

JUDGMENT SUMMARY

Neutral Citation	[2023] ADGMCFI 0002
Case Number	ADGMCFI-2022-002
Name of Case	Sayacorp B.S.C. (C) v NMC Healthcare LTD (in administration) (C) & Others
Judge	Justice Sir Andrew Smith
Date Issued	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.
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
Legislation and Authorities Cited	Private International Law (Miscellaneous Provisions) Act 1995 (UK) – Sections 11 and 12 UAE Federal Law No. 5 of 1985 on the Civil Transactions Law of the UAE (the “UAE Civil Code”) – Articles 282 and 283 ADGM Application of English Law Regulations 2015 – Schedule 1 ADGM Court Procedure Rules 2016 – Rules 2(2), 8(1) and 117(2)
Executive Summary	In this case, Sayacorp BSC (“ Sayacorp ”), a bank, had provided financing to NMC Healthcare Ltd. The dispute arises from the default on these facilities and allegations of widespread fraud within the NMC Group, which the Defendants claim Sayacorp was involved in. Sayacorp applied for a preliminary issue to determine whether English law or UAE law should govern the civil claims in tort and the cross-claims in dishonest assistance and unlawful means conspiracy in the case. The Court ultimately refused this application, finding that resolving the governing law would require substantial evidence regarding the factual allegations of fraud and would not significantly reduce the scope of the upcoming trial.

<p>Overall Summary</p>	<p>Background</p> <p>This Abu Dhabi Global Market (“ADGM”) Court of First Instance (Commercial & Civil Division) judgment considers Sayacorp BSC’s (“Sayacorp”) application for a preliminary issue to determine the proper law governing the Civil Claims and Cross-Claims described below (the “Application”).</p> <p>Sayacorp brought proceedings seeking payment of US\$55,595,980.49 from NMC Healthcare Ltd (“Healthcare”) and the other Guarantors (all the corporate Defendants other than Healthcare), or alternatively, an order admitting its proofs of debt in that amount. This stems from financing facilities, including Murabaha agreements entered into in 2016 and 2018 between Sayacorp and Healthcare. In 2020, Healthcare defaulted on the 2018 agreement, and calls were made on the Guarantors.</p> <p>In 2022, Healthcare and the Joint Administrators of Healthcare (the “JAs”) (the Thirteenth and Fourteenth Defendants) filed a Defence and Counterclaim. Their Counterclaim alleges that Healthcare and other NMC Group entities were victims of a substantial fraud. They alleged that Sayacorp was knowingly party to fraudulent trading or vicariously responsible due to the actions and knowledge of Mr Khaleefa Butti Omair Yousef Almuhairi (“KKBAM”), who was the Chairman of Sayacorp. There are two categories of Counterclaim: (i) civil claims in tort (the “Civil Claims”) and (ii) 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 Third to Twelfth Defendants. Both categories concern these sets of transactions (the “Transactions”): the 2016 Murabaha agreement; 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.</p> <p>Sayacorp denied the Civil Claims. 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 Claims 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.</p>
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	<p>In the Application, Sayacorp contended that English law applied to the Civil Claims and the Cross-Claims, citing choice of law clauses in the Transactions. Healthcare and the JAs argued that UAE law primarily governed the Civil Claims, or alternatively ADGM law for conspiracy to injure by unlawful means.</p> <p>Arguments in favour of the Application included that the issue was precisely defined, the governing law must be decided eventually, and determining the law early could save time and costs by potentially avoiding the need for expert evidence on UAE law.</p> <p>Analysis and Conclusion</p> <p>However, the Court refused the Application. A key reason was that the proposed preliminary issue was not discrete and would require a great deal of evidence about factual allegations at the heart of the case, including whether Sayacorp was involved in the alleged fraud. The Court noted that deciding the governing law might depend on what facts were ultimately proven at trial. Furthermore, deciding the preliminary issue would not determine any of the Civil Claims or Cross-Claims themselves. The Court balanced the potential advantages against the disadvantages, concluding the balance was against ordering the trial of the preliminary issue.</p>
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This statement is not intended to be a substitute for the reasons of the Court or to be used in any later consideration of the Court’s reasons.