For this tender, Shaikh Khalid was in charge on behalf of the plaintiff.

31 On 19 December 1986, pursuant to the mid-November 1986 meeting at UAE, the defendants submitted a revised proposal direct to GHQ. Thereafter there were constant enquiries from the defendants to the plaintiff seeking information on how their revised proposal stood.

32 In early 1987, following the resignation of Brian Morrison as the managing director of the defendants, Durai assumed that office. From March/April 1987 Durai made a number of further visits to UAE. At the first of such visits Durai was alerted as to the existence of a provision in the standard GHQ contract which precluded an arms supplier from using agents in securing a tender. It was sometime in June 1987 that Durai was given the complete standard contract terms, including art 24. The plaintiff was well aware of the existence of art 24. Shaikh Khalid`s evidence quite clearly indicates that the provisions in art 24.1 had been in use for some years, though art 24.2 was new. But Shaikh Khalid explained that art 24.1 was a provision which was not strictly enforced. As art 24 is central to this action, I shall set it out in full:

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> *Article 24 -* ***Miscellaneous***
>
> *24.1 It is understood by both the parties that the seller has not directly or indirectly entered and will not enter into consultancy deal or any other contract with any of the commercial firms, companies or agencies operating in/outside the UAE to act on their behalf as their agent or consultant in consideration of certain amount of fees or remuneration in order to facilitate and promote the negotiation and finalization of this contract. Similarly it is understood that no commission, remuneration and/or fees (including consultancy fees) have been or will be, through gratuities, gifts or personal payments granted either directly or indirectly or in any way conferred by the seller in connection with this contract to any officer or personnel of UAE or working in/outside the UAE or to the abovementioned commercial firms or any other third party as a bribe for securing its signature or obtaining undue advantages in connection with its negotiations or performance. The seller also assures that there is no such promise legally binding on him and if any such commitment or obligation is made in ignorance by the seller with any of the personnel or firms of the UAE in the past the same is hereby revoked and becomes null and void.*
>
> 24.2 If the seller contravenes in any way the provision of this clause and the buyer brings evidence to this effect, the seller is liable to pay to the buyer a penalty of thirty percent (30%) value of the contract and the buyer is entitled to terminate the contract without prejudice to his legal rights.

33 Durai told the court that in a meeting in August 1987 with the Commander of the UAE Navy, the latter wanted an assurance from Durai that the defendants did not have an agent in UAE in relation to that tender. It would appear that the Commander strongly suspected that the defendants had an agent. According to Durai the Commander in fact alleged that the defendants had an agent. The Commander wanted a letter from the defendants giving the assurance that they did not have a local agent. Durai was concerned about giving such an assurance while the agency agreement was formally in existence between the plaintiff and the defendants. Durai discussed the matter with Shaikh Khalid. As a result, an arrangement was worked out under which the defendants would, as a matter of form, terminate the agency agreement but would nevertheless pay

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the plaintiff the agreed commission indirectly through another company of the plaintiff at the Cayman Island, the Berry Group Ltd.

34 Following that understanding, sometime in early September 1987, the defendants wrote out a letter to the plaintiff, but backdated to 4 May 1987, in these terms:

> *As required under the regulations of GHQ Armed Forces, Abu Dhabi, we hereby revoke the agreement dated 8 July 1986. All rights and obligations as stated in the above letter and all other subsequent correspondence relating to the same subject shall henceforth be considered null and void.*

35 However, this letter dated 4 May 1987 was not given to the plaintiff until much later on 3 November 1987.

36 As required by the Commander of UAE Navy, on 3 September 1987, a letter was issued by the defendants to the Commander as follows:

> *This is to confirm that Vosper-QAF Pte Ltd of the above address* ***do*** *not have an agent in the UAE, neither* ***are*** *they represented in any way within the UAE. [Note the present tense of the verbs.]*

37 Even after the defendants gave the assurance to the Commander of UAE Navy, the defendants continued to seek the advice of the plaintiff on the tender. But it was clear that by early September 1987 the plaintiff had substantially rendered all the services he was required to render. The plaintiff had, by then, performed what was expected of him. The contract with GHQ was signed on 17 November 1987.

38 On 3 November 1987, pursuant to the understanding to make the commission payment to Berry Group Ltd, the defendants drew up two draft agreements to be entered into between the defendants and Berry Group Ltd (the Berry drafts), one of which was to pay Berry Group Ltd $862,500 for past

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services. In March 1988 the plaintiff signed both drafts and returned them to the defendants. Subsequently, there was a change of mind on the defendants` part as regards the signing of the Berry drafts. Eventually, the defendants never signed the two drafts.

39 Except for the meeting with the technical committee of GHQ in November 1986, there is no clear evidence that any representatives of the plaintiff appeared in or sat at any meeting which the defendants had with GHQ. But it seems to me that the presence of the plaintiff`s representative at the meeting in November 1986 is significant. It confirms what Shaikh Khalid told this court: that although the provisions in art 24.1 had been in use for some years they were never seriously enforced. The telex of 6 November 1986 from the defendants to GHQ was even copied to the plaintiff (AB45). So GHQ must know that the defendants had an agent.

40 As regards the absence of the plaintiff`s representative in subsequent meetings in 1987 between the defendants and GHQ, I think this could in a sense be said to be due to the directive of the DSC. While Shaikh Khalid averred he had not seen the actual memorandum until 1990, and there is no reason not to believe him as the memorandum was a confidential communication between two departments of the government of UAE, I think it is more likely than not that he could have got wind that GHQ might be getting stricter on the enforcement of the no-agent rule though he might not be sure of the extent. Thus, in order not to take chances, or jeopardize the tender, the plaintiff began to behave more discreetly in 1987.

41 When Durai was asked if before he received the draft contract from GHQ (with art 24) he was informed of the no-agent prohibition, he answered that he could not recall. But he explained that if there were then such a

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prohibition, he did not take it seriously. In cross-examination he did not agree with the defence filed that the plaintiff did not inform the defendants of the prohibition. He further said `even if from the beginning we had known of the prohibition we would still use the plaintiff though with some caution.` He mentioned that `in other countries too, there were similar rules disallowing agents, still we used agents.` He said he did not take art 24 seriously until he met the Commander of UAE Navy in August 1987.

42 On the evidence I find that there was no real intention on the part of both the plaintiff and the defendants to terminate the appointment of the plaintiff as agent. I am inclined to think that in the minds of the parties they still entertained some doubts, notwithstanding the assurance given, as to the extent of seriousness with which GHQ was going to enforce the prohibition. This explains why the defendants did not convey the termination letter to the plaintiff until early November 1987 and the defendants even proceeded to draw up the Berry drafts. This view is consistent with what Durai said: `in other countries too, there were similar rules disallowing agents, still we used agents.`

43 From the evidence of Durai there is no doubt that the plaintiff had assisted and had rendered services to enable the defendants to secure the contract and that the plaintiff has earned his commission. Thus when the first two payments under the supply contract were received from GHQ, the defendants duly remitted the appropriate percentage thereof (SF228,787.94 = $302,561.49) to an account of Berry Group Ltd at a Swiss Bank in Geneva as designated by the plaintiff.

44 Before I turn to consider the issues, I should allude to one further development. In December 1988 QAF sold all the shares in Vosper-QAF Pte Ltd to Swan Hunter Ltd of England. It was a term of the agreement of sale that

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QAF would discharge all liabilities on the contractual commitments relating to the two landing craft. In other words, QAF would indemnify Swan Hunter Ltd for the commission to be paid to the plaintiff. QAF refused to do so because they suffered a loss on the contract due to cost overrun arising from errors of construction. From 1989 Durai ceased to be involved with QAF or the defendants. He has appeared in court to testify in response to a subpoena.

45 **Rate of commission**

46 I will first deal with the factual question whether it was agreed between the parties that the commission payable be further reduced from 8% to 71/2%. The plaintiff`s case is that he had, through Shaikh Khalid, only agreed to reduce it to 8%. He did not agree to a further reduction of 1/2% to 71/2%. Durai`s evidence on this is as follows. At the final stages of negotiation with GHQ he asked Roger Cooper to speak to Shaikh Khalid to obtain another half percentage point reduction. Cooper reported to Durai that Khalid had agreed to that reduction. In the absence of Roger Cooper coming to court to testify, the evidence on the contents of the conversation between Cooper and Khalid is certainly hearsay. But what is significant is that after the two payments were made by the defendants to the plaintiff (based on a computation of 71/2%) there was no protest by the plaintiff that he was paid short of a 1/2%. Furthermore, in one of the two Berry drafts (DB108) the amount which was stated to be due from the defendants to Berry Group Ltd was S$862,500. Shaikh Khalid signed that draft. He told the court that he might have signed it without checking. That figure is consistent with 71/2% commission of the original contract price of S$11.5m. On balance, I find that there was this further agreement to reduce the commission to 71/2%.

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47 The plaintiff further raised the point that even if there was such an agreement to reduce the commission payable, the reduction was given without consideration. I do not see how this point could seriously be advanced when the reduction was given while the defendants were conducting the final negotiations on the price of the landing craft with GHQ.

48 **Proper law**

49 I now turn to the two main issues of the action -- first, the proper law that governs the agency agreement. I have earlier given a brief account of the events leading to the defendants appointing the plaintiff as their agent in relation to the tender. I do not propose to repeat them.

50 Suffice it for me to say that I do not think this may be considered to be a case where the plaintiff had sought out the defendants. Prior to this landing craft tender the plaintiff had dealt with Vosper Pte Ltd. In reality what happened was that the defendants, having taken over the marine business of Vosper Pte Ltd, wished to carry on the relationship with the plaintiff. The desire was quite mutual.

51 In none of the correspondence was there any reference to the proper law of the agency agreement. If it were possible to infer what the parties had intended should be the proper law, that should be done. If not, the proper law would have to be the system of law with which the contract has its closest and most real connection. But, as stated in Dicey & Morris, ***Conflict of Law*** (1987 Ed) at p 1162 `the line between the search for the inferred intention and the search for the system of law with which the contract has its closest and most real connection is a fine one which is blurred.` Both are really objective tests

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and they merged into each other. The arguments of the parties before me centred on the close connection test.

52 In para 587, 8 ***Halsbury`s Laws of England*** (4th Edition) it is stated:

> *Where the parties have not expressed a choice as to the proper law and no such choice can be inferred, the proper law of their contract is the system of law with which the transaction has the closest and most real connection. In such a case the court does not seek to find some presumed or fictitious intention of the parties but, rather, holds the contract to be governed by the law with which it is most closely connected, for that is what it is presumed that reasonable businessmen would have decided.*

53 In determining with what system of law the transaction is most closely connected, the court should look at all the circumstances. Whilst firm rules cannot be laid down, it is clear that the court will look at such factors as the place of contracting, the place of performance, the place of residence or business of the parties and the nature and subject matter of the contract.

54 In ***Dicey and Morris*** at p 1192, the learned authors stated that in this kind of inquiry `many matters have to be taken into consideration. Of these the principals are the place of contracting, the place of performance, the places of residence or business of the parties respectively and the nature and subject-matter of the contract.`

55 In r 200, ***Dicey and Morris*** stated that the proper law for a contract of agency is in general the law of the country where the relation of principal and agent is created. While recognizing that the place of contract may be difficult to determine where principal and agent live in different countries, the law of the place where the principal carries on business is likely to be given some, if not considerable, weight.

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56 On the facts of the instant case it seems to me that the agency contract was made in Singapore. The defendants are a Singapore company and the two crucial letters which evidenced the contract were written in Singapore. They were written in the English language, an official language of Singapore. It would be recalled that in 1984 when Vosper Pte Ltd appointed the plaintiff as consultant, the letter was also written in Singapore in the English language.

57 Further pertinent factors are these. The price of the contract with GHQ to supply the two landing craft was expressed to be in Singapore dollars. The commission to be paid was a percentage of the supply contract price. The two landing craft, the subject of the tender, were to be constructed in Singapore. The only matter that was linked to UAE was that the services to be rendered by the plaintiff were to be carried out in UAE.

58 On balance, considering all the relevant factors, in particular the fact that the defendants, who are the principals, are a Singapore company, I hold that the contract had real and closest connection with Singapore and that the proper law for the contract is Singapore law.

59 **Is the contract void and/or unenforceable**

60 I now turn to the next question: is the agency agreement between the plaintiff and the defendants void and unenforceable under UAE law? The arguments of the defendants go essentially in this way. The supply of the two landing craft was an arms deal. It was the policy of GHQ, as evidenced by art 24.1, and the directive, to prohibit foreign suppliers from appointing local agents in relation to armament contracts. Any contravention of the prohibition would be against the public policy of UAE. Accordingly, the agency agreement

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between the plaintiff and the defendants is against public policy and is thus void and/or unenforceable.

61 It is a settled principle of our law that foreign law is a question of fact which must be specifically pleaded by the party relying upon it and must be proved to the court. Unless it is proved to the contrary it shall be assumed that the foreign law is the same as Singapore law: see 8 ***Halsbury`s Laws*** (4th Ed), para 795.

62 It is also settled law that where a contract which is governed by Singapore law is to be performed abroad and if the law of the foreign country prohibits the performance thereof, the contract would be invalid and unenforceable. This principle was laid down in , where Scrutton LJ enunciated the rationale for that principle as follows (at p 304):

> *... where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent states.*

63 In at p 156, Lord Sankey LC pronounced very much the same principle when he stated:

> *It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do.*

64 So the only question is: is the appointment of an agent in UAE by a foreign arms supplier rendered illegal or void by the law of UAE? This question in turn depends on the answer to the question what is the legal effect of the provisions in art 24.1 and the directive issued by DSC.

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65 Both the plaintiff and the defendants called a legal expert each to testify on this very issue: one Mr Ghosheh for the plaintiff and one Mr Charles Laubach for the defendants. Ghosheh is a legal practitioner in the courts of UAE. While Laubach is not allowed to practise in the courts of UAE, he is a legal consultant with knowledge of the laws of UAE. His competence as an expert is not challenged by the plaintiff. Much of their evidence centred on this very point.

66 From the evidence of both experts, what emerges is this: Presently in force in UAE is a Provisional Constitution which was adopted in 1971 (the UAE Constitution). The UAE is a union of a number of emirates, of which the Emirate of Abu Dhabi is a constituent part. Under arts 110-115 of the UAE Constitution, laws in UAE are enacted in the following three ways:

> *(i)* ***Union laws****: they require the approval of the Union National Assembly, the ratification of the Supreme Council and the signature of the President of the Union. Promulgation of such laws in the Gazette is essential. These are known as federal laws.*
>
> (ii) ***Emergency decrees*** : when the Supreme Council is not sitting, the President of the Union, together with the Council of Ministers, may promulgate decrees having the force of law provided that such decrees are not inconsistent with the Constitution. Such emergency decrees require the assent of the Supreme Council for their continued operation after the expiry of one week.
>
> (iii) ***Ordinary decrees*** : require the confirmation of the Council of Ministers and the ratification of the President of the Union or the Supreme Council. Decrees must be published in the gazette.

67 His Highness Sheikh Khalifa bin Zayed Al Nahyan, was appointed to the office of the Deputy Supreme Commander of the UAE Armed Forces by Federal Decree No 28 of 1976. Under art 2 of that decree, the DSC shall `supervise the enforcement of resolutions on any matter relating to organization, armament, preparation and equipment of the Armed Forces.` The DSC is not

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given any lawmaking power in that decree. However, a federal law could give a minister or official the power to promulgate subsidiary legislation, called resolutions, which could have the force of law. For example, art 3 of Federal Law No 19 of 1972 gives the Chairman of the Supreme Defence Council the power to promulgate resolutions.

68 **Plaintiff`s expert evidence**

69 The difference in opinion between Mr Ghosheh and Mr Laubach centres on the legal effect of the directive issued by DSC and the policy behind art 24.1. They are in agreement that there is no written law in UAE which prohibits a foreign arms supplier from appointing a local agent. Ghosheh is of the opinion that the directive is no more than an administrative instruction and it does not have the force of law. He stressed on the fact that the directive was marked `confidential` and was addressed to the under Secretary for Foreign Affairs. He said:

> *Under the constitution a law can be enacted and enforced only in the manner prescribed in the Constitution. In the legal premises, a directive of the Deputy Supreme Commander or any request from the Foreign Ministry to the ambassadors not being enacted in the manner prescribed by the Constitution cannot be considered as an enforceable law.*

70 Ghosheh admitted that under UAE law a contract may be rendered unenforceable if it is considered to be against the public policy of the State of UAE. He conceded that public policy need not be codified. He was conscious that art 205 of the UAE Law of Civil Transactions, Federal Law No 15/1985 (otherwise known as the Civil Code) provides that `if the law prohibits dealing in a thing or if it is contrary to public order or morals, the contract shall be void.` What he contended is that public policy must be determined in the interest of

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the state as a whole and not formulated by any particular department of the government such as the UAE Armed Forces.

71 He also pointed out that art 3 of the UAE Civil Code states that `public order` shall be deemed to include matters relating to personal status, such as marriage, inheritance and lineage and matters relating to sovereignty, freedom of trade, circulation of wealth, rules of private ownership, and the other rules and foundations upon which society is based in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shariah.

72 Ghosheh expressed these views on `public order` and `public morals`:

> *There is no definite rule to determine `public order` at any time or place since `public order` is a relative concept. The public order at a given time will be formulated for the purpose of achievement of public, political, social and economic interest relating to the foundation of the society. Morals in one country in one generation follow a code governing the existing social relations in the society. Such moral code is a result of inherited habits and customs which go deeply to the roots of the society. The habits, customs, religion and tradition form an essential part of that code.*

73 In his opinion, the directive of DSC, marked `confidential`, does not contain any matter pertaining to public policy in the UAE. It only affects or governs relationship between the UAE Armed Forces and foreign governmental suppliers. As the directive was not issued pursuant to any written law it cannot be considered to be a piece of legislation. In so far as the provisions of art 24.1 of the standard draft contract of GHQ are concerned, Ghosheh felt that they only bind the parties to the contract and have no binding effect on third parties. He made reference to article 252 of the Civil Code which provides that `A contract may not impose an obligation upon a third party but it may create a right to him.`

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74 Ghosheh also made reference to a first instance decision of the Abu Dhabi Federal Court in Case No 812/1990 (exh P5) where the directive of the DSC was one of the points in issue. In that case, the parties did not have a copy of the memorandum of the DSC and the Foreign Ministry assistance had to be sought. It was only after nine months that a copy was produced to court. The court there allowed the plaintiff`s claim for commission and no question of public policy was raised at all by the parties. Neither did the court raise it on its own motion. Admittedly, the defendants filed an appeal. However, the case was eventually settled.

75 He said the general rule is that a foreign supplier is required to appoint a local agent to tender. He referred to the Companies Law, Decision No 12/1986 and Federal Law No 18/1981 (referred to in the next paragraph). Once a foreign supplier succeeds in a tender he must establish a local agent to carry out the contract. He said the directive of DSC in effect exempts armament suppliers from complying with the general requirements that foreign suppliers must appoint local agents. Decision No 12/1986 is a set of administrative rules made by DSC governing general procurements by GHQ, with the exception of armament supplies.

76 Ghosheh also went on to deal with the question whether the agency agreement between the plaintiff and the defendants infringes any other aspect of UAE law. Reference was made to Federal Law No 18 of 1981 on Regulating the Activities of Commercial Agencies, which prescribes that commercial agency business may not be carried out in UAE except by a person whose name is registered with the Ministry of Economy & Commerce. In his view, this law does not apply to the present agency, where the plaintiff was only appointed as agent for the defendants for a specific tender and where the plaintiff was to assist the defendants in relation to the tender, eg obtaining documents, arranging

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meetings, giving advice and obtaining information on the progress of the tender. That law only applies to a trade agency. He said that the object of that law is to protect UAE nationals who are acting as agents for overseas principals. Any failure to so register would only mean that an agent cannot seek protection under that law. But he could still claim payment due to him from the principal under the general principles of UAE law on agency.

77 **Defendants` expert evidence**

78 Laubach for the defendants told this court that the prohibition against the use of agents in the supply of arms to GHQ had been in operation for some years now. The directive of the DSC is really a reaffirmation of the same policy. He then referred to certain clarifications which the US Mission in UAE sought to obtain in 1987 from GHQ regarding the policy. On 18 January 1988, GHQ replied and stated the following:

> *We are committed to the direction of HH The Deputy Commander of the Armed Forces about which he sent a letter to the Foreign Ministry on 9 December 1986 ... .*

79 Also we need to include a `penalties paragraph` in all arms ... deals prohibiting companies from using any mediation, whatsoever ... .

80 Federal Law No 18 organizes the subject of trading agencies in the civil sector: it refers to free works and materials which are of interest to the country`s public market. We operate under this law when the materials required for defence are not among those restricted items as stated in the above direction.

81 While admitting that certain issues relating to the scope of the applicability of the prohibition remains poorly defined, Laubach stated that `it is not in doubt that the prohibition applies to an arrangement like the instant

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situation whereby an intermediary is compensated for intervention with the GHQ on a sale by way of a commission on the final sale price.` In his view, the policies which GHQ seeks to advance by the directive are the control of costs, the maintenance of integrity in the purchasing process and the maintenance of confidentiality.

82 Relying on art 129 of the Civil Code, which provides that:

> *The necessary elements for the making of a contract are:*
>
> *(a) that the two parties to the contract should agree upon the essential elements;*
>
> (b) the subject matter of the contract must be something which is possible and defined or capable of being defined and permissible to be dealt in; and
>
> (c) there must be a lawful purpose for the obligations arising out of the contract.

83 and art 205(2):

> *If the law prohibits dealing in a thing or if it is contrary to public order or morals, the contract shall be void.*

84 and art 208:

> *The contract shall not be valid if it does not contain a lawful benefit to both contracting parties*

85 Laubach came to these conclusions:

> (i) the subject contract lacks the elements of a permissible subject matter and a lawful purpose;
>
> (ii) the services which the plaintiff had agreed to render to the defendants were contrary to the prohibition and thus contrary to law, public order and morals; and
>
> (iii) the prohibition rendered unlawful the benefit which the plaintiff was to receive under the contract and thus the contract is void.

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86 To substantiate his views on the matter, Laubach cited the writings of an eminent Egyptian jurist Abdul Razzah Sanhouri who, in commenting on the provisions of the Egyptian Civil Code which are in pari materia with arts 205(2) and 208 of the UAE Civil Code said:

> *It may be said, then, that the subject matter would be illegitimate if it were in contravention of public order or morals, whether or not there appeared a text of law forbidding it ...*

87 Every intermediary who exerts his intermediation for consideration which he obtains for the arrival at a result ***which integrity in administration*** would require that it be arrived at without consideration or intermediation performs an illegitimate act and his agreement thereupon shall be void. The agreement of the intermediary with a person on compensation that the intermediary shall take if such person is able to obtain a position, rank, medal or privilege from the government or `contracting` in which a `bid` shall be awarded, or the like, shall be a void agreement because of its contravention of the public order. [Emphasis added.]

88 Laubach gave a brief account of the various federal laws under which the UAE Armed Forces are set up. The DSC is given the responsibility of administering the Armed Forces and of arming those forces. Pursuant to that responsibility, the DSC issued Decision No 12/1986 which, as stated above, sets out the general procurement procedures of GHQ. Under those general procurement procedures, appointment of agents by suppliers is permissible. However, what Laubach contended is that, in so far as weapon procurement is concerned, that kind of procurement falls outside Decision No 12/1986 and comes within the scope of the prohibition.

89 As regards the point that neither the memorandum of the DSC nor the substance of the prohibition has ever been published in the official gazette,

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(other than being made a term of the standard contract), he contended that that does not detract from the force of the prohibition on weapon procurement as that concerns the security interests of the State of UAE. He argued that the prohibition is not unlike the GHQ offset requirement introduced in 1990. The offset requirement is this: in exchange for GHQ purchasing equipment, an arms supplier is required to invest part of the purchase price in the UAE, eg by way of opening a factory. When an arms supplier submits a bid, he must also submit an offset bid. The eventual offset contract would provide for penalty for noncompliance. The rationale behind that requirement is that the supplier should plough back a part of the purchase price (presumably some part of the profit) into the economy of UAE. That requirement was introduced without any formal publication by the DSC and was only made known informally. It is essentially a term which would be worked into the contract between an arms supplier and GHQ. Nevertheless Laubach asserted that the offset requirement, like the prohibition, is law.

90 Finally, in his report Laubach made the point that as the plaintiff has not been registered as a commercial agency under Federal Law No 18/1981 it is not permitted by that law to practice as a trade agent in UAE and under art 3 of that law no claim may be enforced by an unregistered agent. However, in court he agreed with Ghosheh that the present case does not come within Federal Law No 18/1981. In his closing address, counsel for the defendants made no submission on this aspect and I need say no more on it.

91 **Findings**

92 From the evidence of the two experts, I do not think there can be any doubt that the prohibition (in the directive or in art 24.1) is not a written law, in the sense that it is not a provision laid down in any federal law or decree. Neither

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is it a regulation having the force of law, as it is not prescribed by an authority under any federal law or decree. It is truly and effectively a purchasing policy of GHQ in so far as arms procurements are concerned. There is, in fact, evidence before me to show that at the Central Military Command at Dubai the same policy of `no agent` on arms procurement is not applied.

93 It is not in dispute that the provisions in art 24.1 of the supply contract entered into between GHQ and the defendants have been in use for some years. Shaikh Khalid admitted that. But from the evidence, it seems to me, and I do so find, that up to the date of issue of the directive by DSC, the prohibition in what was art 24.1 was not seriously enforced. It also seems to me that up to that point GHQ took a more enlightened view about it. This explains why David Barnard, a manager of the plaintiff, was able to be present when the three representatives of the defendants met with the technical committee in UAE in mid-November 1986. Durai said that at the November 1986 meeting, the technical committee and its chairman knew the defendants had the plaintiff as their agent.

94 As is apparent from Laubach`s evidence, the US Mission in UAE only began to raise the question of the prohibition in 1987, well after the issue of the directive by DSC. Obviously the US Mission raised the matter because the UAE Foreign Ministry had written to the foreign missions in UAE following the directive of the DSC. But there is no evidence that the plaintiff knew of this exchange of letters. It was not put to Shaikh Khalid. In passing I wish to note that only copies of the exchange of letters were produced to court. In his report, Laubach also referred to a telex of 1982 allegedly sent by DSC to the US Mission touching on the question of the prohibition. However, he only heard that there was such a telex but had never seen a copy of it. I do not think I should place any reliance on that.

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95 It seems to me that up to August 1987 when the Commander of UAE Navy asked for the letter of assurance from the defendants, neither the plaintiff nor the defendants felt that the prohibition would really be enforced. Indeed, as I have held above, even after the assurance was given by the defendants to the Commander of the Navy, the parties probably still entertained doubts as to the extent to which GHQ was going to seriously enforce the prohibition. It must be borne in mind that the tender related to landing craft, not sophisticated weapons.

96 So what is the effect of the directive or the prohibition? Does it represent public policy which would render an agency agreement entered into by a supplier in breach of it void or unenforceable? Or is it really a purely contractual matter? I must point out that it has not been alleged by the defendants that the plaintiff, in discharging his duties as an agent of the defendants, was expected to or had exercised any undue influence or had been guilty of any improper conduct. The defendants have expressly admitted through counsel that they are not alleging any such things on the part of the plaintiff. The evidence shows that there is nothing in the general law of UAE which outlaws the appointment of local agents by foreign suppliers. In fact, Federal Law No 18/1981 gives local agents a considerable measure of protection. The two experts are also in agreement that Decision No 12/1986 issued by DSC allows appointment of local agents by foreign suppliers (non-arms).

97 It is clear that art 205 of the UAE Civil Code renders void a contract which is contrary to public order or morals. What then is the test to be applied in UAE in determining whether a rule touches on a matter of public order or morals? No cases were tendered to me to show how a UAE court would decide that question in a context similar to the present case. It cannot be said that just because a matter is stated in a contract that that must necessarily constitute a matter of public policy. I would have thought that for a contract or an act to

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infringe public order or morals, it must be a contract or an act which is obviously wrong or improper; no right-minded person in society would at the relevant time think that the contract or act complained of is proper. It must tend to be injurious to the public or against public good. Public policy must be distinguished from the policy of the government of the day. Of course, public policy or morals can change with the times. As the commentary of Abdul Razzah Sanhouri shows, if there is a contract to buy an office or a title, that would be something which is contrary to public order or morals. So is a contract to secure a tender by improper means. None of that is the case here. I do not think that that part of the commentary of Razzah Sanhouri is intended to mean that it is per se against public policy to appoint a local agent to assist in relation to a tender, even if that tender relates to military requirements.

98 It is necessary to bear in mind that the memorandum of 9 December 1986 was an internal confidential directive issued by DSC to the Foreign Ministry of the UAE, asking the latter to advise foreign missions in UAE that henceforth GHQ would not deal with local agents and that GHQ would only deal with foreign arm suppliers through the foreign governments concerned. The precise scope of the directive is certainly less than clear. Was it intended also to prohibit all forms of agency, including the lawyers engaged to draft the supply contract? Laubach admitted that a public policy must be clear and the directive certainly lacks that. And if noncompliance with the directive is something so obviously wrong as to amount to a contravention of public order or morals, how was it that it was not raised in UAE Case No 812/1990 where the directive was under consideration? How was it that the court there did not on its own motion take up the point?

99 As I see it, the introduction in 1987 of the provisions in art 24.2 was intended to give some teeth, in a contractual sense, to that policy. That was

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purely contractual. There is no evidence before me that that policy was in fact enforced in and after 1987. Laubach was asked specifically on that and he could not cite a single instance where the 30% penalty was imposed. He referred to a case where the arms supplier was told to withhold the agent`s fee and pay it to GHQ. He admitted that he had no first-hand knowledge of the case. That was really third or fourth hand hearsay evidence. He also informed the court that he did ask some UAE advocates whether there was any case touching on the prohibition and they were not able to supply him with any.

100 There is really nothing wrong as such in the use of agents. In fact, that is the manner in which transnational transactions are often carried out. A government or its departments may of course, restrict the use of agents for specific tenders. This is very much a matter of policy. Such policy can and do change from time to time. As the evidence shows, the general UAE law does not prohibit the use of agent as a means of securing business. GHQ might very well in the future change its policy and allow the use of local agents by foreign arms suppliers. After all the Central Military Command allows foreign arms suppliers to use local agents. Of course, it is also possible that in time the Central Military Command might well fall in line with GHQ on this question. What I am trying to say is that policies of a government or its department must be distinguished from what is known as public policy in law. Such governmental or departmental policies do not necessarily represent public policy which would vitiate contracts: see .

101 If I should accept the contention of the defendants, it would mean that as of now public policy in UAE would render void and unenforceable an agency agreement if it relates to an arms contract awarded by GHQ, but the same contract would not be void and unenforceable if it relates to an arms contract awarded by the Central Military Command. I find that result strange. I am

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unable to see how that result can be justified. The appointment of an agent as such cannot be against public order or moral. Such an appointment does not mean that wrongdoing is envisaged; and even if it relates to an arms supply, it does not necessarily mean that confidentiality will be breached. As regards the questions of control of costs and the maintenance of the integrity of the purchasing procedure, these are important considerations whether a tender relates to purchase of arms or other non-military requirements of the state.

102 I find Laubach`s views about the nature of the offset requirement unacceptable. He said that that requirement is also law. If a foreign supplier were to breach that requirement I can see that as a breach of contract. That is strictly a contractual term. I really cannot see how one could elevate a contractual term into a law. Furthermore the offset requirement was intended to apply to all government purchases though at the moment it only applies to certain strategic purchases by GHQ exceeding US$10m. I think Laubach has overstated his case on the offset requirement. So has he with regard to the directive and the prohibition.

103 In so far as the defendants are concerned, they clearly knew the contractual consequences if GHQ should discover that they had continued to use the plaintiff as their agent. In all likelihood they thought the risk element was minimal. They did not take the prohibition seriously; and I would say, that was so even after the defendants had issued the letter of assurance to the Commander of UAE Navy. The backdated letter of 4 May 1987 issued by the defendants to the plaintiff was not intended to be acted upon and was not acted upon. While it was written in early September 1987, it was not given to the plaintiff until 3 November 1987 (DB62-63), when the supply contract was about to be signed with GHQ. The evidence of Durai bears out all that. He did not think it fair to deny the plaintiff his dues when the plaintiff had in fact rendered

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services to the defendants in relation to that tender. It is inevitable that after so many years witnesses may not be able to recall precisely what transpired. But I find Durai`s evidence to be generally reliable.

104 Accordingly, I do not find that a breach of the prohibition in art 24.1 would render the agency agreement between the plaintiff and the defendants void and unenforceable. I accept the opinion of Mr Ghosheh that the prohibition in art 24.1, is essentially a contractual term, a breach of which would give GHQ certain recourse as specified in art 24.2. But it does not follow that GHQ must exercise that right. The prohibition in art 24.2 is not of such a nature as to constitute rules of public order or morals, a breach of which would render a contract void and unenforceable. I would emphasize that it is not alleged that by the agency agreement, the plaintiff was expected to do or had in fact done anything improper. Of course, the defendants hoped that the plaintiff would promote the defendants and in turn help secured the tender for the defendants. Promotion of the goods and services of a principal by an agent are the normal duties of an agent. I cannot see how it could be said that such promotion is in itself wrong. As regards the directive, besides being a rather vague document, it is also confidential. For the reason given before, I also do not see how it could constitute public policy so as to nullify contracts.

105 I would reiterate that besides the evidence of both experts on the prohibition or the directive, there is no other evidence before me to show that it is otherwise against public order or morals of UAE for foreign arms suppliers to engage local agents and/or to pay them.

106 Counsel for the defendants has relied on the case . There, the defendants in August 1984 entered into an agreement with the National Oil Corp of Qatar for the purchase of crude oil. At the time of the execution of that agreement the

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defendants signed a side letter confirming that the supply contract had been negotiated without agents or brokers. Early in 1985 the plaintiffs entered into an agreement with the defendants under which, if the plaintiffs procured the renewal of the supply contract, they would be paid a commission. The supply contract was renewed. In that case, it was agreed that it was official Qatar Government policy to prohibit agreements for commission in respect of oil supply contracts and that the agreement was void as being contrary to public policy of Qatar. The commission agreement was governed by English law. The English High Court dismissed the plaintiffs` claim.

107 To fully appreciate the case in it is necessary for us to see what were the services contemplated there. Phillips J stated that the services which the plaintiffs were to offer were these (p 452):

> *Mr Yassin`s task was to use personal influence within QGPC in an endeavour to procure the renewal of the supply contract. Mr Yassin`s evidence was that his duties were restricted to `working on` or `lobbying` Mr Jaida, the managing director. Mr Abdelnour denied this and said that he expected Mr Yassin to use his influence with the minister himself. Whichever be correct, the first question that it seems to me appropriate to consider is whether an agreement to pay commission for such services is one which the English courts will enforce.*

108 The parties there also accepted the legal position in Qatar to be as follows, as stated in the report of the legal expert:

> *It is my opinion that, as a matter of official practice, payment of commission to a foreign intermediary in connection with an oil supply agreement entered into with (the National Oil Corp) is prohibited and that it is accordingly contrary to public policy in the State of Qatar. In my view, therefore, assuming the plaintiffs` pleaded case to be correct, the commission contract in question would be void under the laws of Qatar on the basis that its object is contrary to public policy in the State of Qatar.*

109 It would be apparent that the fact situation in is quite different from our present case. There the evidence clearly showed that the plaintiffs exercised undue influence on persons in authority; that was what was expected of the plaintiffs there. Second, there was evidence before the court, and it was so agreed, that the commission agreement was void under the law of Qatar as being contrary to public policy and was thus unenforceable. The case was, therefore, decided on that basis.

110 Phillips J drew a distinction between contracts which infringed public policy of a foreign country and contracts which violated provisions of the law of that country. He stated (at p 456):

> *I have been referred to no decided case that supports the proposition that the English courts should, as a matter of comity, refuse to enforce an English law contract on the sole ground that performance would be contrary to the public policy of the country of performance. The public policy of Qatar cannot, of itself, constitute any bar to the enforcement of the agreement in this case. It may, however, be a relevant factor when considering whether the court ought to refuse to enforce the agreement in this case under principles of English public policy.*

111 After reviewing the authorities, Phillips J deduced two broad principles in so far as English public policy is concerned:

> (i) it is generally undesirable that a person in a position to use personal ***influence*** to obtain a benefit for another should make a financial charge for using such influence, ***particularly if his pecuniary interest will not be apparent*** ;
>
> (ii) it is undesirable for intermediaries to charge for using ***influence*** to obtain contracts or other benefits from persons in a public position.

112 While recognizing that in certain circumstances the employment of intermediaries to lobby for contracts or other benefits was an acceptable and respectable practice, Phillips J held that if the fact situation in the case there had

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occurred in England the contract would be held to be unenforceable on the ground of public policy because, inter alia:

> (i) Yassin was to exercise influence over the controlling minister or the managing director of the National Oil Corp;
>
> (ii) `The influence was to be exerted in circumstances where it was essential that the person influenced should be unaware of Mr Yassin`s pecuniary interest`;

113 Accordingly, he held that an English court should not enforce an English contract which is to be performed abroad where (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.

114 I do not think is of much assistance to the defendants here. On the contrary, applying the principles decided there, it would mean that in relation to our present case, even if I were to hold that a breach of the directive or prohibition would constitute a breach of public order or morals in UAE, it does not necessarily follow that a Singapore court must refrain from enforcing a Singapore agreement which is in breach of that public policy. There is no evidence before me at all that there is such a public policy in Singapore which prohibits a foreign arms supplier from appointing a local agent in relation to a tender. Nothing is submitted to me to show that it is in the public interest of Singapore to prohibit such appointments. One must bear in mind the obiter dicta of Asquith LJ in where he said that `the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest.`

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115 I would of course entirely agree that it is against public policy of Singapore if a person should be hired for consideration so that he could use his position to exercise undue influence on persons in authority to procure a benefit from the government or obtain a title from the state. Such a kind of contract must be struck down and would not be enforced as they tend to be injurious to the public interest. That is not the case here. A more detailed discussion of the various heads of public policy under which contracts may be rendered illegal or void is set out from para 391 of 9 ***Halsbury`s Laws*** and I do not propose to go into them.

116 In the circumstances, following , a Singapore court should not refuse to enforce the present agency agreement. Counsel for the defendants conceded that he has no authority to support the proposition that a Singapore court should still refuse to enforce a contract which infringes the policy of a foreign government or a department thereof, but which does not infringe the public policy of Singapore. Cases like and ought to be distinguished as they relate to infringements of the written laws of foreign countries.

117 In this regard the Malaysian Federal Court case is also pertinent. There the court held that share contracts between an unregistered remisier and the plaintiffs were not contrary to public policy even though the plaintiffs had breached the bye-laws of the Malaysian Stock Exchange by using the unregistered remisier. The court said:

> *Not being registered as a remisier is not contrary to public policy because the bye-laws of the Stock Exchange are the bye-laws of a private body which have no force of law. They are binding on the plaintiffs but not on the defendant. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of bye-law 97 of the Stock Exchange Rules which provides for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.*

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118 **Quantum of damages**

119 Next, there is the question of quantum of damages. The defendants pleaded that the sums already paid to the plaintiff through Berry Group Ltd should be sufficient. In the alternative, the defendants submitted that the balance sum of $528,078.51 claimed by the plaintiff is excessive.

120 As I have found that the plaintiff is entitled to the commission, there is no basis for awarding the plaintiff any sum other than what the parties have agreed. The plaintiff should be paid a commission based on 71/2% of the value of the supply contract, namely, $10,383,000, (which was the final contract price) less the two sums already received by the plaintiff.

121 **Judgment**

122 In the pleadings, certain questions on implied terms are raised. But in view of the evidence, particularly those of Durai, I do not think there is any merit in those points. Thus, in his final submission, counsel for the defendants had not pursued them. The point on frustration was also not pursued.

123 Accordingly, there shall be judgment for the plaintiff in the sum of $476,163.51 ($778,725 less $49,993.94 and $252,567.55) with costs.

124 **Point on pleadings**

125 Before I conclude this judgment I ought to refer to a point on pleadings. In his closing submission, counsel for the defendants stated that the plaintiff has not substantiated what he alleges in paras 3 and 4 of the re-amended statement of claim, which read:

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> *3 Pursuant to the aforesaid contract, the plaintiff acting as the defendants` agent duly commenced negotiations with buyer for the sale of the defendants` two landing craft to the buyer.*
>
> 4 On or about September 1987, the plaintiff completed negotiation with the buyer and the defendants` two landing craft ... were sold to the buyer.

126 Counsel submitted that the evidence of the plaintiff`s main witness, Shaikh Khalid, shows that the plaintiff stayed very much in the background and was not involved in direct negotiation with GHQ on behalf of the defendants.

127 When counsel for the plaintiff began his closing address he asked for leave to make amendments to the statement of claim to clarify and amplify those two paragraphs to read:

> *3 Pursuant to the aforesaid contract, the plaintiff duly acted as the defendants` agent in and about the negotiations with the buyer for the sale of the defendants` two landing craft to the buyer by rendering services which included:*
>
> (1) providing administrative services such as applying for visas, arranging for hotel accommodation and transport to and from the airport and to and from meetings with the buyer;
>
> (2) informing the defendants of the tender by the buyer for the landing craft;
>
> (3) obtaining tender documents from the buyer and forwarding them to the defendants;
>
> (4) arranging appointments for the defendants with the buyer and attending meetings between the defendants and the buyer;
>
> (5) obtaining information about the defendants` competitors` tenders;
>
> (6) monitoring the defendants` tender and advising the defendants generally on the state of the tender and on the tactics for negotiating with the buyer; and
>
> (7) liaising with the buyer on the progress of the tender.
>
> *4 The defendants` two landing craft with on-board spares, accessories and training were sold to the buyer for $10,383,000.00 on or about 17 November 1987 as a result of the negotiations.*

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128 I granted leave to the plaintiff to amend notwithstanding the defendants` opposition. From the first day of the trial, it was clear that the plaintiff`s appointment as an agent was not in dispute. The exact nature of the services rendered by the plaintiff as an agent was also not really in issue. This is borne out by the defence filed. It is also borne out by the statement of issues tendered by the counsel for the defendants at the commencement of the trial. The issues canvassed in this action are those discussed above.

129 The case has been fought not on whether services were rendered by the plaintiff or what services were in fact rendered by the plaintiff but on whether it was unlawful for the plaintiff to be appointed as an agent in view of the prohibition. There is no allegation that the plaintiff had exercised any undue influence or committed an act of misconduct in relation to the tender. It is not the defendants` case that they would not have defended the action if the services rendered by the agent did not involve direct negotiations with GHQ. The defendants were aware, as the evidence of Durai shows, that the plaintiff`s representative only participated in the negotiations in November 1986 but probably did not sit in with the defendants to negotiate with GHQ after March/April 1987 when the defendants` representatives visited the UAE on the second and subsequent occasions. The amendments are entirely in line with the evidence of Durai. The amendments sought do not change the nature of the cause of action: it is still a claim for commission, earned as an agent. I would observe that there is no question whatsoever of limitation being applicable.

130 I was conscious that the amendments were applied for at a rather late stage. The principles on which the court should exercise its discretion are fully discussed in paras 20/5-8/6-12 of the ***Supreme Court Practice 1993*** and I do not propose to restate them. Suffice it if I should say that lateness per se is not an absolute bar to amendments being allowed, provided there is no unfairness

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or prejudice to the other side: see the Court of Appeal decision in . In the present case, I felt that the amendments were essentially to amplify and clarify certain factual aspect in the statement of claim. All the evidence is before the court. I did not think the defendants are in any way prejudiced by the amendments, and if there was indeed any prejudice, I did not think that the same could not be compensated by an appropriate order as to costs. On the other hand, I felt that an injustice would be caused if the amendments were not to be allowed.

131 In allowing the amendments, I gave leave to the defendants to make such consequential amendments to the defence as they might think fit. Out of abundance of caution, I also gave liberty to the defendants to call further evidence which they might wish to call in consequence hereof: see . An amended defence was accordingly filed after an earlier version of it was ruled by me as being out of order as it sought to completely rewrite the defence and introduce new matters not consequential upon the amendments made to the statement of claim. However, the defendants did not consider it necessary to either recall any witness or call any additional witness. I would award $500 costs to the defendants occasioned by the amendments.

132 ***Plaintiff`s claim allowed.***

Chao Hick Tin J

Tan Tee Jim and Wilson Wong (Allen & Gledhill) for the plaintiff
Arjan Chotrani and Haresh Kamdar (Arjan & Co) for the defendants

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