Monday, October 25
9:00am-10:30am

103 - Mastering the Challenges of Cultural Differences in Cross-Border Transactions

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Session 103

Faculty Biographies

Sara Biro

Sara A. Biro is senior counsel in Bechtel Corporation's civil global business unit and is based in Bechtel's London office. In this role, Ms. Biro is responsible for providing legal/commercial support and advice to the Bechtel group of companies and has led all aspects of the company's legal work on major rail, road, infrastructure, aviation, and telecommunications bids and projects in countries such as Abu Dhabi, Algeria, Azerbaijan, Croatia, Italy, The Netherlands, Portugal, Greece, France, Spain, Germany, the Russian Federation, the United Kingdom, and Turkey.

Prior to joining Bechtel, Ms. Biro was a senior associate with Freshfields in its project finance practice in London and a senior associate with Mayer, Brown & Platt (now Mayer Brown) in its corporate, finance, and international practices in Chicago and London.

Ms. Biro is a member of ACC and the Association of American Women Lawyers in London.

Ms. Biro received a BA summa cum laude from Georgetown University and a JD from The University of Chicago Law School.

Sabine Brumme

Sabine Brumme is associate group counsel at BearingPoint (Germany). She is responsible for the group wide legal support of the business unit financial services and alliance agreement. She is also lead counsel for Russia. She is primarily dealing with international commercial law, in particular IP and IT contracts.

Prior to joining BearingPoint Mrs. Brumme served several years as in-house counsel in the financial service industry providing advise on commercial law including IT and Internet law, software licensing, competition law.

She is a member of the board of ACC's Europe Chapter (ACC Europe) and German Country Representative of the ACC. She is also a member of the German Society for Law and Information Technology (DGRI). Mrs. Brumme is the co-author and co-editor of several books on IT and Internet law. She speaks at seminars and conferences.

Mrs. Brumme graduated from Ludwig-Maximilians Universit-t, Munich, Germany.

Charles Laubach

Charles Laubach is a partner in Afridi & Angell, one of the oldest law firms in the U.A.E., with offices in Dubai, Abu Dhabi, Sharjah and the Dubai International Financial

Center. Afridi & Angell is the Lex Mundi member firm for the U.A.E. Mr. Laubach specializes in construction, project and project finance matters and is also involved in advising defense and offset clients on their activities in the U.A.E. and advising American clients on compliance with antiboycott law, the FCPA, and local anticorruption laws.

Mr. Laubach played a leading role in establishing the Abu Dhabi chapter of the US Chamber of Commerce, and he has served on its board and on the board of its sister chapter in Dubai. He is also a leader of the Boy Scouts of America Troop in Dubai. He is a recognized authority and frequent speaker on U.A.E. law.

Mr. Laubach holds a JD from the University of Pennsylvania, an MA from the University of Pennsylvania, an MA from the University of London School of Oriental and African Studies, and a BA from Dartmouth College.

Charles Wilkinson

Charles F. Wilkinson is a senior corporate counsel for Ashland Inc, a Fortune 500 company providing products and services through Ashland Distribution, Ashland Performance Materials, Ashland Consumer Markets ("Valvoline"), Ashland Water Technologies, and Ashland Aqualon Functional Ingredients. He has global responsibility for Ashland's international trade activities and transactions (including EAR, ITAR, FCPA, and OFAC compliance), government relations (political action committees and lobbying), commercial and government contracts, acquisitions and divestitures, and corporate real estate.

Prior to joining Ashland, Mr. Wilkinson held several law department positions with Lockheed Martin in Baltimore, Maryland and Marietta, Georgia, and with Hercules Incorporated, Wilmington, Delaware. In those positions his responsibilities included commercial and government contracts, international transactions, economic development, real estate, and litigation. Before entering corporate practice, he was a US Air Force Judge Advocate with assignments in the US and overseas.

Mr. Wilkinson is a member of the State Bar of Illinois and the State Bar of Georgia. He belongs to ACC's Corporate and Securities Law Committee, Information, Technology Law & e-Commerce Committee, International Legal Affairs Committee, Law Department Management Committee, and Real Estate Law Committee.

Mr. Wilkinson received a BS from Loyola University of Chicago and a JD from Northern Illinois University.

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MASTERING THE CHALLENGES OF CULTURAL DIFFERENCES IN CROSS-BORDER TRANSACTIONS

Speakers:

Sara A. Biro, Senior Counsel, Bechtel
Sabine Brumme, Associate Group Counsel, BearingPoint
Charles Laubach, Partner, Afridi & Angell
Charles F. Wilkinson, Senior Corporate Counsel, Ashland, Inc.

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I. Manage Expectations and Maximize Success

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MANAGE EXPECTATIONS

- US companies often subscribe to "faster and cheaper" approach.
  - Ignores reality of cross-border transactional work.
  - Always asking why you have to go there, spend so much money, and take a lot of time.
- Time and money constraints may limit your ability to negotiate.
  - Wisely spend what you must to do the job; a principal inconsistent with the "bean counters" back home.
  - Establish a protocol of equally sharing the burden with the other party.
  - We visit you this month, you visit us next month.
  - Utilize e-resources to maximize data flow; not to shun the other side.
- The objective is to negotiate a satisfactory deal, not fight internally.
  - Line up your internal resources and establish your authority to commit before you get there.
  - Understand what sales and marketing have been up to.
  - Avoid overplaying your authority.

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MAXIMIZE SUCCESS

- Coping with traditions and a variety of legal systems.
  - We respect your traditions; however, we will follow applicable legal norms and requirements.
  - For a U.S. company/its foreign subsidiaries and affiliates/its U.S. citizen employees, this means knowing and complying with laws and regulations that use abbreviations such as "FCPA", "EAR", "ITAR", and "OFAC".
  - We do due diligence; you do yours, too.
  - No, we cannot contribute to your personal well-being to close the deal.
- Interpreting words and actions.
  - Translate first, then interpret.
  - Ask: are you empowered to commit your company to this deal? And who else?
  - Prepare to explain your position numerous times to many people.
  - The contract is more than a "mere formality."
  - Yes, we expect both parties to live up to their written commitments.

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II. Differences in Legal Systems – Are We Speaking the Same Language?

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A. Civil Law and Common Law

- Common Law vs. Civil Codes
  - Lawyers often ignore that the legal system in the other country is different to their own.
    - Seadrill v Gazprom – the dangers of exporting contract forms.
  - The way to draft a contract may be totally different in the other country.
    - In Civil Code countries, contracts are often shorter because many material contract terms and the consequences of those terms are defined in that country's Civil Code.
    - Statutory provisions (e.g. warranties) may apply even if not stated in the contract. An express contractual exclusion or limitation would be necessary in order to exclude or limit those provisions; some statutory provisions cannot be excluded.
  - Each jurisdiction is different.

B. Other Legal Systems

1. Shariah Law
2. Custom and practice

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B. Other Legal Systems (continued)

3. Far East

Korea – Civil Code
- Developed from local laws and other countries' civil codes; codified in 1958.
- Concepts like "customary law" recognized as an unofficial source of law.
- 2009 – 2012: Undergoing major revisions.

Japan – Civil Code
- Enacted in 1896.
- Influenced by German Civil Code and French Civil Code.
- Influenced development of Korea's code and Taiwan's code.

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B. Other Legal Systems (continued)

Peoples Republic of China – Civil Code
- A long history of laws; e.g. theories of Confucianism and Legalism, Tang Code of 624.
- General Principles of the Civil Law promulgated in 1986 and effective in 1987.
- Framework for civil law interpretation.
- Heavily influenced by the German Civil Code.
- There is no nationwide comprehensive civil code; there are many local laws and regulations.

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C. Mandatory Law

- The chosen jurisdiction may require certain minimum protections for the other party. Important contract clauses therefore might be wholly or partly null and void.
  - Limitation of Liability
  - Warranties
  - Unfair/unequal contract terms
  - Penalty clauses
  - Third party rights

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D. Interpretation and Translation Issues

- Terms are often used in a different way in the other country:
  - Warranty / Guarantee
  - "Consequential" / Indirect Damages
    - In a number of Civil Code countries, loss of profit is a direct damage.
- Translation may create additional risks:
  - It might be wise to add the translated legal term (local language) to avoid mistakes.
    - Issues/risks if include foreign legal term in the contract.

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E. Contracts

- Pre-contractual obligations
  - "Agreements to agree"
- Offer and acceptance
- Consideration
- Contract styles
  - "Gap filling"
  - Rules of interpretation
- Negotiating Styles
- Authority
- Special contract parties
  - Government bodies

III. Achieving Success in a Foreign Legal Environment – Perspectives of an American Attorney in Dubai

A. Counterparties

1. Personal trust first

Example: Termination of contract without damages and without recriminations, because of good personal rapport between local manager and local sponsor.

Example: Termination of contract for "acceptable" termination payment, because subject was raised courteously.

Counter-Example: 11 years of litigation following contested, adversarial termination.

2. Introductions

Sometimes essential. Without an introduction, meetings with some people cannot be arranged.

Always a good idea. Someone to vouch for you. Good introductions can lead to good personal relationships which can lead to $ubstantially different outcomes in difficult situations (as described above).

Example from Henderson book: In trip through Oman in 1940s, convoy held up because the guides were from the wrong tribe. Still happens.

3. Status, tribe, function, national origin

Who are the leading families?
Who are the leading members of those families?
Some families are very large.
How does the person you are dealing with fit in?
Black sheep? Rivalries? Reputation with locals and foreigners?
Relations through mother's side as well as father's side.
Examples: H. family and Q. family in Abu Dhabi.
Resentments?
Static or dynamic?

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4. Government structure – authority to decide

I can deliver this oil concession. Really?

I can get all of the required approvals. Really?

Know in advance what approvals are needed, and what the requirements are. Easy or difficult task?

Discretionary approvals or clerical process?

Protectionism? Unwritten rules?

Different levels of multiple governmental decision-makers?

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B. Advisors to Counterparties

1. Delegation of "details" to trusted advisors.

   Example: BCCI.

2. Authority to decide.

3. Expertise or trust?

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C. Approaching negotiations

1. Courtesies.
2. Multi-tasking.
3. Punctuality and deadlines.
4. Onerous forms
5. Embarrassments and extraneous factors

Falls from favor, changes of reputation, assumption of government appointment, differing views of policy.

Example: Swan Hunter case (reported case from Singapore).

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D. Implementation and other issues

1. Re-thinks, revisions of specifications, changes and variations
Examples:
   - Dubai Airport project (see Bechtel case, next slide)
   - Saadiyat Financial Free Zone
   - Saadiyat Island Bridge
   - Grand Mosque
   - Lulu Island
   - Third Crossing

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2. Termination and compensation

Bechtel v. Department of Civil Aviation of the Government of Dubai, 300 F.Supp. 2d 112 (D.D.C. 2004)

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3. Regional and national differences

- Arab League states are very different from their non-Arab neighbors.
- In the Arab League, the states with traditional rulers differ from those whose traditional rulers were overthrown.
- The states that were created by the European powers after WW I are different from the less-"artificial" states.
- Maghreb, Levant and Gulf differ from each other. Saudi Arabia is unique.
- Some states are centralized, some are decentralized.
- Internal differences: Abu Dhabi and Dubai.

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4. Lead time

Case study: Shipyard in Abu Dhabi
- Required by Offset Program
- Multiple approvals required
- Local shareholders and local directors
- Hidden agenda of counterparty's advisors
- Land allocation, utilities, roads
- Purchase of Navy vessels
- Advisor's fall from favor

TOP 10 THINGS TO REMEMBER

1. They are the host, you are the guest. Be respectful.
2. They are from a civilization greater, prouder and more ancient than yours.
3. What works in their environment may pose legal problems for you.
4. Know the "who," "how," and local details before you go.
5. Look for connections; i.e. family, visits or education in the U.S.
6. Be receptive to and accommodate new information and insights.
7. Don't get lost in translation:
   - Legal terms may have a different meaning in other jurisdictions.
   - Inaccurate translations of legal terms may lead to misinterpretation.
   - Avoid slang, expressions, gestures, and acts that may be misinterpreted.
8. There will be substantial differences between U.S. law and the law of the country (even if it is England).
9. Think long term.
10. Give plenty of lead time and have a back-up plan and exit strategy (even when things are going well).

AND ONE MORE THING …………

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"Toto, I have a feeling we're not in Kansas any more."

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Seadrill v Gazprom - the dangers of exporting contract forms

A recent decision of the Court of Appeal provides a relatively rare and interesting insight into the approach of the English courts to the interpretation of oil and gas contracts and also the dangers of taking a contract drafted for one jurisdiction and applying it in another without careful thought.

This case concerned a contract under which Gazprom contracted Seadrill to drill wells in India. While pre-loading the legs before jack-up for the first well the rig was damaged and had to be taken to Singapore for repairs. The parties then fell out and the rig never returned to the wellsite. At trial Seadrill admitted negligence and the main question was what sums could be recovered by Gazprom. Seadrill claimed for unpaid hire while Gazprom argued that any liability for this sum should be set off against the direct costs which Gazprom had incurred arising out of the incident and which were due from Seadrill. Seadrill argued that under the contract it had no liability for any such direct losses. Seadrill also tried to argue that Gazprom should pay for the damage to the rig on the basis of a clause dealing with unforeseen seabed conditions. The parties had used a standard form contract for offshore international drilling daywork issued by the US-based International Association of Drilling Contractors, but had chosen to have the contract governed by English law.

At the trial of the case the judge decided:

- Although the development of the IADC form could be considered as part of the "factual matrix" to be considered when interpreting the contract, because the contract was governed by English law normal English principles of interpreting contracts should apply and commentaries from US perspective should not subvert those principles.

 25/08/2010

- Although the contract did not include any express warranty as to the standard of performance Seadrill would provide, English law implies into service contracts a provision that services will be supplied with reasonable skill and care and the negligence of the Master amounted to a breach of this implied term.

- Clause 901 in the contract said *"It is the intention of the parties hereto that the provisions of [certain clauses] shall exclusively govern the allocation of risks and liabilities of said parties without regard to cause ... it being acknowledged that the compensation payable to Contractor as specified herein has been based on the express understanding that risks and liabilities shall be determined in accordance with the provisions of this Contract."* The judge held that this meant that where the indemnity provisions applied, they applied regardless of whether the loss resulted from negligence or any other cause. It did not, however, mean that the indemnity clauses were the only provisions that applied in the event of any breach of contract. In other words, as long as the kinds of losses which Gazprom was seeking were not the kinds of losses covered by the indemnity clauses (property damage or personal injury) then Gazprom could still claim them under general contract law principles.

- The indemnity clause contained one of the more common exceptions to the "mutual hold harmless" indemnity regime. It provided for Gazprom to indemnify Seadrill for damage to the rig resulting from "faulty bottom conditions" - Seadrill maintained that this provision applied regardless of Seadrill's negligence but the judge decided the clause applied only if there were in fact faulty bottom conditions and in this case the seabed was fine - it was Master who was at fault.

The Court of Appeal upheld the original trial judge's decision on all grounds.

The parties had agreed that *"Except for such obligations and liabilities* ***specifically assumed by Contractor,*** *Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis, including results and all other risks or liabilities incurred in or incident to such operations, notwithstanding any breach of representation or warranty, either expressed or implied, or the negligence or fault of Contractor...."*

It is possible that the intention of the drafters of the IADC form in including these words was to create a contract under which the driller would have little or no liability for any breach of contract - certainly Seadrill's legal team cited to the court an article by a leading US practitioner which made the point that this argument was possible. However, the Appeal Court did not accept that the contract should be interpreted in this way. Seadrill had agreed to operate the rig. This amounted to a specific assumption of the normal liability which flows from agreeing to provide services, namely a liability for failing to provide those services with reasonable skill and care.

Very clear words would be needed in the contract to find that such liability was excluded and no such clear words were found by the Court.

An ancillary issue which the court considered was whether, when ascertaining the intentions of the parties with a view to construing the contract, it was legitimate to have regard to the history of the amendments that had been made to the IADC standard form, as part of the commercial background. The judges doubted whether it was legitimate to simply compare the later and earlier versions of a standard form on the assumption that both parties knew of the differences and had adopted a particular version for a reason. They held that in this case, since there was no evidence of the parties consciously adopting the later version of the standard form by having regard to the differences in them, there was a real likelihood that the parties "simply reached for the current form without any consideration of the earlier form".

This case is a reminder, if more reminders were needed, of the importance of clear drafting when dealing with liability issues. But it is also a reminder that taking a contract drafted in one jurisdiction and using it another jurisdiction is always fraught with risk, particularly where the governing law is also changed.

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Sabine Brumme

Core Legal Issues Of Commercial Contracts in Germany – Conflicts of Law.

1. Introduction

This article explores some typical legal issues a supplier or service provider may encounter when doing business in Germany. The article focuses on issues that arise in commercial contracts and discussed typical contract clauses (such as warranties and limitations of liability) with a special focus on contracts relating to IT and telecommunication services. This article also discusses conflict of law principles that would apply if the company providing goods or services in Germany has its principal office outside Germany (e.g., in the USA) and has no registered office in Germany. Aspects of contracts with consumers are also considered briefly, but, because of the special rules which apply to contracts with consumers, are not discussed in detail.

2. Conflict of law principles

In situations where a provider of goods or services has its principal office outside of Germany (e.g., in the US) and no registered office in Germany, but is providing goods or services in Germany, it may be possible to chose either the foreign law (which, in the following example, would be U.S. law) or German law or a combination of both as the law(s) governing the contract.

a) Conflicting EU regulations or international treaties

Under German law, EU regulations and international treaties may have priority over the general regulations of the German conflict of law provisions, which are set out in the Introductory Act to the German Civil Code (EGBGB).

Currently no EU regulations which may interfere with the choice of law apply to the commercial contracts between parties in the U.S. and Germany. However, there are specific regulations regarding consumer contracts. Additional regulations may apply which may affect a choice of law if the provider is located in another EU country.

With respect to international treaties, the regulations of the CISG (United Nations Convention on Contracts for the International Sale of Goods) only apply to international sales of goods. Under German law, it is possible for parties to a commercial contract to agree that the CISG regulations will not apply to their contract. It might be wise, however, to have a look at the CISG regulations because they may be more beneficial in some cases. There are currently no other international treaties that are binding under German law that effect the choice of law in a commercial contract.

b) Applicable law where the contract contains no express choice of law clause

In the absence of a choice of law clause in an agreement between a U.S. provider of goods or services and a German commercial customer, the German conflict of law principles assume that the law of the jurisdiction which has the strongest connections to the contract is that law that will apply to the contract (Art. 28 EGBGB). There is a presumption under German law that the law of the country in which the provider has its registered office is the law that will apply to the contract. However, this presumption would not apply in cases where the circumstances indicate that the contract has a closer connection to the country where the customer is based. For instance, if the customer is located in Germany and all marketing activities are conducted and all services provided in Germany, then the laws of Germany would apply to the contract.

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Core Legal Issues Of Commercial Contracts in Germany – Conflicts of Law.

In the case of contracts with consumers[1], German law expressly provides that the law of the country in which the consumer has his primary residence is that law that governs the contract (Art. 29 EGBGB). Thus, German law will apply if the consumer is located in Germany and selection of a different governing law is not possible.

As the German law allows interpretation in commercial contracts regarding the question which law (German or US law) will apply, it is advisable to include a choice of law clause in the agreement.

c) Choice of law clause

German law allows the parties to a commercial contract to choose a foreign law as the law applicable to their contract, in whole or in part, even if the contract has a connection to German law (Art. 27 EGBGB). However, the EGBGB includes the following exclusions and restrictions that apply to the parties' choice of a foreign law:

- If there is no connection to the foreign law selected by the parties, certain mandatory regulations, which may not be changed under German contract law, will apply (Art. 27 (3) EGBGB).
- In any case, as discussed below in section d), mandatory provisions of German law with respect to the circumstances of the services will apply (Art. 34 EGBGB).
- The procedures of the law of the country in which the services are provided shall be taken into account for issues relating to the performance of the services and the consequences of non-performance (Art. 32 (2) EGBGB).
- The freedom to select the applicable law is restricted if the relevant contract is a consumer contract (Art. 29 EGBGB).

The choice of a different law must be expressly made in the agreement or clearly result from the factual context of the agreement. Formal requirements for the execution of the agreement will be judged under the chosen law (Art. 11 EGBGB).

Despite the existence of express rules in German law that relate to the use of contractual choice of law clauses, some lower courts in Germany still take into account aspects of German law when reaching a decision. One way to reduce the risk that this will occur is to include in your contract a clause that specifies the court or arbitration proceeding in the chosen country in which disputes relating to the contract will be heard. It has to be defined as exclusive forum.

d) Mandatory provisions of German law

German law does not clearly indicate which rules of German law are mandatory and would therefore still apply even if the parties had included in their contract a clause that expressly selects a foreign law as the law governing their contract.

No connection with foreign law

If neither the parties nor the contract have a connection with the foreign law selected by the parties, clauses of the Civil Code that prohibit the parties from "contracting out" from certain provisions of German law (such as restrictions on limitations or exclusions of liability) have to be taken into account. For example, if services are provided by a German subsidiary of a U.S. company, German courts may

[1] Under German law, "consumer" is defined as a natural person who purchases products or receives services for personal (i.e. non business or professional) purposes.

decide that German law should apply to the contract. However, if a company having its registered office in the US is the contracting party, then there is usually a clear foreign dimension to the contract and the mandatory restrictions in Art. 27 (3) EGBGB would not apply.

Connection with foreign law

In cases where the parties and/or the contract have a connection with the foreign law, German law still would not allow the parties to circumvent basic public policies of the German legal system (e.g., protection of public safety and order, antitrust regulations, export regulations, registration requirements).

In cases where only the interest of an individual is affected the foregoing usually does not apply, except regarding specific regulations such as consumer protection. The prevailing opinion among German legal commentators is that the articles of the Civil Code restricting the ability to include certain clauses in standard terms (e.g., liability limitation clauses) are not mandatory in this context. However, it is not clear, and there is no explicit case law available, as to whether this also applies to the articles of the Telecommunication Act which determine minimum standards for customer protection, including not only consumers but also business customers. Therefore those customer protection regulations that also include general telecommunication security requirements should particularly be taken into account when drafting contracts that are governed by these articles of the Telecommunications Act. In the telecommunication sector this specially relate to requirements to comply with standards and technical specifications issued by the EU (§ 45c Telecommunication Act (TKG)). These requirements will need to be taken into account on a case-by-case basis depending on the service or product that is being provided.

Performance of the contract and the consequences of non-performance

Art. 32 (2) EGBGB states that the legal procedures of the country in which performance of the contract occurs must be taken into account on issues relating to the performance of a contract and the consequences of non-performance. This would effect matters such as the days and times on which contracts are performed would not effect the parties' material contractual obligations (i.e. liabilities; warranties).

e) Enforceability of the choice of law under the chosen law

Under German law the question of the enforceability of the choice of law other than German law must also be determined under the chosen law. If a foreign court comes to the conclusion that the choice of law is not enforceable under its law, the case can be referred back to the German law.

Therefore it is advisable for the parties to a commercial contract to confirm that their choice of law would be enforceable under the chosen law, too.

3. Use of non-German Language

The use of a language other than German in contracts that are governed by German law is in general permissible. However, only German language documents may be used in court proceedings in Germany. Therefore all foreign language documents would have to be translated into German in such cases. Aside from the translation costs, the major problem with translations is that translations may allow a misinterpretation of the agreement. This may result from the translation itself or also if judges use foreign law aspects to interpret the contractual language. It may therefore be advisable to include in a contract governed by German law which is not in German translations of key legal terms, particularly if those terms are defined in the Civil Code.

To avoid the need to translate foreign language documents into German for use in German court proceedings and to reduce risks relating to translations of foreign language documents, the parties could agree to include in their commercial contract a clause specifying arbitration proceedings as the contract dispute resolution forum and the language that will be used in the arbitration proceedings. It nevertheless would still be advisable to include the German language version of key legal terms in the contract.

4. Introduction to contract types and contractual obligations under German civil law

Unlike common law, the German civil code (Bürgerliches Gesetzbuch – BGB) establishes standard types of contracts (i.e. sales, employment, lease, or service contracts) which include well defined mutual obligations. As IT and telecommunication services are not defined as a contract type in the statutory provisions, German legislation uses analogies to existing contract types depending on the scope of the agreement in question and the obligations set out in that agreement. If the contract includes several obligations which are typical of different types of contracts, courts interpreting the contract may look at German statutory provisions that relate to a combination of relevant contract types or a "contract sui generis" will be considered. In such a case, whichever terms of the BGB that are closest to each specific obligation will be applied.

Under the German civil code, as under the civil codes of many countries, classification of a contract is critical to the interpretation of the contract provisions. The statutory contractual obligations and the particular legal consequences of non-performance depend on the classification of the contract type. In addition, obligations defined in the agreements may apply. The contract parties may choose to exclude or limit statutory obligations from their contract to a certain extent. However the right of the parties to exclude or limit those obligations depends on whether the parties are using standard contract terms of one of the parties or are negotiating the contract provisions.

a) Sales Contract (§§ 433ff. BGB)

In a sales contract, the customer is purchasing a product. In the IT and telecommunication sector, this would typically be a piece of hardware or a perpetual software license. These purchases are subject to standard warranties under German law that apply to the product as soon as it is delivered to the customer. Delivery causes the warranty period to start to run. A sales contract governed by German law does not need to include the warranty clause as the warranty obligation applies to the contract and the parties as a result of statutory provisions of German law that apply to sales contracts. For details see sec. 6.

b) Service Contract (§§ 611ff. BGB)

In a service contract the services provider has an obligation to provide services according to the contractual specifications. Those services may include continuing obligations (i.e. telephone or internet access). In particular cases in the telecommunication sector, the contract is considered to be a service contract if the access or the particular use was specified by the customer (i.e. transmission of data).

Under a service contract, the provider is only required to use best efforts to perform the services and non-performance does not lead to any statutory warranties. However, the customer has the right to refuse to pay or to reduce fees otherwise payable to the provider if the provider does not provide the services as specified in the contract. As is discussed below in section 6, however, a breach of a contractual obligation to provide the services in full and in a timely manner or non-performance may lead to liability.

c) Contract for Works (§§ 631ff. BGB)

Under a contract for works, the provider is obliged either to deliver specified works or to provide services that achieve a specified result. In those circumstances the provider is responsible for delivering the works (deliverables). The works and the deliverables are subject to acceptance or rejection by the customer and, once accepted, are subject to the warranties which the German civil code specifies for these types of contracts.

Delivery and Acceptance

The provider must provide the deliverables to the customer in compliance with the contract specifications, or in absence of any specifications in the contract, in compliance with applicable norms and standards. The customer must check the deliverables and, if the customer neither detects any obvious or known defects , must accept them within the time specified in the agreement or, in absence of a specified time, within reasonable time. In certain circumstances, deliverables will be deemed to have been accepted by the customer. Depending on the scope of the contract, it may not be necessary to include express warranty in the contract, as the standard warranties that German law specifies for these types of contracts will apply (see sec. 5).

Unless expressly provided otherwise in the agreement, acceptance leads to an obligations to pay for the works; it transfers the burden of proof to the customer to show that the work or services have not been provided in compliance with the contract and it causes the warranty period to start to run. In addition, the customer has the obligation to check the works/deliverables to determine whether there are any obvious defects. If the client does not identify and make a claim for obvious defects in the works/services, they are deemed to have been accepted and the customer may lose the protection of warranties that relate to such obvious defects. Acceptance, however, does not affect the customer's right to claim for hidden defects that are discovered later during the warranty period.

If the works have not been provided or have not been provided in compliance with the contract, the customer may claim damages (see section 5) and, unless delivery is impossible, may claim for re-performance of the works.

Acceptance may not be required if acceptance is not feasible because of the nature of the works. In such a case, completion of the works or services replaces the requirement of acceptance by the customer.

d) Lease (§§ 535ff. BGB)

In a lease, the lessor/ provider is required to lease a piece of equipment or parts of it for a specific period of time. Telecommunication or IT services can be subject to a lease, particularly in the case of non-perpetual licenses, ASP services or web hosting.

Unless specified otherwise in the agreement, the provider must grant the customer the right to use the leased item and must maintain it (i.e. web space, software and hardware). Therefore the provider is responsible for any non-availability of the item/system. These obligations will even apply, however, if warranties are expressly excluded from the contract, as these obligations are obligations to deliver, not warranty obligations, under German law.

The main consequences of any failure to provide the services are that the customer will have a rights to claim (1) a reduction in the fees payable to the provider, regardless of whether the non-availability was the provider's fault and (2) damages for the non-availability, depending on whether the provider was at fault (see section 6). The customer will also have the right to terminate the agreement.

The customer is responsible for informing the provider of any known defects or problems that may cause damage to the leased item/system or that could otherwise be a danger to health or safety.

5. Warranties ("Mängelhaftung")

As mentioned above, warranty obligations under a contract arise upon delivery in the case of a sales contract and after the acceptance of the works in the case of a contract for works or services. The statutory provisions applicable to particular types of contracts establish warranties for defects in title and quality. These warranties will apply even if not expressly stated in the agreement. The statutory warranty period is two years unless specified otherwise in the agreement. However, if the supplier or provider is using its standard contract terms, the minimum warranty period in commercial contracts is one year[2]. During the warranty period, the customer may claim his warranty rights for defects that were not known or obvious at the time of acceptance.

Based on warranties, the customer may:

- require the provider to provide further performance/re-performance and/or performance to remove defects;
- remedy the defects itself and seek reimbursement for the cost of remedying the defects from the provider;
- terminate the contract;
- reduce the fees that it pays to the provider; and/or

[2] With respect to consumer contracts even stricter rules apply regarding limitation of warranties.

- seek compensation for damages (as discussed in more detail in section 6).

German law prohibits the supplier or service provider from seeking to exclude or limit these remedies in its standard contract terms.

Warranties vs. Guarantees

In addition to the "Mängelhaftung" that is usually translated as "warranty," the civil code also includes the concept of a "Garantie" that is commonly translated as "guarantee." Typically guarantees relate to the quality of a deliverable. The provider is not required to provide any guarantee and is free to define the scope and the extent of a guarantee he would like to provide. However if a guarantee is offered, a limitation of liability for damages resulting from non-compliance with the guarantee would be unenforceable. In addition, the provider will be liable regardless of its fault (strict liability) if it fails to comply with its express guarantee obligations.

To avoid any misinterpretation of the words "warranty" and "guarantee", the German words for these terms should be included in the contract.

6. Liability

According to the Civil Code, a breach of contract will lead to a liability for damage that (1) was caused by the breach and (2) resulted from the defendant's fault (negligence or willful misconduct). In very rare cases the law provides for absolute liability regardless of fault. As mentioned above, one circumstance in which the provider will be strictly liable is if it fails to comply with its express guarantee ("Garantie") obligations.

Parties are liable for acts of their agents and representatives (and other auxiliary persons, e.g., subcontractors) to the same extent as they would be liable for their own acts.

The injured party may only claim actual damages and must prove them. Actual damages may include direct and indirect damages (and in very rare cases compensation for pain and suffering, i.e. in case of personal injury). However, punitive damages are not awarded under German law.

a) Standard contract terms vs. negotiated contracts

German law protects the party to a contract that has accepted an agreement based on the other party's standard contract terms. This means specifically that the party who accepted the standard contract terms of the other party may claim that specific clauses are not enforceable as they are unexpected or unreasonable. The German Civil Code lists certain clauses that are void and also allows the courts to decide within certain parameters whether or not other standard contract term clauses are acceptable. In particular, the Civil Code places restrictions on attempts to limit or exclude certain liabilities. If a part of a clause is unenforceable, then the whole clause may be void. German law does not allow a court to "blue pencil" void standard clauses in a way that would enable the valid parts of the clause to be enforced.

Sabine Brumme
Core Legal Issues Of Commercial Contracts in Germany – Conflicts of Law.

On the other hand, if the parties negotiate such clauses and include them in their contract, those clauses may become enforceable. In such cases, it would be necessary to show that the party which offered the clause was willing to change the clause and has given the other party a chance to negotiate it. Typically this can only be proved if there is a deviation between the specific language in the contract as compared to the relevant standard clause. A mere statement in the agreement that the parties had an opportunity to negotiate the clause would be insufficient to establish that the clause was a negotiated clause and therefore should be enforceable.

In addition, the Telecommunication Act establishes a statutory limitation of liability. As discussed below in section d), however, this limitation is very restrictive.[3]

b) Limitation of liability in negotiated contracts

Any limitation of liability for damages resulting from either party's or its directors' and officers' willful misconduct is not enforceable in any kind of agreement. It is possible, however, to limit liability for willful misconduct of the agent or representative of a party.

In addition, it is not possible to limit liability for non-compliance with a guarantee.

c) Limitation of liability in standard contract terms

The BGB includes many restrictions on limiting liability in a party's standard contract terms. Though many of those limitations were at first expressly included in the civil code specifically for consumers, case law has partly extended the applicability of those restrictions to commercial contracts.

Willful misconduct ("Vorsatz")

A limitation of liability for willful misconduct is not enforceable in negotiated contracts or in standard terms. In addition, liability for willful misconduct of its agents and representatives cannot be limited by a party's standard terms.

Personal injury, death

The liability for personal injury or death cannot be limited.

Guarantee ("Garantie")

A limitation of liability for non-compliance with a guarantee is not enforceable.

Gross negligence ("grobe Fahrlässigkeit")

Limitations in cases of gross negligence are generally not enforceable when they are included in a party's standard contract terms. Only unforeseeable damages resulting from gross negligence may be excluded. It is also possible to negotiate and agree limitations on liability for gross negligence in the context of negotiations on a particular contract.

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[3] There are additional statutory limitations also for selected other professions.

Ordinary or slight negligence ("einfache Fahrlässigkeit")

In case of ordinary or slight negligence, the party who has proffered its standard terms may limit its liability for damages resulting from such negligence to typical foreseeable damage from such negligent acts. Most of the commonly occurring damages, however, will be considered as typical foreseeable damage and are therefore not excluded. In addition, the party which is preferring its standard contract terms may exclude or limit its liability for breach of obligations which are not considered a "cardinal" obligation, that is an essential contractual obligation. Most of the obligation which in practice lead to damages, however, are considered to be a "cardinal" obligation.

A party may limit the total amount of its liability under the contract if the specified amount would cover typical foreseeable damages. It is to be noted that, in general, typical foreseeable damages include all damages normally occurring as a result of a particular failure to perform or breach. Thus, this limitation, as a practical matter, does not restrict a party's liability for damages in most cases.

Limitations on the amount of a party's liability under a contract which are defined by reference to the fee to be paid or that is owed under the contract or any multiple thereof are not enforceable, as they usually do not reflect the amount of the typical foreseeable damages. The same applies to total amounts not reflecting the typical foreseeable damage.

Restrictions under the Telecommunication Act

See below section d)

Direct and indirect damages

Under German law, the distinction between direct and indirect damages is typically not used in liability clauses, as both the restrictions described above apply. A general exclusion of indirect damages is not enforceable under German law. In addition, the terms "direct damages" and "indirect damages" are not defined by German law, something which leaves room for interpretation by the parties and/or a court. In general, however, the way these terms are used in Germany differs from the use of these terms in common law countries. For example, under German law loss of profit may in certain cases be a direct damage.

Conclusion

In general, most of the internationally common limitations on liability are not enforceable in German if they are included in a party's standard contract terms. It may be possible to negotiate such limitations, however, if the standard terms are individually negotiated and the other party has an opportunity to seek modifications to the standard contract terms.

d) Limitation of liability for telecommunication services

According to the Telecommunication Act (§ 44 a TKG), the liability of the provider is limited to 12.500 Euro for pecuniary damages ("Vermögensschäden") per End User per event causing damage, and up to 10 million Euro for all End Users for the same event. This does not apply in the case of damages resulting from the provider's willful misconduct or with respect to death, personal injury or property damage.

End users for purposes of these provisions of the Telecommunications Act are customers who do not provide telecommunications services to others. Therefore this limitation would not apply to contract parties who are resellers or to other telecommunications services providers.

The standard contract terms which are used for end users do not permit deviations from those terms. It is possible, however, to seek changes to those terms through negotiations of a specific contract.

7. Indemnification

The German statutory provisions do not provide for indemnification. Usually the right to indemnification known in common law countries is replaced by the remedies that are available for contractual liability. As the use of indemnities is not addressed in the German statutory provisions, the inclusion of indemnities in a contract may leave effect of the indemnities open to interpretation by a court. In addition, if a language other than German is used in the relevant contract or document, the court may refer to legal principles of the foreign law in deciding a case. In those circumstances, the court may argue that a breach in itself would give rise to liability under the contract and that, as is the case where a party has given a guarantee, it is not necessary to show that the provider was at fault (i.e. strict liability). Thus, the implementation of indemnities may result in liability claims which would not arise out of the statutory provisions of German law.

If a separate indemnification clause is included in the contract, it could also be interpreted in a way that takes the indemnification obligation outside any general limitation on liability of a party under the contract. Given the risks involved in including indemnities in a contract that is governed by German law, indemnities, if used, should be drafted very carefully and precisely.

8. Forum/Arbitration

In case of cross-border agreements, it is advisable to select in the contract an exclusive forum that is familiar with the chosen governing law and experienced in applying it (i.e. a German court in case of German law). A provider could either choose a city (it is advisable to choose one with experience in international trade) or use the place of either its registered office or of its customer's as the exclusive forum for resolution of issues and disputes that arise under the contract. German courts are extremely efficient and legal costs from proceedings in German courts are considered to be reasonable, particularly when compared with the legal costs of court proceedings in common law countries.

German law also allows the contract parties to chose arbitration as the exclusive forum for resolution of disputes and issues that arise under the contract and to specify the requirements applicable to the appointment of an arbitration panel. Arbitration can be advisable, particularly, when dealing with international disputes that involve the use of different languages. However arbitrations may be more expensive than court proceedings in certain countries.

THIS STRANGE EVENTFUL HISTORY

Memoirs of Earlier Days in the UAE and Oman

EDWARD HENDERSON

QUARTET BOOKS
LONDON NEW YORK

it would be no more than a step in the right direction. The Sultan said he was arranging for us to go further south and into the Duru area later. He was most insistent that we should pay no rentals to the shaikhs, and our meeting passed pleasantly, as he could be charming in an interview. He promised to attach an effective government official named Yusuf to our party to help us with the tribes. We left the Sultan with the feeling that we could not get anything more from him but that what he had agreed to might not suffice. We prayed that the official might turn out to be a man of influence and purpose.

Early on the following day, we again took the long, bumpy and suffocatingly dusty track up the coast past the hundreds of beautiful date gardens and by late evening joined the rest of the party near Suhar on the Batinah coast. Yusuf the Sultan's trusted official was there to see us up the valley of the Jizzi. He was pleasant enough, but we could see at once that he had little or no authority or presence. We did not expect him to be of much help, and help from the government was what was needed. The Sultan himself had ordered the villagers to make a track up the valley which our cars were to negotiate. We spent the night at Suhar and looked at the fine old Portuguese fort and great square tower which dominated the town. The gardens at Suhar were particularly beautiful, and the water was plentiful and sweet. Early next day, we loaded our vehicles and set off up the *wadi*. We soon left the plantations behind us and began crossing the grey rocky plain, not difficult driving but hard on our springs. As we came into the foothills, we were forced to drop down into the valley bottom; but there had been recent rain in the mountains and there were intermittent pools of water in the *wadi* bed. These we negotiated as best we could, sometimes going round them, sometimes through. We began to reach habitations, small villages perched on low bluffs near the *wadi* bed but high enough to be clear of flash floods which can suddenly sweep down these valleys without warning, carrying everything with them that lies in their path.

It was near the first village that trouble began with the vehicles. We could find no clear way round a particularly deep pool and had to use crowbars to clear a path round it through the boulders, with difficulty pushing and pulling the vehicles through the rocks on the pool's edge. When we came up to the village, we were immediately asked into one of the houses and entertained with coffee and mounds of dates served on basket mats. We asked after the track which was supposed to have been made as we could not see one. Our hosts took us across to see it. It was on the other side of the *wadi* bed, very rough indeed and not nearly wide enough; in fact virtually useless. The villagers told us, I am sure in all innocence, that they did not expect our vehicles to be so wide. We had to make up for the inadequacies of the track by the use of crowbars to clear the bigger rocks and the work was laborious; although the difficult stretch was only a matter of a few miles, it took us from morning until nearly sunset to cover it.

As we toiled up this difficult sector, the sun became hotter, the way dustier. The valley sides which had been gentle slopes became steeper, the dried *wadi* bed varying from twenty feet in width to a hundred yards. In places it had three or four feet of water in it, but mostly it was dry. Sometimes the *wadi* bed took 'U' turns and we were able at a few of these places to climb over spurs to shorten our journey. The grey rocks were bare, polished and shining in the sun; but where the hard rock disappeared into the gravel and stones of the *wadi* bed, oleander sprouted luxuriantly. At places, looking up side valleys, we could see villages high in the rocks with a few palms or fig trees on tiny terraces hacked out of the cliff. At others, there were small plantations of palms and groups of huts right down in the valley only a few feet above what seemed to be the possible flood line, and at such places the villagers would come out and look at us in astonishment.

The tribesmen lower in the *wadi* offered us a gang of workers to help us to push the trucks through the difficult places. Yusuf, the Sultan's representative, had at last admitted he was a newcomer to the area, like ourselves, but he agreed to a dozen Shawami tribesmen joining us. They jumped on to our trucks and were to come with us as far as Hail and Rabi, two villages mid-way up the *wadi*. We continued slowly and noisily with more than one hold-up to clear rocks. The front truck was just negotiating a particularly deep stretch of water, which we could see no way of avoiding, when we were greeted by a crackle of musketry, and one or two bullets came singing by us, ricocheting on the rocks around us. Needless to say, we all stopped and the front truck stuck right in the water. Both Sabir and Firdullah characteristically laughed at this apparent misfortune. We switched off our engines and in the sudden silence after their roaring, the atmosphere seemed tense, brittle and electric. A few more shots came from a low bluff about a hundred yards to our front and fifty yards above us. There were shouts from above and we shouted back explaining we were friends and had the Sultan's blessing. Then Yusuf took up the story and joined us in the shouting game.

We had all climbed off the trucks which straggled down a steep and difficult boulder-strewn slope to the leading truck which looked half submerged now in the water. The slope was exposed to the tribesmen who were firing at us, and they were in good positions on the bluff above the water in front of us. They had us at their mercy; there was no getting back and no cover within two hundred yards of us, or more, in any direction. Yusuf had a rifle and, I remembered with some concern, so did one or two of the excitable Shawamis; but they were by this time crouching behind the tail boards of the vehicles on which they had been riding, and those in the front truck had perforce to crouch in the water. Inevitable at such moments thoughts of other such incidents in Oman's history came to mind in which the victims either did or did not live to walk away.

Eventually two men appeared on the bluff and invited Yusuf to come forward. Yusuf did go forward a little, and we could hear the echoes of a shouted talk. He came back to us some minutes later and said that the villagers knew all about us and that as the Sultan had warned them of the trip, they would let us through with pleasure. But, why had we picked up those beastly Shawamis? Everyone knew, but not us and certainly not Yusuf, that Shawamis were not allowed on the territory of these two villages, and their plan to come as part of our party was just a trick to get them over forbidden ground. If we left them behind and took on some of their own villagers instead as helpers, we could go through.

In due course, but not without the Shawamis making a great noise, agreement was reached. We walked up to the village which was only just past the bluff, and we were offered coffee and dates: honour was satisfied. The disgruntled Shawamis went home on foot, having been paid off liberally to compensate them, and we took on a like number of the Bani Ghaith tribe who assured us that they were acceptable all the way up to Buraimi. So, it turned out, was the case. Our worst physical troubles with the 'going' coincided with the political hold-up, but the Bani Ghaith showed us a way round the wide water obstacle, and with their help we cleared a passable track. Soon after leaving the village, we saw that we were now near the watershed and had come out of the area of habitation. From here onwards the valley was nearly barren, the rocks brown and grey. They rose on both sides steeply to the serrated mountain tops, the *wadi* bed itself being only twenty yards wide; and we mostly found our way along tracks made by animals some twenty feet up at the side of the gorge, not without some excitement and alarm as we put our trucks through places which their makers could not have had in mind for them. If only we had four-wheel-drive vehicles! Land Rovers and jeeps had yet to become available.

From the watershed, about 1200 feet above sea level, the going became gradually easier and nearly level until we came out at sunset between two arms of black crags on to the Dhahirah plain, and there in front of us was the familiar whale-back of Jebel Hafit. Turning northwards, we were soon among the trees and found our way across the bumpy gravel towards Buraimi. It was dark and rather cold when we got into the village. We dropped Yusuf there, at his request, and paid off the Bani Ghaith. It was not until 10 p.m. that we got back to fort Jahili. We had been at it since five in the morning, and were tired but happy to have got through. A brew of tea, our bedrolls laid down on the sand, and that was enough for the day.

Yusuf had fresh instructions from the Sultan to give to Shaikh Saqr, and we had a succession of meetings with tribal leaders on the following days. The geologists did manage a few trips a little into the Dhahirah, but Ibri and the south remained places we could not reach, and for that reason they began to have a strange fascination for me. What were they like, these places we could not visit? Clearly, we were still making no progress and the geologists, although they could find a little work to do on the Abu Dhabi side, were wasting their time. Both Yusuf and Saqr thought that it might help with the other tribes if Sayyid Ahmad bin Ibrahim, Minister of the Interior in Muscat, could come up and talk to them. We could hardly refuse to support this idea, and I set off with Sabir and two pick-ups, on our own, all the way down the Jizzi again to see if I could persuade him to come from the capital.

Remembering the toil and trouble coming up, I expected that we would have trouble going down again, but Sabir assured me that if we took two empty trucks and two or three spare hands to help push us, we should be all right. Apart from an alarming moment when the truck I was driving stuck near Hail, with one wheel on the edge of a fifty-foot drop, all was well. We spent about an hour digging out rocks to widen the track at that point and we found that the rest of the track, though still rather

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Suit No 1611
of 1990

Between

Shaikh Faisal Bin Sultan Al Qassim
t/a Gibca

.. Plaintiff

And

Swan Hunter Singapore Pte Ltd
(formerly known as Vosper Naval Systems Pte Ltd and Vosper-QAF Pte Ltd)

.. Defendants

Coram: **Chao Hick Tin J**

Curria Advisari Vult

JUDGMENT

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.

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.

Facts

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.

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 twelve 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.

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.

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 ..."

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.

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 maximise effectiveness and meet the relevant people.
>
> 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."

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 4th July 1986.

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 was the state of the competition. 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."

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:

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

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 10 days after closing date."

On 8th 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 23rd June 1986.
>
> The proposal was couriered direct to DGP by DHL Forwarding Airbill No. 88361906 dated 7 July 1986.
>
> 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.
>
> We look forward to a successful conclusion to this business and shall be grateful if you will keep us fully informed of developments."

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 7½%. More will be said about this aspect later.

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 re-directed to the correct body.

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 competitiors were.

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

It was clear that the defendants were pleased with the meeting at UAE and with the arrangments made by the plaintiff so much so that on their return to Singapore Roger Cooper wrote a letter of

A appreciation. He also specifically thanked one David Bernard, who was a staff of the plaintiff.

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:-

B

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

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

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.

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.

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 article 24. The plaintiff was well aware of the existence of article 24. Shaikh Khalid's evidence quite clearly indicates that the provisions in article 24.1 had been in use for some years, though article 24.2 was new. But Shaikh Khalid explained that article 24.1 was a provision which was not strictly enforced. As article 24 is central to this action, I shall set it out in full:-

"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."

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

Following that understanding, sometime in early September 1987, the defendants wrote out a letter to the plaintiff, but back-dated 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."

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

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 Private Limited 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].

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.

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 Limited (the Berry drafts), one of which was to pay Berry Group Ltd $862,500 for past 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.

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 article 24.1 had been in use for some years they were never seriously enforced. The telex of 6 November 1980 from the defendants to GHQ was even copied to the plaintiff (AB45). So GHQ must know that the defendants had an agent.

A 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 B 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 C not to take chances, or jeopardise the tender, the plaintiff began to behave more discreetly in 1987.

When Durai was asked if before he received the draft contract from GHQ (with article 24) he was informed of the no-agent prohibition, he answered that he could not recall. But he explained that D if there were then such a 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 E that "in other countries too, there were similar rules disallowing agents, still we used agents." He said he did not take article 24 seriously until he met the Commander of UAE Navy in August 1987.

On the evidence I find that there was no real intention on F 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."

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 (SF 228, 787.94 = $302,561.49) to an account of Berry Group Ltd at a Swiss Bank in Geneva as designated by the plaintiff.

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 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 subpoenae.

Rate of Commission

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 7½%. 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 ½% to 7½%. 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 7½%) there was no protest by the plaintiff that he was paid short of a ½%. 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 7½% commission of the original contract price of S$11.5 million. On balance, I find that there was this further agreement to reduce the commission to 7½%.

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.

<u>Proper Law</u>

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.

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.

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

In para 587, volume 8 of 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.
>
> 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."

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."

In rule 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 recognising 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.

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.

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.

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.

Is the contract void and/or unenforceable

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

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 Halsbury's Laws (4th Ed) vol 8, para 795.

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 *Ralli Brothers v Compania Naviera Sota Aznar* [1920] 2KB 287, 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."

In *de Beeche v South American Stores (Gath & Chaves) Ltd* [1935] AC 148 at 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."

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 article 24.1 and the directive issued by DSC.

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.

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 Articles 110 to 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.

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 article 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 given any law-making 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, article 3 of Federal law No

19 of 1972 gives the Chairman of the Supreme Defence Council the power to promulgate resolutions.

Plaintiff's expert evidence

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 article 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."

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 article 205 of the UAE Law of Civil Transactions, Federal Law No 15 of 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 the state as a whole and not formulated by any particular department of the government such as the UAE Armed Forces.

He also pointed out that article 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 sovereignity, 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.

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."

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 article 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."

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.

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.

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, e.g., obtaining documents, arranging 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.

Defendants' expert evidence

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 re-affirmation 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 H.H. The Deputy Commander of the Armed Forces about which he sent a letter to the Foreign Ministry on December 9, 1986 ......

> Also we need to include a 'penalties paragraph' in all arms ... deals prohibiting companies from using any mediation, whatsoever ....
>
> Federal Law No 18 organises 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."

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 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.

Relying on article 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."

and article 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."

and article 208 -

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

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.

(iii) the prohibition rendered unlawful the benefit which the plaintiff was to receive under the contract and thus the contract is void.

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 Egyptial Civil Code which are in pari materia with article 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 ...

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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)

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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 of 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 of 1986 and comes within the scope of the prohibition.

D

E

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, (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

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exchange for GHQ purchasing equipment, an arms supplier is required to invest part of the purchase price in the UAE, e.g., 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 non-compliance. 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.

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 of 1981 it is not permitted by that law to practice as a trade agent in UAE and under Article 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 of 1981. In his closing address, counsel for the defendants made no submission on this aspect and I need say no more on it.

<u>Findings</u>

From the evidence of the two experts, I do not think there can be any doubt that the prohibition (in the directive or in article 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 is it a regulation having the force of law, as it is not prescribed by an authority under any Federal law or

A 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.

B It is not in dispute that the provisions in article 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 article 24.1 was not C 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 D meeting, the Technical Committee and its Chairman knew the defendants had the plaintiff as their agent.

As is apparent from Laubach's evidence, the US Mission in UAE only began to raise the question of the prohibition in 1987, well E 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 F 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.

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.

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 of 1981 gives local agents considerable measure of protection. The two experts are also in agreement that Decision No 12 of 1986 issued by DSC allows appointment of local agents by foreign suppliers (non-arms).

It is clear that Article 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 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.

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 non-compliance 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?

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

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 *Monkland v Jack Barclay Ltd* [1951] 1 All ER 714.

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 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 consideration whether a tender relates to purchase of arms or other non-military requirements of the State.

I find Laubach's views about the nature of the offset requirement unacceptable. He said that that requirement is also law. If

A 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 B GHQ exceeding US$10 million. I think Laubach has overstated his case on the offset requirement. So has he with regard to the directive and the prohibition.

In so far as the defendants are concerned, they clearly C 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 D back-dated 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 E 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 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 F reliable.

Accordingly, I do not find that a breach of the prohibition in article 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 article 24.1, is essentially a contractual term, a breach of which would give GHQ certain recourse as specified in article 24.2. But it does not follow that GHQ must exercise that right. The prohibition in article 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 emphasise 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.

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.

Counsel for the defendants has relied on the case *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 QB 448. There, the defendants in August 1984 entered into an agreement with the National Oil Corporation of Qatar for the purchase of crude oil. At the time of the execution of that agreement the 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.

To fully appreicate the case in *Lemenda* 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 Q.G.P.C. 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."

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 Corporation) 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."

It would be apparent that the fact situation in *Lemenda* 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.

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."

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.

While recognising 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 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 Corporation;

(ii) "The influence was to be exerted in circumstances where

A

> it was essential that the person influenced should be unaware of Mr Yassin's pecuniary interest";

B

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
C same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.

I do not think *Lemenda* 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
D 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
E 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 *Monkland* where he said that "the
F 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."

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 Vol 9 of Halsbury Laws and I do not propose to go into them.

In the circumstances, following *Lemenda*, 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 *Ralli Brothers* and *Regazzoni v Sethia* [1957] 3 AER 286 ought to be distinguished as they relate to infringements of the written laws of foreign countries.

In this regard the Malaysian Federal Court case *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 255 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."

<u>Quantum of damages</u>

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.

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 7½% of the value of the Supply Contract namely, S$10,383,000, (which was the final contract price) less the two sums already received by the plaintiff.

<u>Judgment</u>

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.

Accordingly, there shall be judgment for the plaintiff in the sum of \$476,163,51¢ (S\$778,725 less S\$49,993.94¢ and S\$252,567.55¢) with costs.

Point on pleadings

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:-

> "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."

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.

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 Buyer for the sale of the Defendants' 2 landing craft to the Buyer by rendering services which include:

(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' competitiors' 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.

(7) Liaising with the Buyer on the progress of the tender.

4. The Defendants' 2 landing craft with on-board spares, accessories and training were sold to the Buyer for S$10,383,000-00 on or about 17 November 1987 as a result of the negotiations."

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.

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.

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 paragraphs 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 or prejudice to the other side: see Court of Appeal decision in *Smith v Baron* [1991]

TLR 52. 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.

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 *Loutfi v Czarnikow Ltd* [1952] 2 All ER 823. 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.

CHAO HICK TIN
JUDGE

SINGAPORE
DATE: 30th May 1994

Certified true copy

Lilian
Private Secretary to Judge
Court No. 17
Supreme Court, Singapore

A *Solicitors:* *Mr Tan Tee Jim (with Mr Wilson Wong) for plaintiff*
Mr Arjan Chotrani (with Mr Haresh Kamdar) for defendants

Firms: *M/s Allen & Gledhill*
Arjan & Co

B Swan/Judgment[1]/Court[17]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration Between INTERNATIONAL BECHTEL COMPANY LIMITED, Petitioner, and DEPARTMENT OF CIVIL AVIATION OF THE GOVERNMENT OF DUBAI, Respondent.	Civil Action No. 03-0277 (JR)

MEMORANDUM ORDER

International Bechtel Company Limited ("Bechtel") petitions this American court for judicial confirmation of an arbitration award issued on February 20, 2002, under the laws of Dubai. The Department of Civil Aviation of the Government of Dubai ("DCA"), the other party to the arbitration, moves to dismiss. The motion raises jurisdictional questions, which I have resolved in petitioner's favor, and a question of international comity, which need not be decided at this time. Further proceedings in this matter will be stayed pending a decision on Bechtel's appeal of the decision of the Dubai Court of First Instance invalidating the award, now pending before the Dubai Court of Cassation.

Background

On March 30, 1992, Bechtel and the DCA entered into a written Project Management Services Agreement for the design and construction of a theme park and adjacent commercial and residential developments in Dubai. The parties agreed, inter alia, that any disputes arising from the Agreement would be decided by arbitration. In 1999, a dispute did arise: Bechtel claimed that the DCA had failed to pay Bechtel amounts due and owing to it for services rendered and expenses incurred under the terms of the Agreement; and the DCA counterclaimed that Bechtel had breached its contractual obligations under the Agreement and was liable in damages to the DCA and/or needed to make restitution of payments already received from the DCA. See Final Award, dated February 20, 2002, at 2. Pursuant to the Agreement, on July 26, 2000, the parties met with and began arbitration before Dr. Georg von Segesser, who had been appointed sole arbitrator of the dispute.

On February 20, 2002, the arbitrator issued an extensive written opinion, awarding Bechtel approximately $24.4 million in damages, costs and legal fees, and dismissing the DCA's counterclaims for approximately $42 million. On April 7, 2002, after the DCA had failed to satisfy the award, Bechtel filed a petition in the Dubai Court of First Instance to confirm the arbitration award.

On April 22, 2002, the DCA filed a complaint in the same Dubai court, seeking to overturn the award. In a written opinion dated November 16, 2002, the Court of First Instance rejected five of the six arguments put forth by the DCA but overturned the award on the sixth, finding that witnesses in the arbitration had not taken oaths in the form prescribed by Dubai law:

> As for the last ground in the suit statement concerning the invalidity of the award on the ground that the witnesses did not take oath prior to hearing their statements[,] . . . the arbitrator . . . is bound to comply the procedures stipulated in the Arbitration Chapter. As such, . . . the violation of such requirement renders the procedure invalid, which affects the award.
>
> . . . Article 41/2 of the [Civil Procedure] Law determined the form of the oath to be taken by a witness, namely: "I swear by the Almighty to tell the truth and nothing but the truth". Upon taking the oath, the religion of the witness shall take into consideration, if the witness requires the same. The purpose of stipulating to take the oath or to put a witness to oath . . . is to give such statement a frame leading to the truth with the exclusion of lying, deviation or fancy, so that the statement becomes a satisfactory decisive evidence, and satisfaction arises from taking the oath. The statement of a witness will not be valid and certain unless the witness takes the oath . . . [nor will] anything that relies on such statement, as it becomes ineffective and cannot, accordingly, be relied upon, particularly if such statement is the evidence on which the award relied. It is imperative that the arbitrator puts a witness on oath prior to giving his statement, which may not be ignored or made other than in the form provided by the law, as above quoted. It is established from the award, the subject matter of the suits, that the arbitrator did not address the oath in the above form as provided in the law upon hearing witnesses William G. Leuing, Tilak Raj Billo, Christopher

> Hertzell, Steven Martin, Keith Kennedy, Ann Saha, Christopher Brown, Mohamed Saleh Al Saleh, HH Sheikh Ahmed Bin Saeed Al Maktoum, Abdullah Al Hashimi, Simon Azzam, Surish Kumar, Masood Hasan Dariwala, Robert Burnett and W. Michael. As such, the requirements for the validity of the respective statements of the above witnesses were not available, which renders the said statements invalid and also renders everything established on such statements invalid. Whereas the award relied on the statements of the above witnesses without putting them to oath as above quoted, the award, the subject matter of the suits, is invalid because it relied on an invalid procedure.

<u>Int'l Bechtel Co. Ltd. v. Dep't of Civil Aviation of Gov't of Dubai</u>, case No. 288/2002 [Court of First Instance], at 6-8. The court rejected Bechtel's arguments that the DCA had waived its objection to the form of the oaths by failing to object on that ground during the arbitration, or by agreeing in advance that the arbitration award would be final and binding and that there would be no appeal to any court. <u>See</u> Agreement, at ¶19B. The court explained:

> [T]he party who is originally required to comply with the procedures stipulated under the law, is the arbitrator, but not the litigants. Administering oath on witnesses is an imperative requirement under Article 211 of the Civil Procedures Law, which the arbitrator should comply with even if the litigants have agreed otherwise.
>
> . . .
>
> Article 216/2 of the Civil Procedures Law . . . provides that "The acceptance of a request to invalidate an award shall not be affected by the waiver of a litigant of its right to such invalidation prior to the issuance of the award". Moreover, it may not be held to the request to invalidate the award before the arbitrator himself but such request may be held thereto either under a separate suit or during the hearing of

> the suit brought before the court to confirm such award.

Int'l Bechtel, [Court of First Instance], at 9.

Bechtel appealed the Court of First Instance ruling to the Dubai Court of Appeal on December 14, 2002. While that appeal was pending, on February 19, 2003, Bechtel filed its petition in this Court. On June 8, 2003, the Dubai Court of Appeal affirmed the decision of the Court of First Instance. Bechtel has taken that decision to the highest court of Dubai, the Court of Cassation, where Bechtel's appeal remains pending.[1]

I. SUBJECT MATTER JURISDICTION

Bechtel has invoked this Court's jurisdiction under 28 U.S.C. § 1330(a),[2] asserting that the DCA is a foreign state as defined in § 1603(a) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq. ("FSIA"), and that its claim falls

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[1]The parties also informed the Court at oral argument on January 12, 2004, that Bechtel has filed a petition for confirmation of the arbitration award in the courts of France.

[2]Section 1330(a) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

under two of the FSIA's exceptions to immunity: for commercial activities, 28 U.S.C. § 1605(a)(2), and for arbitration awards, 28 U.S.C. § 1604(a)(6).[3]

The DCA's jurisdictional argument does not meet Bechtel's jurisdictional allegations. It focuses instead on the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), and maintains that "Bechtel seeks to invoke jurisdiction here solely under the FAA . . . [b]ut the FAA does not apply because the Agreement explicitly states that Dubai law governs, and Dubai law expressly designates the Dubai Court as the exclusive forum for confirmation of the arbitration award." Resp't Mem., at 4-5 (emphasis in original). But Bechtel does not assert that the FAA confers subject matter jurisdiction in this Court, and clearly it does not.[4] It is the FSIA that "provides the sole basis for

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[3]The petition states in relevant part:

Jurisdictional Allegations

> . . . Respondent Department of Civil Aviation of the Government of Dubai ("DCA") is a foreign state as defined in 28 USC § 1603(a) and is not entitled to immunity from this claim under either 28 USC §§ 1605 through 1607 or any applicable international agreement. Accordingly, this Court has original jurisdiction over this matter pursuant to 28 USC § 1330(a).

Pet. to Confirm Arbitration Award, at 1-2.

[4]See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create

obtaining jurisdiction over a foreign state in the courts of this country," Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); see also id. at 434 ("Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity." (emphasis omitted)).

"At the threshold of every action" against a foreign state, the Court must satisfy itself that it has jurisdiction by "apply[ing] the detailed federal law standards set forth in the [FSIA]." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493-94 (1983). The DCA has not responded to Bechtel's petition on the merits. Its motion to dismiss does not assert immunity under the FSIA or challenge the facts upon which Bechtel relies in invoking the commercial activities and arbitration award FSIA exceptions. The D.C. Circuit has held that "if the sovereign makes a 'conscious decision to take part in the litigation,' then it must assert its immunity under the FSIA either before or in

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any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. IV) or otherwise. . . . [H]ence, there must be diversity of citizenship or some other independent basis for federal jurisdiction . . . ."); see also Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1245-47 (D.C. Cir. 1999).

its responsive pleading.'" Phoenix Consulting Inc. v. Republic of Angola, 216 F.3d 36, 39 (D.C. Cir. 2000) (quoting Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443-45 (D.C. Cir. 1990)). This is because "failure to assert the immunity after consciously deciding to participate in the litigation may constitute an implied waiver of immunity, 28 U.S.C. § 1605(a)(1), which invests the court with subject matter jurisdiction under 28 U.S.C. § 1330(a)." Id. (citing H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6616-17); but see id. at 39 n.*.

I make no ruling as to whether the DCA has consciously decided to take part in this litigation. Suffice it to say that there is nothing now of record to indicate that this Court does not have jurisdiction over the subject matter of this case.

II. INTERNATIONAL COMITY

The DCA invokes the doctrine of res judicata, asserting that Bechtel may not relitigate here what it lost in the Dubai courts. "The theory often used to account for the res judicata effects of foreign judgments is that of comity, which is the 'recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 288 F. Supp. 2d 783, 794 (N.D. Tex. 2003) (quoting Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S.D. Iowa, 482

U.S. 522, 544 n.27 (1987) (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895))). In no event will this Court undertake to decide whether witness oaths were properly administered in the arbitration as a matter of Dubai law, nor, indeed, does Bechtel ask for such a ruling. Instead, Bechtel seeks direct enforcement of the arbitration award, without any regard for Dubai court proceedings subsequent to that award. Bechtel's position is that the proceedings of the Dubai courts in this matter are not entitled to international comity and that they should be ignored.

In the seminal case of Hilton v. Guyot, 159 U.S. 113 (1895), the Supreme Court found that "'the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact' if there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect . . . ." Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (quoting Hilton, 159 U.S. at 158-59).

"[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts," but a special reason for declining comity exists when the foreign judgment is "contrary to the crucial public policies of the forum in which enforcement is requested." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931, 937 (D.C. Cir. 1984).[5] "[A] state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests" or which are "predicated on laws repugnant to the domestic forum's conception of decency and justice." Id. at 931 & n.71. However, the public policy exception is "a narrow one, and a court will not deny enforcement because the foreign

[5]The D.C. Circuit further explained that

> [w]hen the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.

Laker Airways, 731 F.2d at 937.

jurisdiction has different procedural or technical rules of law than does the United States, or because the foreign judgment is based on a cause of action not recognized by the enforcing jurisdiction." Ricart v. Pan Am. World Airways, Inc., case No. 89-0768 (D.D.C. Dec. 21, 1990) (internal citations omitted).

Bechtel has not alleged that the Court of First Instance is not a court of competent jurisdiction, nor does it question the court's general integrity. Bechtel has not argued that the Dubai judgments rendered in this case were fraudulent, or that the relevant parties did not have an opportunity to be heard. And Bechtel will not be heard to argue that Dubai does not have a legitimate and reasonable interest in providing a forum for the dispute, see Gulf Petrol, 288 F. Supp. 2d at 794, as the Agreement required that the arbitration be conducted under Dubai law. The comity question that Bechtel's challenge does raise is whether the Dubai courts' invalidation of the arbitral award on the ground of improper administration of witness oaths is "repugnant to fundamental notions of what is decent and just"? Tahan, 662 F.2d at 864 (citation and internal quotation marks omitted).

The Dubai court's invalidation of the arbitral award solely on the ground that witness oaths were not properly administered, where neither party objected to the form of the oaths when given, in the face of a contract provision stating plainly that the award would be final and binding and that there would be no appeal to any court, registers at the hypertechnical fringe of what Americans would call justice. Whether it is "repugnant to fundamental notions of what is decent and just," however, remains to be seen, as (a) Bechtel's appeal to the Dubai Court of Cassation has not been decided, and (b) neither party to this dispute has been able to say whether an affirmance by the Court of Cassation would have a preclusive effect on rearbitration.

* * * * * * *

It is accordingly by the Court sua sponte **ORDERED** that all proceedings in this case are **stayed** pending further order of the Court. As an administrative matter, the DCA's motion to dismiss [16] is **denied without prejudice**. The Court will entertain a further motion by either party after a decision is rendered by the Dubai Court of Cassation, or in the event that

Bechtel's petition to confirm its arbitration award in the courts of France moves forward.[6]

JAMES ROBERTSON
United States District Judge

[6]In light of the decision to stay the case, I need not and do not consider the merits of the parties' contentions concerning proper application of the Agreement's choice of law clauses.

The DCA's "forum non conveniens" argument asserts that the courts of Dubai are an adequate alternative forum, but, since the parties' dispute is already sub judice in that forum, the argument is really only a variant of the DCA's res judicata argument that need not be given further consideration.

LAST LINE OF DEFENCE

Glenn Freeman reviews developments in the regional defence sector, with a focus on Abu Dhabi ship building projects and plans for a UAE missile defence shield

Missile defence systems, military shipbuilding and massive aviation deals – the UAE's defence and aerospace sector is booming.

In 2009, the Middle East spent US$90bn on defence, which was about six per cent of the global spend, according to the Global Aerospace & Defense Review 2010 by US-based advisory firm AlixPartners.

While the nation's construction and real estate sectors have grabbed international headlines in the past few years, some of the biggest deals in the Middle East are brokered within the defence sector.

With the global economic downturn having impacted the traditional defence hub nations of the US, UK and EU states, the UAE has grasped the unprecedented chance to boost its presence in this lucrative and vitally important sector.

According to the recent report from AlixPartners, defence spending is most likely to decline or at best stay flat as a result of US and European government budget deficits.

However, spending in the more robust Middle East is now likely to account for a more significant portion of the global sector, growing to US$100bn by 2014.

Eric Benedict, who heads up AlixPartners' work in the Middle East, said: "The industry made it through 2009 remarkably well compared to most other industries, because the major players reacted quickly to cut production capacity."

He also pointed out that US defence spending continued to be strong in 2009 and so far in 2010, largely due to "supplemental spending authorisations" for the wars in Iraq and Afghanistan.

"However, because of the financial crisis and [the US's] lingering fragile economy, pressures on defence budgets will be intense going forward," Benedict added.

BILLION-DOLLAR BOATS

Abu Dhabi Ship Building (ADSB), the only regionally-based organisation with military shipbuilding capability, has also boosted its activities in recent times. Providing maritime craft for navies, coast guards and other military, paramilitary and commercial operators, the Mussafah-based public joint-stock company posted a net profit of AED114.39m on revenues of more than AED1.16bn in 2009.

It most recently provided the Royal Bahrain Naval Force with the first of two 42-metre landing craft, having supplied two 16-metre fast landing craft to the same customer at the end of 2009.

Another huge project they've been working on for the last seven years is the Baynunah Project, which involves the design, construction and fit-out of six 72-metre Baynunah-class multi-purpose missile corvettes for the UAE Navy.

The contract for this programme, estimated at around US$1bn, was signed in 2003, marking the first warship of this size and complexity to be built in the region.

As a subcontractor to ADSB, the French company, Constructions Mecaniques de Normandie (CMN), designed the platform and is building the first of the warships in Cherbourg, France, where it is currently undergoing integration and testing.

The remaining five are all being built in ADSB's shipyard in Mussafah. The launch of vessel 2 at ADSB will take place this year.

Along with building ships 2 through 6 completely in Abu Dhabi, ADSB is also responsible for procurement of the high-tech combat systems of all six of the warships, including weaponry, sensors, navigation and communication equipment. Selex Sistemi Integrati of Italy is the combat system integrator for the project, also as a subcontractor to ADSB.

According to Bill Saltzer, ADSB's chief executive officer, 2009 was the busiest year in the company's 14-year history, although he concedes that the market in general has started to restrict a little bit with the world economic slowdown.

He explains that although the flow of new orders may diminish slightly at times, the large scale and longer-term characteristics of major military shipbuilding projects has been a buffer for them.

"Military projects are typically multi-year projects, so you don't just stop things overnight... we have a good, healthy backlog of projects now," he says, although emphasises they are still vigilant in scouting out new business for their order book to continue growing the company. ADSB currently has orders for 54 new ships

"MILITARY PROJECTS ARE TYPICALLY MULTI-YEAR PROJECTS, SO YOU DON'T JUST STOP THINGS OVERNIGHT... WE HAVE A GOOD, HEALTHY BACKLOG NOW"
BILL SALTZER, CHIEF EXECUTIVE OFFICER, ADSB

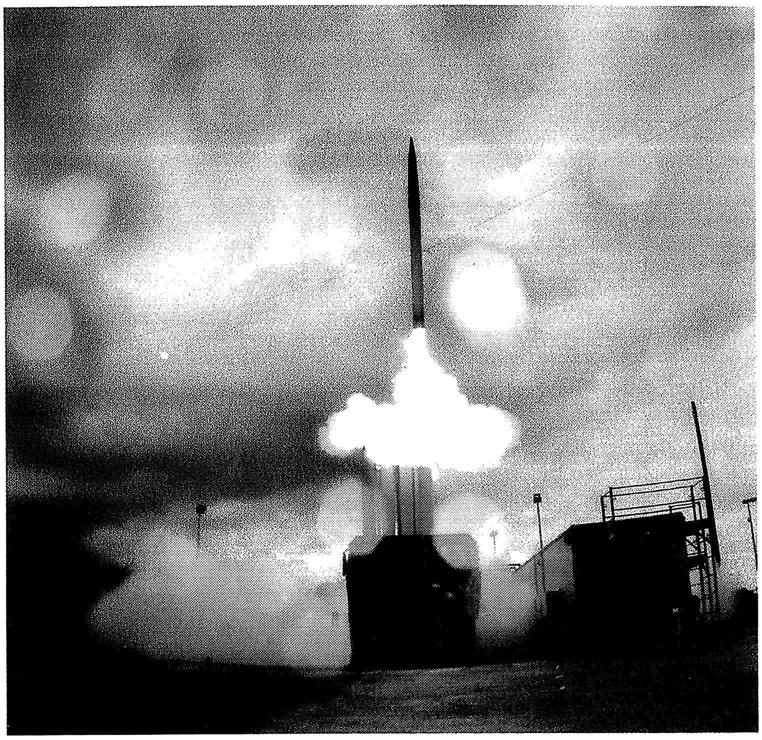
and boats on its books, including customers in the UAE and other Gulf countries.

Saltzer also commented on the nature of the market in recent years, giving his view that defence spending has been strong, but all countries, the US and UK included, have begun to tighten up.

He explains that the prime market for ADSB is the UAE and other GCC countries, although they aren't averse to supplying to countries outside the region. He suggests that more foreign deals could happen in the years to come, but for the time being the relatively young company will concentrate most of its efforts on its regional market. Along with the recently completed deal with the Bahrain military, it has also worked with customers in Oman, Qatar and Yemen, and is currently tendering for new projects throughout the GCC.

A public joint stock company listed on the Abu Dhabi Securities Exchange (ADX), the Abu Dhabi government's investment arm, Mubadala Development Company, is the largest shareholder, holding almost 40 per cent of ADSB's stock. The Abu Dhabi Government holds 10 per cent of the shares, with the remaining 50 per cent owned by several thousand individual shareholders.

Over the past few years, there has been an increasing presence of companies from the Middle East at the UK's Farnborough Air Show, among the world's biggest of its kind and the setting for numerous billion-dollar deals each year. The presence of companies from the Middle East is growing each year, with



"YOU BUILD IN DIFFERENT LAYERS OF DEFENCE - SOME TO NEUTRALISE AND BLOCK SOMETHING AT LONG RANGE. YOU WANT ROBUST SYSTEMS THAT ARE MULTI-LAYERED" KEVIN W MASSENGIL, VICE PRESIDENT AND REGIONAL EXECUTIVE FOR MENA, RAYTHEON

AN INTEGRATED MISSILE DEFENCE SYSTEM FOR THE UAE HAS BEEN NINE YEARS IN THE MAKING

companies such as Abu Dhabi Aircraft Technologies, Mubadala and the Middle East Aerospace Consortium among the thousands of exhibitors.

Another major defence exhibition is the International Defence Expo (IDEX), held bi-annually in the UAE. Indeed, it was at the last IDEX event, in 2009, that ADSB brokered the deal with the UAE Navy.

Many other hugely lucrative deals were also inked during the event, including a US$89m contract between an Abu Dhabi joint-venture, Abu Dhabi System Integration, and the UAE Navy.

Among some of the most significant defence deals completed at IDEX 2009 was the US$1.8bn financing of nine advanced military transport aircraft for the UAE Armed Forces, which was put together by Abu Dhabi-based investment company, Waha Capital, in 2009.

Earlier last year, the UAE Armed Forces entered into deals with US defence contractor behemoths Lockheed Martin and Boeing. Lockheed Martin and Boeing inked deals worth US$1.6bn and US$1.2bn respectively, for a total of 16 military aircraft to enhance the UAE's airlift capability. These deals were also financed by Waha Capital.

UAE DEFENCE SHIELD

Despite the UAE's secure borders and stable relationships it enjoys with neighbouring countries, the nation still has contingency plans in place to deal with unprovoked, sudden attacks. One of these plans, the UAE missile defence shield, is being created in partnership between the UAE Government and Raytheon, a US company that specialises in guided missiles, having invented the eponymous SCUD missile that rose to prominence during the first Gulf War. Based in Massachusetts, with offices around the world, Raytheon also employs 72 people in Abu Dhabi.

In recent months, work began on the implementation phase of a complex integrated missile defence system for the UAE. Based around the Raytheon-developed Patriot missile and the longer-range Terminal High Altitude Area Defence (THAAD) system developed by Lockheed Martin, which uses Raytheon's radar technology, the deal was mapped out over four years.

Valued at a total of around US$5.2bn – US$3.6bn for the Patriot system and US$1.6bn for the THAAD – the UAE will become the first country outside the US with such a system. According to Kevin W Massengill, Raytheon's vice president and regional executive for MENA, this deal has been nine years in the making.

In justifying the hefty multi-billion-dollar price tag, Massengill explains some of the finer detail of how the missile defense shield will work. The dual-layer nature of the system means that both closer-range and long-range attacks can be dealt with and neutralised within a short space of time. Patriot missiles have a longer-range capability than the THAAD missiles, which are better suited to closer attacks.

"You build in different layers of defence – some to neutralise and block something at long range. We're talking about minutes, so you want robust systems that are multi-layered. Patriots are really good in a longer range – but can't kill things that are right in close," he says.

The deal is currently in the final review process, with each government of the two countries going through each of the items in minute detail. According to Massengil, the US government has notified US congress and obtained permission to move it forward.

Although security considerations mean he is unable to give a more precise scheduled delivery date, Massengil says the Patriot system is in the final stages of being deployed, with the first fire units on schedule for delivery within the next one to two years.

Another element this brings is the potential added benefit of boosting indigenous training and expertise within various defence- and technology-related fields. For instance, Raytheon has collaborated with Abu Dhabi's Ministry of Education in creating training programmes for Emirati employees involved in the missile defence project.

Having already obtained sign-off from the Ministry of Education last year, they will soon have systems engineering courses running out here. ●

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