

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

**COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN**

DIJLLAH JEWELLERY FZE

Claimant

and

AVA TRADE MIDDLE EAST LIMITED

Defendant

JUDGMENT OF JUSTICE PAUL HEATH KC



Neutral Citation:	[2025] ADGMCFI 0010
Before:	Justice Paul Heath KC
Decision Date:	23 May 2025
Decision:	<ol style="list-style-type: none"> 1. The Preliminary Issues are determined as follows: <ol style="list-style-type: none"> a. The contract between the parties is governed by English law. b. The Claimant did not designate the 492 Account as an Islamic Account. 2. Consequential to paragraph 1 above, by 12.00 pm on 30 May 2025, the Claimant shall file a Draft Order setting out all amendments agreed between the parties in relation to: <ol style="list-style-type: none"> a. the Expert Issues Order; and b. paragraphs 18-33 of the Case Management Order. 3. If the parties are unable to agree on any proposed amendments pursuant to paragraph 2 above, each party shall file and serve by 12.00 pm on 30 May 2025 their list of proposed amendments supported by a statement of reasons in relation to each proposed amendment, and the Court will decide any proposed amendment that is not agreed on the papers as soon as practicable thereafter. 4. Costs reserved. 5. Liberty to apply.
Hearing Date(s):	29 April 2025
Date of Orders:	23 May 2025
Catchwords:	Preliminary issues. Governing law. Applicable version of terms and conditions. Whether a contractual election was made.
Cases Cited:	<i>Awad v 3AM Property Investment Company LLC</i> [2025] ADGMCFI 0003



	<i>Fabre v Arenales</i> (1992) 27 NSWLR 437 (CA) <i>NMC Healthcare Ltd (in administration) v Dubai Islamic Bank PJSC & Ors</i> [2023] ADGMCFI 0017
Case Number:	ADGMCFI-2024-169
Parties and representation:	Mr. Robert Whitehead of Hamdan Al Shamsi Lawyer and Legal Consultants LLC for the Claimant Mr. Amr Bajamal of Nassar H Bajamal (NHB Legal) Limited for the Defendant

JUDGMENT

Introduction

1. Dijllah Jewellery FZE (“**Dijllah**”) is a bullion company which undertakes physical trading on gold commodities’ markets. Dijllah is registered in the Jebel Ali Free Zone, in Dubai, UAE.
2. AVA Trade Middle East Ltd (“**AVA Trade**”) is a broker, primarily offering services in the bullion trading industry. It describes itself as “*serving over 300,000 registered traders around the globe*”. Dijllah engaged AVA Trade to provide agreed financial services to it.
3. The substantive trial of this proceeding is set down for hearing over three days (with one day in reserve) starting on 12 August 2025. During the course of the proceedings, it became clear that there were two points that could usefully be determined as preliminary issues (the “**Preliminary Issues**”). While they are not necessarily dispositive of the case, a ruling on each is likely to save time, either in preparation for or in the duration of the trial.
4. The Preliminary Issues concern the governing law of the contract into which the parties entered (the “**Contract**”), in circumstances where there is a dispute between the parties as to which version of Ava Trade’s “*General Terms and Conditions*” (the “**General Conditions**”) applies to their trading relationship, and whether their trading relationship was subject to Islamic financing principles. I frame the questions as follows:
 - a. Is the Contract between Dijllah and AVA Trade governed by English law or the laws of the Emirate of Abu Dhabi (Abu Dhabi law)? Dijllah contends for the former, while AVA Trade asserts the latter (the “**Governing Law Issue**”).
 - b. Did Dijllah, through its agent, Mr Dilshard Khan, Head of Trading (Precious Metal), designate (under clause 25.1 of the Contract)¹ the account to be an Islamic account? (the “**Islamic Account Issue**”)

¹ Clause 25 is set out in full at paragraph 27 below.



5. On 3 April 2025, I made an order for the determination of the Governing Law Issue on the papers. I have received witness statements and skeleton arguments in relation to that issue.
6. On 15 April 2025, I made an order that the Islamic Account Issue be tried as a Preliminary Issue. An oral hearing took place on 29 April 2025, at which Mr Khan gave evidence and was cross-examined. I received the last of counsel's written closings on 12 May 2025.
7. For convenience, I deal with both issues together.

Context

8. In 2021, Dijllah commenced negotiations with AVA Trade. Ultimately, it established three accounts with AVA Trade. The one in issue in this proceeding is number [REDACTED] 492 (the "**492 Account**"), which AVA Trade opened on 12 April 2022. The first trade on the 492 Account took place on 8 February 2023. The last trade was on 22 June 2023.
9. AVA Trade's position is that, whenever any customer creates an account with it, that customer becomes bound by the General Conditions, which are published and updated from time to time on its official website.
10. The 492 Account was established under General Conditions contained in an agreement into which the parties entered on-line. No physical contract was executed. Rather, Dijllah clicked on an option shown on AVA Trade's website to choose the finance product that suited it best.
11. Counsel accept that the outcome of my decision on the Islamic Account Issue will be the same, irrespective of whether the Contract is governed by English or Abu Dhabi law.

The Governing Law Issue

12. I have received two witness statements on the question of governing law. One is from Mr Mohammed Alabid, Dijllah's Managing Director. He gives evidence about the way in which the on-line account with AVA Trade was opened and the General Conditions that he believed governed the Contract. AVA Trade's witness was Ms Somya Priyadarshini, a legal representative of the company. She describes the process by which sub-trading accounts are created through AVA Trade's on-line system. Submissions from counsel for each party also considered whether there were any differences between English and Abu Dhabi law which might be determinative of Dijllah's claim.



13. The version of the General Conditions on which Dijllah relies is annexed as Exhibit 11 to its Particulars of Claim. These are dated 26 November 2015 (the “**2015 Terms**”). The governing law provision states:²

“46. GOVERNING LAW AND JURISDICTION

46.1 *This Agreement, the rights and obligations of the parties hereto, and any judicial or administrative action or proceeding arising directly or indirectly hereunder or in connection with the transactions contemplated hereby shall be governed by, construed and enforced in all respects in accordance with the laws of England and AvaTrade and the customer hereby irrevocably submit to the nonexclusive jurisdiction of the English Courts.*”

14. Ms Priyadarshini emphasised that the contract into which Dijllah entered was with “AVA Trade Middle East Ltd”, which used general terms and conditions applicable in the Gulf region. According to Ms Priyadarshini, as at the date on which the account was opened (12 April 2022),³ the version of the General Conditions that would have been accessed through Dijllah’s “User Profile” had been in effect since 11 December 2019 (the “**2019 Terms**”).

15. Clause 46 of the 2019 Terms provides:

“46. GOVERNING LAW AND JURISDICTION

46.1 *This Agreement, the rights and obligations of the parties hereto, and any judicial or administrative action or proceeding arising directly or indirectly hereunder or in connection with the transactions contemplated hereby shall be governed by, construed and enforced in all respects in accordance with the laws of Emirate of Abu Dhabi and [AVA Trade] and the customer hereby irrevocably submit to the exclusive jurisdiction of the Emirate of Abu Dhabi courts.*”

16. In explaining the way in which Dijllah’s account with AVA Trade was opened, Mr Alabid:

- a. Referred to clause 6 of AVA Trade’s “Application Form”, which set out a declaration to be confirmed by the applicant that it had “*read, understood and accepted the term and conditions applicable to [the relevant] corporate account opening on www.avatrade.com*”.

² A separate version of the General Conditions, effective from 3 May 2024, is annexed to the witness statement of Mr Alabid. He explains that this version of the General Conditions were “current” at the time he made his witness statement. Clause 47.1 of those General Conditions also apply English law, in the same terms as clause 46.1 of the 2015 Terms.

³ See paragraph 8 above.



- b. Understood that, by checking the “*I Accept*” box, he had in effect signed the “*Application Form*” on behalf of Dijllah, and that Dijllah would be taken to have agreed to the relevant terms and conditions.
 - c. Clicked on the website link and was led to the AVA Trade website that had the terms and conditions contained in the version of the General Conditions on which Dijllah relies (i.e. the 2015 Terms). These terms stated that the Contract was governed by English law.
17. Although Ms Priyadarshini has explained the way in which sub accounts were generally opened, mistakes can be made. Dijllah must have obtained the 2015 Terms containing clause 46.1 (which refers to English law) at the time the account was opened. There is no suggestion to the contrary. Whether the website link to the General Conditions on which Dijllah relies ought to have taken Mr Alabid to the 2019 Terms instead of the 2015 Terms is beside the point. The Contract is governed by those terms accessed by a party that opens an account through AVA Trade’s on-line processes. On a balance of probabilities, I find that Mr Alabid accessed the General Conditions containing the 2015 Terms when the 492 Account was opened. As a result, English law applies.
18. For those reasons, I hold that, the General Conditions constitute the 2015 Terms, and, that within the boundaries of the wording of clause 46.1 of the 2015 Terms, the Contract between Dijllah and AVA Trade is governed by English law.⁴ The most significant consequence of that holding is that Dijllah’s claims based on causes of action for concealment and unjust enrichment are to be determined in accordance with English law.

The Islamic Account Issue

19. On 7 June 2023, Dijllah made a request to withdraw (the “**Withdrawal Request**”) a sum of USD 1,000,000 from the 492 Account. At that time, the 492 Account had a positive balance of USD 2,165,842.32. Dijllah’s position is that, prior to opening the 492 Account, it was assured that withdrawal requests would be approved quickly, with funds received within one to two days. It was not until 12 June 2023 (after a reminder from Dijllah) that AVA Trade indicated that it had rejected the withdrawal request due to Dijllah’s “*trading practices*”.
20. Ultimately, AVA Trade deducted a sum of USD 988,884 from the 492 Account, retaining it for its own benefit. AVA Trade relies on principles involving the operation of Islamic Accounts as one of the grounds on which it says that it was entitled to deduct and retain the sum of USD 988,884.
21. By a witness statement provided by Ms Priyadarshini on the Governing Law Issue, AVA Trade confirmed that the “*deduction of USD 988,884 was made from [the 492 Account] under clause 25*” of the General Conditions.⁵ This is the provision that enables a customer to elect to convert to an Islamic Account. In response, Dijllah contends that the account

⁴ Clause 46.1 of the 2015 Terms is set out at paragraph 13 above.

⁵ Clause 25 is set out at paragraph 27 below.



was a traditional banking arrangement, whereby moneys could be deposited and withdrawn from time to time at its discretion. For that reason, it asserts that there was no legitimate basis on which AVA Trade could have deducted the sum of USD 988,884 from the 492 Account for its own benefit.

22. My order requiring the Islamic Account Issue to be tried as a Preliminary Issue was made on 15 April 2025, in the following terms:

“IT IS ORDERED AND DIRECTED THAT:

1. *The Hearing ... shall determine the following question of fact as a preliminary question in the proceedings: “Did, as a matter of fact, the Claimant elect (under clause 25 of the Agreement) that the account be designated as an Islamic Account?” (the “Preliminary Question”).*
 2. *The Hearing on the Preliminary Question shall proceed only on the basis of the Claimant’s witness evidence.*
 3. *The Claimant’s witness shall attend the Hearing for examination by the Claimant and cross-examination by the Defendant.”*
23. I ordered that the Islamic Account Issue be tried solely on the basis of Dijllah’s witness statement because, as at 15 April 2025, AVA Trade had elected not to file witness statements in response to those provided by Dijllah. However, at the hearing, Mr Bajamal, for AVA Trade, sought to rely on Ms Priyadarshini’s witness statement on the Governing Law Issue. Because her witness statement made it clear that it was limited to that topic, I ruled that evidence inadmissible for the purpose of the Islamic Account Issue. Nevertheless, I allowed Mr Bajamal to put to Mr Khan any documents produced by Ms Priyadarshini which had been disclosed during the disclosure process. That is the approach that would have been followed at trial, if there had been no bifurcation of the Islamic Account Issue.
24. AVA Trade’s “Statement of Further Particulars to Defence” of 24 March 2025 stated:

“...

2. *Para 31 of the Defence states as follows:*

“The Claimant’s account number [REDACTED] 492 was an Islamic Account under Clause 25 of the Agreement where swap charges on positions held overnight are waived for a few days in order to accommodate the religious beliefs as explained in the Paragraph 16 of this Defence. The Claimant had explicitly requested this condition from their account manager, Mr. Alain A. Mansour (“Mr. Mansour”), to be able to avail the



benefit of swap-free account which is only available for Islamic Accounts.”

3. *The Defendant’s position is that the Claimant requested the Defendant to covert account number [REDACTED] 492 into an Islamic Account in order to avail of the benefit of a swap-free account.*
 4. *As pleaded in paragraph 31 of the Defence, this request was made verbally on the Claimant’s behalf by Mr. Dilshad Khan during a telephone call with Mr Alain Mansour on 8 February 2023.*
 5. *The Defendant activated the Claimant’s account number [REDACTED] 492 as an Islamic Account on 8 February 2023, following the instructions of Mr. Dilshad Khan.”*
25. Although the particulars were provided on 24 March 2025, at the time that my Order of 15 April 2025 was made, AVA Trade had filed no evidence to support the contention pleaded in those particulars; specifically, to confirm that, on 8 February 2023, Mr Khan had requested AVA Trade’s account manager, Mr Alain Mansour, to convert the 492 Account into an Islamic Account.⁶ As a matter of law, the absence of such evidence may be taken into account in determining what factual finding should be made on whether a request was made. In *Fabre v Arenales*,⁷ Mahoney JA (with whom other members of the Court of Appeal of New South Wales agreed) observed that the “*significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so*”.⁸
26. AVA Trade’s case is that it activated the 492 Account as an Islamic Account on 8 February 2023 (the day on which the account was opened)⁹ after Mr Khan had given telephone instructions to Mr Mansour to do so on that day. Dijllah had unequivocally stated that no such election had been communicated to AVA Trade by any authorised representative of Dijllah.
27. Clause 25 of the General Conditions provides:

“25. ISLAMIC ACCOUNTS

- 25.1 *In the event that [Dijllah], due to its observance of Islamic religious beliefs cannot receive or pay interest, [Dijllah] may elect to designate, in the manner provided by [AVA Trade], its trading*

⁶ As to the need to “*designate*” the account as an Islamic Account, see clause 25.1 of the General Conditions, set out at paragraph 27 below. Limitations on the way in which an Islamic Account would operate are set out at clauses 25.2-25.4.

⁷ *Fabre v Arenales* (1992) 27 NSWLR 437 (CA).

⁸ *Ibid*, at 449. See also, to similar effect, *NMC Healthcare Ltd (in administration) v Dubai Islamic Bank PJSC & Ors* [2023] ADGMCFI 0017 at paragraph 39 and *Awad v 3AM Property Investment Company LLC* [2025] ADGMCFI 0003 at paragraph 24.

⁹ See paragraph 8 above.



account to be an Islamic Account, which is not charged with, or entitled to, overnight interest and/or rollovers.

- 25.2 *In the event that [Dijllah] designates its account as an Islamic account, [Dijllah] may not keep transactions in such account open for more than 5 days and may not otherwise abuse such benefit.*
- 25.3 *[AVA Trade] reserves the right to cancel the aforesaid benefit at any time and take any action necessary in [AVA Trade's] absolute discretion due to abuse of this benefit.*
- 25.4 *Such actions may include, without limitation, the designation of the Islamic Account as a regular account and retroactively effecting required adjustments (e.g., setting off amounts from the account equal to amounts paid by [AVA Trade] as interest), cancellation of transactions, and adjustment of account balances.”*
28. Oral evidence on the Islamic Account Issue was heard on 29 April 2025. Mr Khan confirmed his earlier written evidence. He deposed that he had never asked AVA Trade to designate the 492 Account as an “*Islamic Account*”. Accordingly, the only direct evidence on the question whether Dijllah designated the facility as an “*Islamic Account*” under clause 25.1 of the Contract is that of Mr Khan.
29. In his comprehensive closing argument, Mr Bajamal referred to (what he characterised as) Mr Khan’s uncertainty of any telephone conversation with Mr Mansour on 8 February 2023 and to (what he contended were) equivocal statements about Mr Khan’s focus on terms of payment and his failure to read the terms of the Contract carefully. However, Mr Bajamal avoided confronting directly the absence of any evidence from Mr Mansour to respond to Mr Khan’s direct denial of having made an election to designate the facility as an Islamic Account, under clause 25.1 of the Contract.
30. Whatever inferences might be drawn at a later substantive hearing about any uncertain and/or equivocal statements from Mr Khan on questions of fees and costs (on which I reserve my view), I consider that Mr Khan was an honest and reliable witness on this important question of fact. For AVA Trade to succeed it has to establish that an intentional election was made by Dijllah to designate “*its trading account to be an Islamic Account*”.¹⁰ I accept Mr Khan’s evidence that he did not make such an election in any telephone conversation that he may have had with Mr Mansour on 8 February 2023. The absence of evidence from Mr Mansour has fortified my conclusion on this issue.¹¹ In my view, the only explanation for Mr Mansour’s absence as a witness is that AVA Trade feared that his evidence would not support the pleading by which it alleged that Mr Khan had, on behalf of Dijllah, elected to designate the account as an Islamic Account.

¹⁰ See clause 25.1 of the General Conditions, set out at paragraph 27 above.

¹¹ See paragraph 25 above.



Result

31. For the reasons I have given:

- a. I hold that the governing law of the Contract is English law.
- b. I find that Dijllah did not designate the 492 Account as an Islamic Account.

32. On 4 April 2025, I made orders in relation to the topics to be addressed in expert evidence to be filed and served in accordance with earlier directions given on 12 December 2024. As a result of the need to deal with the Governing Law and Islamic Account Issues separately, there has been some slippage in relation to the dates by which expert evidence was to be filed. I request counsel to confer and provide to the Court a proposed consent order:

- a. modifying the dates by which relevant expert evidence shall be filed and served; and
- b. clarifying the topics that remain following my ruling on the Islamic Account Issue.

I ask counsel to bear in mind the need to structure such an order in a manner that will not put the August 2025 substantive trial in jeopardy. The proposed consent order shall be filed and served by midday on 30 May 2025. If counsel cannot agree, separate memoranda shall be filed by the same time, and I will rule on those issues on the papers.

33. I reserve questions of costs for determination once the outcome of the substantive proceeding is known.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
23 May 2025