ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

SAYACORP B.S.C. (formerly First Energy Bank B.S.C.) (C)
Claimant

and

NMC HEALTHCARE LTD (C)
First Defendant

~~**NMC HEALTH PLC**~~
~~Second Defendant~~

~~**N.M.C. SPECIALTY HOSPITAL LTD (C)**~~
~~Third Defendant~~

~~**N M C SPECIALTY HOSPITAL LTD (C)**~~
~~Fourth Defendant~~

~~**N M C ROYAL HOSPITAL LTD (C)**~~
~~Fifth Defendant~~

~~**N M C ROYAL HOSPITAL LTD (C)**~~
~~Sixth Defendant~~

~~**NMC ROYAL WOMEN'S HOSPITAL LTD (C)**~~
~~Seventh Defendant~~

~~**N M C PROVITA INTERNATIONAL MEDICAL CENTER LTD (C)**~~
~~Eighth Defendant~~

~~**NEW MEDICAL CENTRE TRADING LTD (C)**~~
~~Ninth Defendant~~

~~**NEW MEDICAL CENTRE SPECIALTY HOSPITAL LTD (C)**~~
~~Tenth Defendant~~

~~**NEW MEDICAL CENTRE LTD (C)**~~
~~Eleventh Defendant~~

~~**NMC ROYAL HOSPITAL LTD (C)**~~
~~Twelfth Defendant~~

RICHARD DIXON FLEMING (as joint administrator of NMC Healthcare LTD)
Thirteenth Defendant

BENJAMIN THOM CAIRNS (as joint administrator of NMC Healthcare LTD)
Fourteenth Defendant

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2023] ADGMCFI 0002
Before:	Justice Sir Andrew Smith
Decision Date:	4 January 2023
Decision:	1. The Claimant's application for the determination of a preliminary issue is refused. 2. Costs reserved pending application by the parties.
Hearing Dates:	17 November 2022 and 16 December 2022
Date of Order:	4 January 2023
Catchwords:	Application for a preliminary issue; Factors in favour of application; Whether preliminary issue is precise and defined; Whether preliminary issue would be determinative of claims.
Legislation cited:	Private International Law (Miscellaneous Provisions) Act, 1995 Application of English Law Regulations 2015
Cases Cited:	Steele v Steele, [2001] CP Rep 106 Merck KGaA v Merck Sharp & Dohme Corp, [2014] EWHC 428 (Ch). NMC Healthcare Ltd v Abu Dhabi Islamic Bank, [2022] ADGM CFI 0008
Case Number:	ADGMCFI-2022-002
Parties and representation:	Mr Richard Gillis KC, Mr William Willson and Mr Rabin Kok instructed by Trowers & Hamlins LLP for the Claimant Mr Henry King KC and Mr Nico Leslie instructed by Quinn Emanuel Urquhart & Sullivan UK LLP for the First, Thirteenth and Fourteenth Defendants

JUDGMENT

The Proceedings

1. The trial of these proceedings is fixed to begin in March 2024. At a case management conference ("**CMC**") on 17 November 2022, the claimant, Sayacorp B.S.C. (C) ("**Sayacorp**"), applied for an order for a preliminary issue. The application was adjourned part-heard to 16 December 2022. Between the hearings, the parties sought to formulate the issues of United Arab Emirates ("**UAE**") law between them and to agree upon the facts that should be assumed in order to decide the preliminary issue, if ordered.

2. Sayacorp, which is incorporated in the Kingdom of Bahrain and is licensed as an Islamic shariah closed joint stock company, was formerly called First Energy Bank BSC, and its activities included banking. The first twelve defendants were companies in the NMC Group, which was founded in the 1970's by a Dr B R Shetty and his wife, and grew to become the largest provider of private healthcare in the UAE. On 9 April 2020, the second defendant, NMC Health plc, was put into administration by the English High Court. On 27 September 2020, the first and the third to twelfth

defendants were put into administration by order of this Court, and the thirteenth and fourteenth defendants (the "**JA**") were appointed as their Joint Administrators.

3. In 2016 and 2018, Sayacorp entered into agreements with the first defendant, NMC Healthcare Limited ("**Healthcare**"), to provide financing facilities, including:

   a. a Murabaha Agreement of 21 December 2016 (the "**2016 Murabaha Agreement**") for a facility of up to US$100 million; and

   b. a Murabaha Agreement of 27 December 2016 (the "**2018 Murabaha Agreement**") for a facility of up to US$105 million.

4. NMC Health plc guaranteed Healthcare's obligations under the 2016 Murabaha Agreement, and all the corporate defendants other than Healthcare (the "**Guarantors**") entered into an agreement of 27 December 2018 to guarantee Healthcare's obligations under the 2018 Murabaha Agreement. In 2020, Healthcare defaulted under the 2018 Murabaha Agreement, and calls were made on the Guarantors. On 23 November 2020, Sayacorp filed proofs of debt in the administrations of Healthcare and the Guarantors other than NMC Health plc. On 2 November 2021, Sayacorp was notified that its proofs of claim had been rejected on the grounds that a cross-claim could be set off against it, and on 23 November 2021, the JA notified Sayacorp that they intended to make a claim against it.

5. Sayacorp brought these proceedings against the corporate defendants on 6 January 2022. By order dated 24 March 2022, they were stayed against NMC Health plc. By its amended claim of 27 May 2022, Sayacorp seeks against Healthcare and the other Guarantors an order for the payment of US$55,595,980.49, or in the alternative an order that the JA admit its proofs of debt in that amount. By an order dated 31 May 2022, the Court permitted Sayacorp to add the JA as defendants to the proceedings, and ordered that the proceedings against the third to twelfth defendants be discontinued.

6. On 1 July 2022, Healthcare and the JA filed a defence and a counterclaim. In their defence, they pleaded (i) that, under the terms of Deeds of Company Arrangement, Sayacorp was not entitled to seek a money judgment, but only an order that its proof be admitted; and (ii) that their counterclaims can be set off against Sayacorp's claim.

7. Healthcare has taken an assignment of the claims of the third to twelfth defendants (the "**Assignors**"), and the counterclaim includes both Healthcare's own claims and claims assigned to it. It is alleged that Healthcare and other entities in the NMC Group were victims of a substantial fraud operated over many years by shareholders and senior managers of the Group, and that it was carried out "*with the knowledge and collusion of*" Sayacorp and by, among others, Mr Khaleefa Butti Omair Yousef Almuhairi ("**KBBAM**"), who was the chairman of Sayacorp and Chairman of the Board's Investment Committee.

8. There are two categories of counterclaim: civil claims in tort (the "**Civil Claims**") and insolvency claims, which allege fraudulent trading on the basis that, from at least December 2016, Sayacorp was knowingly party to trading carried on with the intent to defraud, among others, Healthcare and the Assignors. Both categories concern these sets of transactions (the "**Transactions**"): the 2016 Murabaha Agreement; mandates (the "**Mandates**") that Sayacorp was given in 2017 to act as Healthcare's financial adviser; the 2018 Murabaha Agreement; and a Sukuk instrument of 21 November 2018 listed on the London Stock Exchange International Securities Market whereby the NMC Group raised funds, Sayacorp being a co-manager of the arrangement. At the heart of the counterclaims is the contention that Sayacorp is liable because KBBAM's knowledge of the fraud relating to the Transactions is to be attributed to it, or that it is vicariously responsible for his wrongful acts regarding the Transactions.

9. Healthcare and the JA contend that the governing law of the insolvency claims is the law of the Abu Dhabi Global Market ("**ADGM**"). As for the Civil Claims, their primary case is that they are governed by the law of the UAE, and that Sayacorp is liable under articles 282 and 283 of the UAE Civil Code on the basis of fraud or gross negligence (or both). They have an alternative case that, if UAE law does not govern the claims, then Sayacorp is liable to them under the law of the ADGM for conspiracy to injure by unlawful means.

10. The Civil Claims are denied. In its Defence to Counterclaim, Sayacorp contends that KKBAM was not involved in organising, negotiating or executing the Transactions, and so his guilty knowledge (if any) about any fraud concerning them is not attributable to it, and it is not vicariously liable for any wrongdoing on his part. It also disputes Healthcare's and the JA's contention that the matters complained of caused loss, on the grounds that, if Sayacorp had not entered into the Transactions, the NMC Group would have raised external finance elsewhere, and even if Sayacorp had notified the NMC Group of accounting irregularities associated with the alleged fraud, it cannot be shown that Healthcare or the NMC Group would have acted differently. Other defences to the Civil Claim pleaded by Sayacorp include: (i) that Sayacorp has cross-claims in dishonest assistance and unlawful means conspiracy (the "**Cross-Claims**"), which can be deployed by way of set-off or a defence of circuity of action; (ii) contributory negligence; and (iii) limitation.

11. Sayacorp contends that the Civil Claims are governed by English law, as are the Cross-Claims (although it pleads them alternatively under UAE law). In their Reply to the Defence to Counterclaim, Healthcare and the JA plead (inter alia) that the Cross-Claims are governed by UAE law.

The Application for a Preliminary Issue

12. Sayacorp sought an order for trial of a preliminary issue at the CMC without issuing a separate notice of application, but the issue is defined in a draft order attached to its Directions Questionnaire as follows: "*The question of the proper law of the Civil Claims and the Cross Claims shall be heard and determined as a preliminary issue* ...".

13. Rule 8(1) of the Civil Procedure Rules (the "**CPR**") provides that the Court may "*make any order, give any direction or take any step it considers appropriate for the purpose of managing the proceedings and furthering the overriding objective of these Rules*". The overriding objective in Rule 2(2) is to ensure that civil justice in the ADGM is "*accessible, fair and efficient*". There was (unsurprisingly) no dispute between Sayacorp, represented by Mr Richard Gillis KC, Mr William Willson and Mr Rabin Kok, on the one hand, and Healthcare and the JA, represented by Mr Henry King KC and Mr Nico Leslie, on the other hand, that the Court has a discretion, in an appropriate case, to direct trial of a preliminary issue, nor about the approach to how the discretion should be exercised.

14. Reference was made by counsel to English authorities, including the well-known list of matters identified by Neuberger J in *Steele v Steele, [2001] CP Rep 106* as potentially relevant to applications for a preliminary issue, but there is no need to go through them. It suffices to say that in appropriate cases orders have been made for a preliminary issue to determine which law governed the matters between the parties, including the decision in *Merck KGaA v Merck Sharp & Dohme Corp, [2014] EWHC 428 (Ch).*

Factors in Favour of the Application

15. To my mind, four significant considerations support Sayacorp's case for the Application. Firstly, as I said in *NMC Healthcare Ltd v Abu Dhabi Islamic Bank, [2022] ADGM CFI 0008*, "*For obvious reasons, it is important that a preliminary issue be precisely and clearly defined*" (at para 38): the issue proposed by Sayacorp is precisely stated and defined with certainty.

16. The other three considerations can be stated by reference to the judgment of Nugee J in the *Merck case*. He observed (loc cit at para 19) that "*The question of which is the proper law of the Agreement is an issue which has to be decided anyway*". Here too, the questions about the governing law must be decided sooner or later. Nugee J also said (at para 20), "*The decision on the issue will mean that the parties will then be able to prepare and appear at trial in the knowledge of which system of law governs the Agreement. That will obviously obviate entirely the need for expert evidence of the other system of law*".

17. The first of these two points needs little elaboration: in a case as complex as this, there is distinct advantage to both the parties and their representatives and the Court in being able to prepare for the case and focus at the hearing knowing the governing system(s) of law.

18. I should say more about the last point: Mr Gillis submitted that, if Sayacorp succeeds in establishing as a preliminary issue that the Civil Claims and Cross-Claims are governed by English law, this will mean that the Court will not need the assistance of experts in UAE law, and that will save time and costs in preparation for trial and at the trial itself. Otherwise, he said, "*extensive submissions on or expert evidence of UAE law*" will be required. Mr King submitted that Sayacorp exaggerated this point, but I am persuaded that Sayacorp's position is realistic. As I have said, after the hearing on 17 November 2022, the parties' representatives sought to identify and reach agreement about the issues of UAE law between them: their exchanges about support Sayacorp's argument. It has become clear that the issues include these:

    a. Healthcare and the JA plead that, under Article 282 of the UAE Civil Code, there is "*liability for tort where there is an act or failure to act, the act and/or failure to act is harmful and it causes harm*" and allege (in their propositions of UAE law) that a claim may be brought under Article 282 "*by reference to, inter alia, Article 383*", which provides that "*in all cases, a party shall be liable for any fraud or gross negligence on its part*". There is a difference between the parties about whether this fully states what acts (or failures to act) give rise to tortious liability, or whether, as Sayacorp contends, there is an additional requirement of unlawfulness, and if so, what it is.

    b. Further, the Court would likely be assisted by a UAE lawyer with regard to the test, under the UAE Civil Code, for what Healthcare and the JA term "*gross negligence*".

    c. There is also a difference between the parties about the circumstances in which the knowledge of an individual is attributed to the company of which he is an official. This, is, of course relevant to issues about whether the knowledge of KKBAM is to be attributed to Sayacorp for the purpose of establishing liability.

    d. There is a similar question about limitation under the law of the UAE: about whether and in what circumstances the knowledge of a director or shareholder or other individual is attributable to a company. This is relevant to when Healthcare (and, I suppose, the Assignors) are taken to have known of the wrongs alleged against Sayacorp.

    e. There is also an issue about when contributory negligence is available in principle as a defence under UAE law: more specifically, whether it is available: (a) when the tort is intentional; and (b) when an element of it is dishonesty.

19. These five points are not exhaustive of the issues of UAE law, but they sufficiently illustrate the position. A judge trained in English or another common law system will, as Mr Gillis submitted, require assistance from a lawyer familiar with the UAE civil legal system. After all, articles of the Civil Code, of which there is no authoritative English translation, must be interpreted in light of their context in the Civil Code as a whole and by refence to relevant jurisprudence, which might include Egyptian jurisprudence and legal works.

20. Therefore, I accept Sayacorp's argument that there would be significant savings in time and costs if a decision on the proposed preliminary issue meant that questions about UAE law could be put aside. However, the point should not be overstated. First, there would be significant savings only if Sayacorp were entirely successful in its contention that Civil Claims and Cross-Claims are governed by English law, but not if they are governed by the law of the UAE, nor, as I see it, if some of them are (for it is by no means certain that all are governed by the same law). Secondly, the Court is entitled under rule 117(2) of the CPR to direct that questions of foreign law should be dealt with by legal submissions, which, in all likelihood, would take the less time than expert evidence. It is possible that at least some issues of UAE law will not require expert evidence. Thirdly, the Court would require assistance only with regard to the principles of UAE law, and it is not the role of expert witnesses to opine about how the legal principles apply to the facts of the case, still less what facts should be found.

21. Fourthly, and importantly, a decision on the preliminary issue would not significantly reduce the factual inquiry at trial. Specifically, while there will, no doubt, be argument at trial about whether contributory negligence is a defence to all the Civil Claims, Sayacorp will advance the defence to at least some of them, whatever the governing law. Accordingly, however the preliminary issue is decided, evidence about the factual basis for the defence will be required at trial. Secondly, Civil Claims under UAE law include allegations of gross negligence as well as fraud, whereas Civil Claims under English law do not include allegations of negligence (or gross negligence). However, I accept Mr King's submission that the allegation of gross negligence depends on the same primary facts as the allegations of fraud (under UAE law) and conspiracy by unlawful means (under English law): the same allegations against KKBAM and his role in the Transactions will be examined, whichever the governing law; and in so far as the allegations of gross negligence might include complaints about persons at Sayacorp other than KKBAM, the facts on which they are based, or at least some of them, are likely in any case to be relevant to causation, that is to say to whether the loss would have been suffered in any event.

Does the Application identify a discrete Preliminary Issue that can be decided with little evidence?

22. The question which law governs the Civil Claims and the Cross-Claims is to be decided in accordance with the *Private International Law (Miscellaneous Provisions) Act, 1995* ("**PILA**"), incorporated into the law of the ADGM by the *Application of English Law Regulations 2015* and with modifications stated in Schedule 1 to the Regulations. Section 11 of PILA provides that, in cases such as this, the "*general rule is that the applicable law is the law of the country in which the events constituting the tort ... in question occur*", but that, where "*elements of those events occur in different countries, the applicable law is to be taken as being ... the law of the country in which the most significant element or elements of those events occurred*". Section 12 provides that the general rule may be displaced if "*it appears, in all the circumstances, from a comparison of - (a) the significance of the factors which connect a tort ... with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort ... with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country*"; and then "*the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country*". The relevant factors for this purpose "*include, in particular, factors relating to the parties, to any of the events which constitute the tort ... in question or to any of the circumstances or consequences of those events*". However, as incorporated into the ADGM law, the provisions of section 12 are subject to an overriding qualification (the "**Overriding Provision**") that a "*party's non-contractual obligations to another party shall be governed by any law expressly chosen by those parties in an agreement between them to apply such law to those non-contractual obligations, whether entered into before or after the event giving rise to the damage occurred*".

23. The basis for Sayacorp's argument that English law that applies to the Civil Claims and the Cross-Claims is that the 2016 and 2018 Murabaha Agreements include a provision that "*any non-contractual obligations arising out of or in connection with*" them should be governed by the English law, and, according to Sayacorp's pleading, the guarantees contain equivalent provisions; that the Mandates provide that the parties' obligations are governed by English law; and the Sukuk Trust Deed provides that English law is applicable to "*any non-contractual obligations arising out of or in connection with*" it. It is said that, therefore, English law governs the Civil Claims and the Cross-Claims either (in the case those related to the Murabaha Agreements) under the Overriding Provision, or under the general rule in section 11 of PILA, or because of the significance of the contractual provisions in assessing the applicable law by reference to the significant factors under section 12.

24. Healthcare and the JA, on the other hand, plead with regard to the Civil Claims that "*the choice of law provisions in certain related contacts ... are of subsidiary importance in circumstances where (a) The claims do not allege breaches of the 2016 Murabaha Agreement and of the 2018 Murabaha Agreement, or breaches of tortious duties owed under those contracts, but rather concern a wider tortious conspiracy and pattern of fraudulent conduct... . (b) [Sayacorp] was not a party to the 2018 Sukuk Deed... . (c) ...[T]he Mandates did not provide that English law would govern their non-contractual obligation*... ". They also plead that the Guarantors were not parties to the Agreements containing the provisions on which Sayacorp relies.

25. Initially Sayacorp submitted that "*the governing law of the* [Civil Claims and Cross-Claims] *is a discrete, siloed issue*" that will largely be decided on the basis of "*legal arguments and arguments relating to the construction of the governing law clauses in the 2016 and 2018 Murabaha Agreements – only a limited amount of evidence will be required*". It also argued that any facts that could not be agreed were "*not crucial*" to the dispute, and could probably be assumed, if not agreed. This was over-optimistic, as became apparent from the parties' exchanges before the resumed hearing. I do not express any view on Sayacorp's argument about the Overriding Provision. It suffices for present purposes to note that, at least as regards the claims concerning the Mandates and the 2018 Sukuk, Healthcare and the JA are entitled to rely on, and present evidence, about the various factors referred to in the other provisions of section 12 of PILA.

26. Against this background, when Healthcare and the JA sought to reach agreement with Sayacorp about what facts should be assumed for the purpose of hearing the Preliminary Issue, there was a wide gulf between them. The position of Healthcare and the JA was that the assumed facts should cover all relevant facts that might be found at trial, including controversial facts, such as KKBAM's involvement in the frauds, and including facts that might emerge upon disclosure, such as what other persons at Sayacorp did at KKBAM's direction. Sayacorp, on the other hand, would confine the assumed facts to what is agreed on the pleadings or can readily be verified at this stage of the proceedings. In particular, it declines to invite the Court to hear the preliminary issue on assumptions that it was involved in the alleged fraud. The reputational and commercial reasons for this stance are readily understandable, but I cannot accept that the governing law can be decided without regard to the possibility that Healthcare and the JA will establish their allegations against Sayacorp.

27. Faced with this difficulty, Mr Gillis proposed that the Court should decide the preliminary issue on alternative bases: on the basis that Sayacorp would seek to prove at trial, and on the basis of the facts that Healthcare and the JA would seek to prove at trial. I do not find it attractive to order a preliminary issue to determine the proper law when the decision might be that it depends on what is proved at trial. Nor is it practical: it does not accommodate the possible, maybe probable, result that each party might win on some factual issues and not others.

28. The reality is that a great deal of evidence would be required to decide the preliminary issue, much of it about the allegations of fact on which the Civil Claims and Cross-Claims are based and which will be for determination at the subsequent trial. The proposed preliminary issue is not discrete.

Other factors against the Application

29. However the proposed preliminary issue is decided, it would not determine any of the Civil Claims or Cross-Claims. This will often be the case with an application for preliminary decision about a governing law. It is a relevant consideration when deciding whether to order a preliminary issue, but, as Mr King rightly accepted, it is not in itself fatal to the Application that it would not be: see *NMC Healthcare Ltd v Abu Dhabi Islamic Bank, (loc cit) at para 35.*

30. Sayacorp suggested that the hearing of the proposed preliminary issue would take one day. I think that optimistic, but in any event, the hearing of a preliminary issue would disrupt the preparation for trial. Moreover, it is very likely that an early decision on the governing law would be appealed (or at least the losers would apply for permission to appeal). If the governing law is decided after the trial, it might well be apparent that the issue about the governing law is an arid one: that the overall result would be the same whether the issues be governed by English law or the law of the UAE.

Conclusion

31. I must balance the advantages, and potential advantages, of an early decision about the governing law against the disadvantages. To my mind, the balance comes down against ordering the trial of the preliminary issue. The weightiest considerations are that the factual inquiry would not be significantly reduced by an early decision about the governing law (or laws) and that the Application does not identify an issue that can be decided without a good deal of evidence about issues at the heart of the allegation that Sayacorp is liable for KKBAM's involvements in the fraud. I refuse the Application.

Costs

32. Any application concerning the costs of the Application is to be made by no later than 5.00 pm (GST) on 25 January 2023. I will then give directions for written submissions, and, unless I order otherwise, decide it without an oral hearing.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
4 January 2023