

ARTICLE:

The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates

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Introduction

The purpose of this article is to set out and discuss the law in the United Arab Emirates regarding the use of electronic documents and electronic signatures as a means of proof in legal proceedings.¹ Arguably, transactions made on-line need a special legal system that adjusts to the environment of e-commerce, and one that is capable of accommodating the needs of those engaged in electronic transactions.² The inherent issues of risk and security when dealing with the internet need control and regulation; because of this, different countries have undertaken measures to regulate e-commerce.³

In Arab countries, Tunisia initiated direct measures to regulate electronic transactions by passing Law No. 83 of 2000. In the United Arab Emirates, Dubai passed Law No. 2 of 2002 to regulate electronic commerce and transaction in electronic transactions. Acting in response to Dubai's initiatives, the Federal Government of the United Arab Emirates subsequently passed No. 1 Federal law of 2006 on Electronic Transaction and Commerce. This paper seeks to look into the Federal Law on Electronic Commerce and Transaction in the United Arab Emirates (UAE). There are numerous other laws, but this paper focuses on the Federal Law No. 1 of 2006 on Electronic Commerce and Transactions. Even though the law was passed some seven years ago, there is a deficiency of scholarly research on this important piece of legislation. This article seeks to fill that lacuna. Pursuant to this matter, it is appropriate to examine the Law on Electronic Transaction and Commerce in UAE, the regulation of electronic evidence, and for a better understanding, it is appropriate to consider a case study.

¹ Jacaeline Klosek, *The War on Privacy* (Greenwood Publishing Group, 2007), 30.

² Fred Molen, *Get Ready for Cloud Computing: A Comprehensive Guide to Virtualization and Cloud Computing* (The Netherlands: Van Haren Publishing, 2010), 16.

³ Colin Bennett and David Lyon, *Playing the Identity Card: Surveillance, Security and Identification in Global Perspective* (London: Routledge, 2013), 139.

The law on electronic transaction and commerce in the UAE

As the law on Electronic Transaction and Commerce was only endorsed in the year 2006, it is to be expected that there will be a deficiency of scholarly studies and case law. Unfortunately, the legislation did not incorporate the UNCITRAL model law as the foundation of the law of electronic commerce.⁴ Here, the focus is on the UAE Federal Law No. 1 of 2006 relating to Electronic Transactions and Commerce in the UAE, to explore the *raison d'être* of the law of electronic commerce in the UAE, the extent of electronic commercial law, and the effect caused by the case study discussed in this article.

Raison d'être of the law of electronic commerce

The law of electronic commerce in all countries covers a range of important areas and matters that are brought about by modern technology and the effect it has on society. These areas involve the confirmation of electronic signatures, electronic contracts, liability of the verifier of signatures, evidence of the value of electronic documents, amongst other things, and the responsibility of the providers of internet services.⁵ In a perfect world, a simple piece of legislation is enough to cover every major area. However, the law governing electronic commerce is not sufficient.

Article 3 of the Electronic Commercial Law of the UAE specifies its purposes, which include the safeguarding of the rights of individuals making transactions electronically and to settle their obligations; to encourage, as well as to facilitate electronic transactions or communications through viable electronic records, and generally to establish rules and regulations that are uniform, and to promote

⁴ Model Law on Electronic Commerce (adopted by the Commission on 12 June 1996); Model Law on Electronic Signatures (adopted by the Commission on 5 July 2001).

⁵ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.01.2000, p.12.

public confidence.

It is significant that setting clear objectives in the content of the law itself is not included in the legislative or traditional practices of a typical civil law country, especially in the UAE. It is more common for common law countries to denote the reasoning for a particular piece of legislation. That is to say that the law governing electronic commerce was drafted by common law specialists and was subjected to the drafting style of Britain. This is so since, in countries practicing civil law, the aim of the law and its context occur in the preparatory stage, with the notes explaining it being included in the bill.

Article 3

The two major objectives revolving around article 3 are: the safeguarding the interests of the parties involved in electronic commerce and transactions, and outlining their responsibilities, as well as improving the application of electronic commerce and dependability through the development of legislation. Article 3 of the Electronic Commercial Law of the UAE provides as follows:

‘This law aims at the achievement of the following:

1. Protection of the rights of the electronic dealers and the specifications of their obligations.
2. Encouragement and facilitation of the electronic transactions and correspondence by electronic records to be relied upon.
3. Facilitation of and removal of any obstacle before the e-commerce and the other electronic transactions which may result from the obscurity as to the requirements of writing and signature and in order to support the legal and commercial development for the implementation of the e-commerce in a guaranteed manner.
4. Facilitation of the transfer of the electronic documents between the governmental and non-governmental bodies and supporting the availability of the services of such bodies and the institutions competently through electronic correspondence to be relied upon.
5. Minimizing the extent and scope of falsification of the electronic correspondence and the subsequent changes of such

correspondence in addition to minimizing the chances of deceit in the e-commerce and the other electronic transactions.

6. Establishing unified principles to the rules, regulations and standards in respect of the authentication and safely of the electronic correspondence’.

Objective evaluation

It is clear that the wide range of objectives outlined in article 3 cannot possibly be attained by one section of legislation without relying on other laws. The attainment of those objectives relies on the legal environment provided in the entire UAE, and not just the context of law relating to electronic commerce. The fact that one of the parties has a history of using electronic methods does not necessarily mean the enhancement or encouragement of electronic commerce. The main issue is to control the transactions and the ability to use electronic records that serve as proof in the legal process.

Federal Law No. 1 of 2006 on Electronic Commerce and Transactions focuses on encouraging electronic transactions by offering a law that governs electronic signature verification to make sure of the validity and authenticity of the documents. This is the first move in ensuring that the rights of the parties involved in electronic business are secured. This law has, to a greater extent, attained these aims by providing comprehensive rules in relation to the confirmation of electronic signatures. However, it can be argued that this law concentrates more on formalities, thus ignoring the substance. Whilst most of the articles of the law cover the authenticity of electronic documents and the confirmation of electronic signatures to a great extent, the substantive rules have been ignored. Success will be achieved when the law concerning electronic commerce passes the litigation test and becomes effective in safeguarding the interests of all the parties involved in transactions over the internet. These safeguards will be measured by a reduction in cases involving electronic evidence in the courts.

It is interesting to know that one of the purposes is to improve electronic transactions both at the local and international level. It is possible that by controlling electronic transactions, the law concerning electronic commerce can improve local transactions, although the manner in which it will improve international transactions is not yet apparent. When referring to

electronic commerce at the international level, it is vital to control matters caused by a conflict of law, as well as the law that applies at the time of the transaction. Nevertheless, the law relating to electronic commerce has not dealt with the question of conflicts of law or applicable law when it comes to international transactions that include a party from the UAE.

Exclusions from the scope of application of the laws relating to electronic commerce

Article 2 of the law governing economic commerce offered a list of documents that are not under the scope of the law of economic commerce. It is very important that those exclusions be explored, to determine whether or not they serve the purposes of the law set out in article 3. Article 2 of the Electronic Commercial Law of the UAE provides:

- ‘1. The rules of international trade practice pertaining to the electronic transactions and trade as well as the general principles of the civil and Commercial transactions shall apply to matters not part include provided for in this law.
2. This law shall apply to these electronic records, documents and signatures pertaining to the electronic transactions and commerce. The following shall be exempted from its provisions:
 - A. The dealings and issues pertaining to the personal matters, such as marriage, divorce and wills.
 - B. Documents of title to immovable property.
 - C. Negotiable instruments.
 - D. Dealings in respect of the sale and purchase of immovable property, disposal of the same and its lease for periods exceeding ten years as well as the registration of any other rights pertaining to the same.
 - E. Any document which the law requires to be notarized by the notary public.
 - F. Any other documents or dealings exempted by a special law provision.
3. The Cabinet may, by virtue of a decision issued hereby, add any other dealings or

matters to the provisions of the foregoing clauses, of clause (2) of this Article or delete or amend the same’.

Exclusions

When the list of documents and activities that are excluded are explored, the study will first take care of the direct exclusions before attending to the controversial ones, and thus will not use the same order as the one adopted by the legislature.

Article 2 of the first exclusion relates to issues of personal status such as wills, divorce and marriage. Those who drafted the electronic commercial law are responsible for leaving out these issues, given their significance and the religious features of such issues. Personal status is important because of its nature, as well as its connections with rituals and religious beliefs, which cannot be subject to the law of electronic commerce. Marriage, as is the case with divorce, has its rituals outlined in Sharia law, which does not fall under the electronic field. It is important to note that marriage, wills and divorce are considered as examples and do not comprise a comprehensive list. For this reason, all personal status issues under the range of Federal Law No. 28 of 2005 are excluded. Guardianship, legal capacity and inheritance are also examples of excluded cases, as they consist of personal issues, though not counted under the law of electronic commerce.

The other exclusion is title deeds regarding immovable properties. This exclusion is crucial, because it is also repeated in the fourth exclusion. This particular exclusion is not familiar to the UAE government in the movement towards the application of electronic governance. Furthermore, the law relating to electronic commerce includes the rules providing for the validity of electronic signatures. There are two rules in accordance with this effect: first, a data message is devoid of legal force and effect just because it is in electronic form; secondly, a data message that passes on information without the provision of details of the information cannot be without legal backing, if the information is accessible in that context.

It can be assumed that if the buyer signs a title deed electronically, and the seller and all requirements concerning electronic signature are satisfied, then such matters will fall under the laws of electronic

commerce.⁶ Nevertheless, this is not so, due to this exclusion. In the same way, a title deed issued electronically by the government authority should have been included under the laws of electronic commerce, and this could raise serious implications for individuals and government authorities that conclude their business in this way if this were the case.

The fourth exclusion deals with the purchase and sale of immovable, as well as any other immovable, dispositions. Inevitably, these transactions will involve the production of a title deed. Due to this, there was no reason why the draughtsmen of the electronic commercial law would provide title deeds as a sole exclusion. This exclusion includes leases relating to more than ten years, as well as rights such as usufruct and easements. When this exclusion handles the issues of disposition of immovable transactions, this means that any transaction on immovable terms has been excluded. For instance, gifts and endowments will be left out from laws relating to the application of electronic commerce.

An issue relating to documents that requires notarization is dealt with in the fifth exclusion. For instance, powers of attorney are required by the law to be executed before a public notary. This exclusion is realistic and acceptable, as it complies with the formalities set out by the law for the documents in question.

Article 2 states that any transaction or document excluded from the law of electronic commercial application by way of a provision under any other law will not be included in the purview of the electronic commercial law. This exclusion permits other laws to have control over the scope of commercial electronic communications.⁷ There is a probability of this exclusion being applied in the amendment to the scope of the law of electronic commercial application, without any alteration of article 2 of electronic commerce and transaction law. As a result, this exclusion is quite serious because it allows other laws to control the scope of application of the E-Commerce

Law. Additionally, it makes it difficult for the practice of law and for legal research. If a legal researcher or practitioner is to make a decision on whether or not a certain transaction falls under the laws of electronic commerce, she or he must examine all the other laws to ensure that the transaction is not excluded from the scope of the law of that applies to commercial electronic communications. As a result, the ideal opportunity for the consolidation of the law has been missed.

Negotiable instruments are dealt with in the third exclusion. The phrase 'negotiable instrument' refers to a range of legal instruments. Negotiable instruments include securities such as bonds and shares given out by companies. Unfortunately, the designers of the electronic commercial law did not include negotiable instruments within the scope of the e-commerce law. Most transactions regarding securities are now performed electronically. Owners of securities and shares can give directives for the purchase or sale of these securities to their brokers via e-mail. Additionally, the sale and purchase of securities is made possible by the exchange of e-mails among sellers and buyers. This exclusion means financial transactions are excluded from the scope of commercial electronic transactions. This does not fit within the aim of the UAE to be seen as the first financial centre in the region. The government of the UAE has done much over the past few years to acquire the status of being the financial centre of the Middle East. This implies that it is necessary for the legislative environment to embrace the techniques and working methods of the sector of financial services, and to address the need to have proper regulation at the same time, considering that the sector is almost fully automated.

Also, negotiable instruments include all the instruments that are transferrable and which enable the bearer or the beneficiary to have a right to the payment of money, such as bills of lading, bills of exchange, promissory notes, warehouse receipts and consignment notes for the delivery of goods. All of these instruments are not included in the application of law relating to electronic commerce. As a result, this law does not apply to these instruments because they are negotiable, but they are used to transfer and sell goods from one person to another. This means that a sale and purchase of a business can be performed through the internet, and completed by the seller endorsing a bill of lading to the purchaser. Such transactions, however, will not fall within the

⁶ This is a significant topic, and the reader might begin by considering knowing how the way case law in other countries has treated these particular issues. For instance, see the cases regarding wills in Stephen Mason, *Electronic Signatures in Law* (3rd edn, Cambridge University Press, 2012), 205-211; regarding mortgage redemption, see 255.

⁷ Zeinab Shalhoub and Lubna Al Qasimi, *The Diffusion of E-Commerce in Developing Economies: A Resource-based Approach* (Edward Elgar Publishing, 2007), 156.

scope of the electronic commercial law.

It is important to note that, in the UNCITRAL Model Law on Electronic Commerce, these instruments were not excluded from the scope of its application. The UNCITRAL law includes certain rules that apply, concerning logistics services.⁸ Ideally, the designers of the law of electronic commerce should have embraced these rules to broaden the scope of the law of electronic commercial application.

It should also be noted that the UNCITRAL Model Law on Electronic Commerce did not contain a list of exclusions. Article 1 of UNCITRAL law was phrased in a manner that incorporated the broadest application within the scope of this law. It would be an ideal method if the e-commerce law embraced similar phrasing regarding the scope of its application.

Authority of the Minister's Council

Article 2 of the law of e-commerce and transactions gave authority to the Minister's Council to modify the exclusion list that was outlined in paragraph (2) of article 2. This authority includes the ability to remove one or more of the exclusions, to add extra exclusions, or modify some of the exclusions. It is unusual that those responsible for drafting the electronic commerce law gave the Minister's Council the powers to determine the extent to which the electronic commercial law would be applied. The intention of this authority given to the Council was to ensure flexibility in this section of legislation. The fact that the electronic commerce and transaction law designers facilitated flexibility within this law is praiseworthy. The Council can respond to a situation by modifying the list set out under article 2 of the law of electronic commerce.

However, the main objectives of the law of electronic commerce are to safeguard the parties in undertaking business electronically, as well as to enhance commercial electronic communications. These aspirations need legislation that will cover all commercial electronic communications. The exclusions mentioned previously limit the application of the scope of the law of electronic commerce and remove from it a section of financial services, which is highly significant. Furthermore, the effects of not including negotiable instruments has the effect of omitting financial services, leading various sectors to

miss out on the benefits of the e-commerce law, such as the sector of logistic services. The final exclusion is quite risky, because it includes the probability of excluding more transactions that might limit the application scope of the law of electronic commerce by authorizing laws that are intended to add more exclusions.

The main purpose of this law is to aid electronic commerce and to eliminate the difficulties that might hinder its development. Nevertheless, as outlined above, securities as well as negotiable instruments are disregarded under the law governing electronic commerce. From this, it can be concluded that the law of electronic commerce has, in a real sense, restricted the scope of its application to controlling transactions in traditional commodities and goods within the perspective of electronic settings. If the electronic commercial law is focused on improving electronic transactions, then it would have been better to have included all types of e-commerce. For this reason, the restrictions on the application's scope have arguably undermined its objectives.

The regulation of electronic evidence in the UAE

The UAE does not have a specialized and comprehensive regulatory regime for electronic evidence. In dealing with electronic evidence, the courts of the UAE normally apply the general rules and principles of UAE laws to determine the adoption, admissibility and treatment of electronic evidence. To this extent, the significant procedural laws that govern legal proceedings, including adducing and the admission of evidence, are vital to understanding regulation of electronic evidence in the UAE. The two fundamental procedural laws are: the UAE Civil Procedure Law and the UAE Criminal Procedure Law.⁹

Scope and admissibility of electronic evidence in the UAE

In the UAE, there is no interpretation of the term 'electronic evidence' or 'digital evidence' in any of the extant statutes. However, article 1 of the UAE Federal Law No. 1 of 2006 on Electronic Commerce and Transaction offers some useful terminology.¹⁰ In this

⁹ For more information regarding the regulation of electronic evidence in UAE, see Khaled Aljneibi, 'Search and seizure for electronic evidence: procedural aspects of UAE's legal system', *Digital Evidence and Electronic Signature Law Review* 10 (2013), 115-122.

¹⁰ There is a similar definition in article 1 of Federal Law No. 5 of 2012 concerning the Prevention of Information Technology Crimes.

⁸ Such as Article 16 of the UNCITRAL Model Law on Electronic Commerce

Act, the terms 'electronic information', 'electronic document' and 'electronic message' are defined as follows:

Electronic Information: 'Data or information of electronic characteristics in the form of provisions or symbol or sounds or drawings or pictures or software or otherwise'.

Electronic Document: 'Record or document composed or stored or extracted or copied or sent or intimated or received by an electronic means on tangible medium or any other electronic medium which shall be liable to a feedback in a manner which can be understood'.

Electronic Message: 'Electronic information to be sent or received by electronic means whatsoever the manner of its reproduction in the place where it is received'.

Legal scholars in the UAE have not discussed the meaning of electronic evidence to date. Case law merely emphasises the admissibility of e-mail evidence, but not what is meant by the term 'electronic evidence'. This absence of any specific provision explaining this term may leave judges in the UAE with scant opportunity to make meaningful decisions about electronic evidence.

The admissibility of electronic evidence in the UAE is not directly mentioned in statute, but its admissibility can be inferred from the wording of the general rules. The choice of evidence is ordinarily unfettered, as, in principle, any means of proof is admissible. With regard to the admissibility of electronic evidence or computer-generated evidence, the question generally is one of evidential value: the value or weight that should be attached to such evidence. The statutory law does not provide any guidance on this issue, with the exception of articles 4 and 10(1) of the UAE Federal Law No. 1 of 2006 on Electronic Commerce and Transaction. Article 4 reads as follows:

1. The electronic message shall not lose its legal effect or its capability of being executed due to the fact that it is in an electronic form.
2. The information embodied into the electronic message shall not lose its legal evidential value even it is precise where the perusal of the details of such information is available in the electronic system of its creator and the way of the perusal is referred

to in the message.'

Article 10(1) provides that:

'None of the following shall be inconsistent with the admission of the electronic signature or electronic message as an evidence:

1. That the message or signature is in an electronic form.
2. That the message or signature is not original or in its original form whenever such electronic message or signature is the best evidence which is reasonably contemplated to be obtained by the person relying upon it as evidence.'

The above provisions provide that the court should give consideration to an electronic message and give it a legal evidential value. However, the list of electronic evidence includes databases, application programs, operating systems, electronic and voice mail messages and records, computer-generated models, and other instructions stored in the computer's memory – not only the electronic message. Electronic evidence is available in digital or binary form consisting of the numbers 0 (pulse absent) and 1 (pulse present). It originates from a multitude of sources including PC hard drives and ISP records, real-time e-mail messages, back-up media, chat-room logs, web pages and digital network traffic. It also includes local and presumptive databases, electronic directories, memory cards, wireless devices and digital cameras.¹¹ This matters that must be taken into consideration by the court when assessing the value of the electronic evidence will differ in accordance with the particular case.

In civil cases, the core principles of the UAE Federal Law provide for the 'freedom of proof' to prove facts. Despite this, all evidence presented by the parties is subject to a judicial decision as to whether it is pertinent to prove the assertions made, because the UAE Civil Law is predominantly generated by the legal evidence system. This means that the judge determines the admissibility of each type of evidence. Once evidence is deemed admissible, the judge must consider all the evidence before the court in order to determine whether it proves the assertions of the party who presented it (relevance). However, the judge may also seek further evidence when requested

¹¹ Chet Hosmer, 'Proving the integrity of digital evidence with time' *International Journal of Digital Evidence*, Spring (2002) 1, 1.

to do so by a claimant or by any other suitable person (although there is no requirement to consent to such a request) or at his or her own volition.

A Case Study¹²

The Dubai Court of Cassation received a case that involved a dispute between a foreign investor and a UAE investor regarding electronic evidence in the UAE courts. The court determined that, according to Federal Law No. 1 of 2006 that relates to E-Commerce, Electronic Transactions and Communications, electronic dealings such as e-mails are granted probative force as long as they can be traced to the senders' sent folder, or when the e-mail in question relates to the point at issue, so that it can be used as proof. In this case, it supported the Court of Cassation on its previous ruling, which should serve as a warning to parties to be cautious regarding the contents of an e-mail, which can be the source of evidence of binding legal agreements between parties. E-mails are now being used as strong evidence, as in other jurisdictions, to evidence agreements, even if the parties involved have not physically signed any agreement.

Proof in the case

In this case, the appellant was a company that concentrated on the provision of public relations services and marketing. The respondent was a company that dealt with real estate development. On 20 November 2006, the parties entered into an agreement where the appellant agreed to provide the respondent with marketing and public relations services to promote a real estate project. The appellant delegated part of this work to a sub-contractor (a third party), and they planned to add any funds that arose from the subcontracted works in its invoices to the respondent.

The appellant stipulated that a sum amounting to almost AED 1.3 million¹³ had been accrued and was in arrears, so it should be paid. The appellant moved to the Court of First Instance¹⁴ in Dubai in search of an order to force the respondent to pay the balance that was in arrears. An expert was appointed by the Court

of First Instance to review the case. In his report, the expert concluded that the case should be terminated due to the fact that the appellant had fallen short of providing the respondent with particulars of invoices submitted by the third party to the appellant. In his report, the expert also held that, in relation to the third party, the respondent had not authorized the invoices. The Court of First Instance was in agreement with the findings of the report.

The appellant was dissatisfied with the ruling and appealed to the Court of Appeal,¹⁵ which in turn retained the ruling of the Court of First Instance. This was because the agreement that existed between the parties did not call for the appellant to produce proof of the sub-contractor invoices, or that the same invoices required permission by the respondent. The appellant appealed on these grounds. It was held that the Court of First Instance was wrong in its reasoning and judgment, because it relied heavily on the report of the expert, who neglected important pieces of evidence, which the appellant had submitted, including an e-mail to the appellant from the respondent dated 31 March 2007. A letter was attached to the e-mail in which the respondent admitted his liability that it was in arrears to the appellant. The expert dismissed this evidence due solely to the fact that the appellant failed to produce the original documents, and in their place only had copies. In the UAE, Federal Law No 8 of 1974 regulates the use of expert evidence in court. The expert is regarded as any other witness, with the judge retaining the power of determining whether his or her evidence is admissible. Article 26 (1) of the Federal Law No 8 of 1974 provides: 'The advice given by the expert shall not constrain the work of the court'. Expert evidence is admissible to demonstrate the reality of matters in issue, and whether it is necessary for this purpose is a matter for the judge to evaluate, as explained by the Emirates Federal Supreme Court: 'The judge has a power to accept or reject the expert report'.¹⁶

His appeals were dismissed for the following reasons:

On the first argument of the respondent, the Court of Cassation determined that it was baseless. On the point that the Court of First

¹² Civil Case of Cassation Court Dubai: UAE No. 277/2009 date of decision 13 December 2009 unpublished.

¹³ At the time of writing, 1 US\$ was 3.67 AED.

¹⁴ Civil Case of First Instance Court of Dubai: UAE No. 377/2009 date of decision 25 March 2009 unpublished.

¹⁵ Civil Case of Appeal Court of Dubai: UAE No. 415/2009 date of decision 21 June 2009 unpublished.

¹⁶ Criminal Case of UAE Federal Supreme Court No. 371/2002 unpublished.

Instance had appointed an expert to review the facts, the court felt that the expert had examined all the relevant proofs, and the court subsequently approved the report, and the court relied upon the expert's report. In relation to article 265(2) of the UAE Civil code, the court has the authority to review the literal words of an agreement among the parties and review the objectives of the parties when scrutinizing the relationship between those parties. In the Code, a contract cannot compel an obligation upon a third party, although it may generate a right from him. On this account, the court alleged that the appellant had provided the respondent with photocopies of third party invoices that entailed details of the work that had already been done in the past. The respondent was also provided with evidence that the appellant had paid the sub-contractor. Therefore, it was a matter of custom in the dealings of the parties for the appellant to provide such information and the respondent was right to ask for information relating to the case.

On the second argument provided by the appellant, the court held that in accordance with the provisions of article 3 of Federal Law No. 1 of 2006, the law of the Court of Cassation in relation to the Electronic Transactions and E-Commerce provided that e-mails could be relied upon as evidence. Under articles 2 and 4, documents, electronic records, and signatures have a probative force, as long as the contents of such information are available for examination in the electronic system of the sender. Electronic signatures or e-mails, as provided for in article 10, should be acknowledged as evidence before the courts either in their original form or as copies, providing that such signatures or e-mail is the best proof expected to be submitted by the party relying on such evidence.

The Court of Cassation overturned the ruling made by the Lower Court and referred the matter back for a new ruling.

On 13 June 2010, the Court of Appeal¹⁷ ruled that the case should be dismissed. The expert's report highlighted the fact that he did not find any relevant e-mail in the respondent's e-mail system. However, the appellant submitted a print-out of an e-mail sent

from the respondent to the appellant dated 31 March 2007 that attached a letter in which the respondent acknowledged the debt due to the appellant.

The interpretation of the court regarding this issue can be said to be positive. The Dubai Court in the Court of Cassation, as discussed earlier, stated that the electronic communication should be awarded the same evidentiary proof as physical communications. Moreover, e-mails should be taken to be original copies, once the party proves that the e-mail was from the sender. The court also ruled that parties could send acceptances together with offers via electronic mail. The evidence that is being used in the civil courts has to be documentary or written in the same sense. Attorneys are not allowed to make oral arguments. Witnesses are rarely cross-examined. Furthermore, affidavits of witnesses are taken to be of low evidentiary weight in UAE civil courts. It is for this reason that the documentary evidence put before the court is substantial, because the court relies on the documentary evidence to establish the facts and make a judgment.

While parties in Anglo-American jurisdictions are required to exchange significant amounts of information between themselves, there is little compulsory discovery or disclosure in the UAE. Each of the parties can file documents that prove their case; nonetheless, they cannot be forced to submit information that could be damaging. Any communication between the lawyer and client cannot be taken as evidence without the client's approval. However, any communication between the parties involved, which may include offers to settle, cannot be seen as privileged and thus cannot be taken as evidence.

Although experts can be involved in cases, they do not have to testify before the civil courts; they just file reports. The court will certify an expert after the parties involved agree to appoint an expert, which appoints by the court. In many cases, however, the parties do not agree to the claim and so the court appoints an expert for them. While experts at times require the parties to secure documents for examination, they cannot force them to produce such documents. In essence, the law that governs UAE civil cases is statutory. The courts give decisions, yet the ruling by higher courts is not binding on the lower courts. Nonetheless, they can be used for the purposes of persuasion in the lower courts.

This case raised the issue regarding the status of

¹⁷ Civil Case of Appeal Court of Dubai: UAE No. 415/2009 date of decision 13 June 2010 unpublished.

electronic evidence and the authentication of the evidence. Challenges with regard to the genuineness, veracity and discretion of the pieces of evidence gathered are difficult to handle because of their very origin and nature, form of broadcasting, usage and storage. These are the challenges associated with using electronically generated evidence.

The extraction of evidence from a computer system to make certain that it is as original as the legitimate initial computer record requires validation through authentication. For example, there may be some doubt that the evidence had been altered before it was gathered; such doubts can have a negative effect regarding the evidence. There are many such examples where lawyers have criticized the authenticity of electronic evidence. They claim that theoretically there is a possibility of the fabrication in such evidence. On the other hand, when judges become more familiar with electronic evidence, they may require proof to determine the truthfulness behind the doubts of the attorney. As a result, requisite standards for electronic evidence are becoming increasingly prominent with the advancement of information communication technology.¹⁸

Concluding comments

In summary, the law was only enacted few years ago and it has yet to develop fully. The outline from the objectives of this law and the exclusions from its application scope show the need for reforms. Among the reforms needed is a reconsideration of the exclusions, to broaden the application scope of the e-commerce law by adding negotiable instruments, and to eliminate the last exclusion. The situation can be corrected by having the Council modify the exclusion list by exercising the powers granted by the legislation.

There are no specific legal rules covering electronic evidence in the UAE. Emirates judges may readily appreciate the pertinence of the evidence in question. The characteristics of electronic evidence mean that its pertinence to the case may be challenged by a party: for example it may be asserted that its reliability or authenticity is questionable. The judge

will then have to determine a suitable response to the allegation raised. Therefore, evidence must be sufficiently pertinent to be admissible and, further, sufficiently relevant evidence is only acceptable insofar as it is not eliminated by any rule of the law of proof. The result, certainly, is that some appropriate evidence is eliminated. Accordingly, the approach taken in the UAE must be to identify the need to develop a strengthened awareness of the integrity, reliability and accuracy of electronic evidence within the broad general rules of the UAE federal rules of evidence.

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¹⁸ This is a significant topic, and the reader might begin by considering relevant texts, such as George L. Paul, *Foundations of Digital Evidence* (American Bar Association, 2008) and Stephen Mason, editor, *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012).