50 Enforcement Updates Under the New UAE Civil Procedure Regulations

March 21, 2021

A roundup of the 50 most crucial additions, amendments, and deletions to the Civil Procedures Law No. 11 of 1992 that were promulgated pursuant to Cabinet Decision No. 57 of 2018 that came into effect in early 2019:

1. Approving the designation of execution officers instead of representatives and adding the possibility of execution by private companies and offices.

2. Deletion of the description of “provisional” in execution matters, which the judge of execution is competent to adjudicate.

3. Linking the jurisdiction of the execution judge to the court that issued the writ of execution.

4. Granting the execution judge the power to take direct action in the jurisdiction of the courts of the other State or to delegate the execution judge thereof.

5. Expansion of the field of delegation to include explicitly all implementation procedures (instead of provisional procedures and declarations).

6. Explicitly provide for the possibility of electronic delegation.

7. Explicitly stipulate the possibility of combining execution files pending before the execution judges of different courts.

8. Granting the execution judge the power to initiate

imprisonment proceedings, even when the debtor’s domicile is within the jurisdiction of the courts of the other State.

9. Addition of provision for grievance against the decisions of the execution judge. The decisions of the execution judge shall be subject to appeal in any of the following cases:

a. Order of preference among convicts.

b. Postponement of execution for any reason.

c. To provide the debtor a time limit to pay or install the amount for which it is executed.

d. Acceptance of guarantee.

e. Travel ban.

f. Seize and arrest order.

10. The grievance shall be filed with the President of the Court or his authorized representative within seven days from the day following the date of issuance in respect of the person in whose presence the procedure is issued, and from the date of notification in respect of the person who issued the procedure in his absence, pursuant to a request filed in the same execution file. Cancellation or amendment of the grievance decision may occur in absentia. The decision of the appeal shall be final and not subject to appeal.

11. Explicitly stating that judgments and orders that are considered writs of the criminal court in restitution, compensation, fines and others, are considered writs of civil rights.

12. To grant the execution judge the competence to order the execution of foreign judgments and orders, within a maximum of three days from the date of submission of the petition, with his order considered as subject to appeal in accordance with the rules and procedures established for the appeal of

judgments.

13. Granting the execution judge the power to complete the supporting documents before issuing his decision.

14. Addition of an exclusive description of the non-competence of the courts of the UAE.

15. Granting the execution judge the competence to order the execution of the notarized documents and conciliation minutes approved by the courts in a foreign country, in accordance with the same procedures and conditions for ordering the execution of foreign judgments and orders.

16. Deletion of the term “paper” from the notification provisions to suit e-litigation.

17. Granting the execution judge, prior to the execution of the execution order against the executor against him, the authority to order the provisional seizure of the movable and the real estate and the seizure of the debtor with others, and to inquire about the debtor’s property.

18. Authorization of the execution procedure by breaking the doors or forcibly opening the locks by the executor even if he is not the court execution representative.

19. Lessening the threshold to prove the presence of a member of the police, to avoid invalidity, even if the police officer did not sign the minutes.

20. Reduction of the period of implementation from third parties to 7 days from the date of the notification, instead of 8 days.

21. Excluding the house (or common share) mortgaged to guarantee a debt arising from its price from the principle that the debtor’s home may not be sold.

22. Explicitly stating that no more than a quarter of the wage

or salary may be enforced against even if transferred to a bank account.

23. Explicitly stating that funds of embassies and bodies enjoying diplomatic immunity may not be seized (with the condition of reciprocity being present).

24. Addition of the explicit provision for the requirement of thorough evidence justifying the fear of the flight of the debtor or the smuggling of its property, so that it can be adopted as a ground for provisional detention.

25. Addition of the explicit provision to add the case of the worker whose settlement of the entitlements could not be settled, after provisionally assessed by the competent administrative authority, to cases of preventive detention.

26. Addition of the power to conduct the necessary investigation or investigations with the assistance of the competent administrative authorities, to the judge (or court) who adjudicates the request for provisional detention.

27. Adoption of the date of issuance of the attachment order for the validity of the filing of the substantive claim, instead of the date of the attachment.

28. Explicitly stipulate that the detention order may be appealed to the urgent matters judge and before the court hearing the right before filing the attachment.

29. Explicitly stipulating the expiry of the attachment by the issuance of a final ruling rejecting the substantive claim.

30. Explicitly permitting the attachment of the movables or debts of the debtor to others, even if they are subject to dispute.

31. Explicitly stipulating that attachments may be made by electronic or paper minutes.

32. Permitting the sale of movables that have been attached to a specific buyer at the request of the debtor and the consent of the creditor.

33. Adding the authority of the judge of execution to initiate the sale procedures or lifting the seizure of if the creditor fails to proceed with the sale of the seizures within (30) days from the date of seizure.

34. Adding the authority of the judge of execution to reduce the price set to start selling the reserved movables by 5% five times and then selling at an estimated price, when the sale does not take place on the day specified.

35. The addition of the use of telecommunications technology in the procedures of auctioning movables.

36. Adoption of notification of the decision of seizure of the property to the competent department of registration of real estate, instead of mandatory transfer of the representative of the execution the day after the issuance of the decision of seizure.

37. Requiring the department where the property is registered to inform the judge of execution directly (without the need to move the delegate in order to obtain an official statement).

38. Reduction of the time limit for declaring the heirs of a right holder to 3 months.

39. Granting the judge the power to request guarantees to defer the sale whenever the debtor had other income in addition to the property's income sufficient to repay the debt in installments within three years.

40. Reduction of the maximum period for estimating the price of the property to 15 days instead of 30 days.

41. Addition of the explicit provision to exclude real estate that foreigners may own in the State in accordance with the

laws in force from the condition that real estate may not be sold to non-citizens.

42. Explicitly stipulating that the sale of the property of the bankrupt shall be in accordance with the Bankruptcy Law, with the condition of informing the bankruptcy administration, and the provision of the role of the execution judge in approving it.

43. Explicitly stipulating that partial or total attribution of the execution of the seizure procedures and the sale of the seizures may be made to any natural or legal person in accordance with the rules and procedures that determine the mechanism of their work and for their fees.

44. Cancellation of the obligation to inform the obligor to vacate the property at the time of execution.

45. If the execution is not possible or the execution requires the debtor himself to do so, the execution judge may commit him to a daily fine of not less than AED 1,000 and not more than AED 10,000 to be paid as compensation to the executor. Provided that the total fines of the principal of the debt in force shall not exceed the original enforcement amount.

46. The execution judge shall have the right to cancel the fine, or part thereof, if the executor is against it.

47. The fine shall apply to the legal representative of the legal person or to any employee who personally obstructs the execution.

48. Explicitly stipulating the imprisonment of the debtor obliged to do or abstain from work.

49. Explicitly stipulating the permissibility of issuing travel bans or imprisonment against a person who refuses to execute a writ of execution issued against a legal person, whether he is a legal representative or otherwise.

50. Adding the removal of a travel ban order after the lapse of three years from the last valid procedure for the implementation of the final judgment of the debt issued by the said travel ban order, without the creditor applying for a continuation of the execution procedures.

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Two Trends to Expect from the Tax Dispute Resolution Committees in 2020

March 21, 2021

TDRCs from 2019 – 2020

The tax dispute resolution committees (“TDRC” / “TDRCs”) began operation in 2019. There are three TDRCs in the United Arab Emirates:

- in Abu Dhabi dedicated to taxpayers with a registered address in Abu Dhabi and out-of-State registered taxpayers;
- in Dubai dedicated to taxpayers with a registered address in Dubai; and
- in Sharjah dedicated to taxpayers with a registered address in the other five emirates.

After submitting a reconsideration application to the Federal Tax Authority (“FTA”) requesting a review of an FTA respective decision, the person submitting the reconsideration application may subsequently file an objection to the competent TDRC against the FTA’s response to the reconsideration application, or lack thereof.

In 2019, the Dubai TDRC had almost 38 tax objections registered.

In 2020, up until mid-February, 15 tax objections registered in 2020 with the Dubai TDRC have already been ruled on.

Here we look at two trends to expect from the TDRCs in 2020.

Trend 1: Speed of TDRC Ruling Issuance

In 2020, so far, the average timeframe from the date of submitting the objection till issuance of a TDRC ruling has been about three weeks from the date of filing the objection.

Albeit the Tax Procedures Law, its bylaws, and the legislation forming the TDRCs grant the TDRCs 20 working days to issue their ruling, and the ability to extend another 20 working days; i.e. 40 working days in total, looking at the current trend so far, it is expected that the TDRCs increase or maintain their admirable promptness in issuing rulings.

This is partly due to various matters of dispute (such as applicability of late penalties on voluntary disclosures or the ‘pay now, argue later’ rule) having already been addressed in part or in whole by the TDRCs, the Federal Primary Court, the Federal Appeals Court, and the Federal Supreme Court – or the Constitutional Circuit of the Federal Supreme Court.

Trend 2: Objections in Case of No Response on a Reconsideration Application

As a general matter, grievances against a government agency require explicit statute on the consequences of a lack of response to such grievance.

For example, the Civil Procedures Law states that "*…if 60 days lapse from the date of submission of the grievance without a reply from the competent authorities, the grievance shall be deemed rejected*."

Or in another example, the CbCR Law states that where a person submits an appeal against CbCR penalties to the Ministry of Finance and does not receive a response within 60 business days *"…then the appeal will be deemed to have been successful and any penalty imposed shall be canceled."*

The Tax Procedures Law grants the FTA 20 working days to decide on a reconsideration application and notify the applicant within 5 working days of making its decision, but the law is then silent on whether no response from the FTA is to be deemed a rejection or acceptance of the reconsideration application by the FTA.

However, the Tax Procedures Law grants the TDRCs jurisdiction to decide in respect of applications for reconsideration that were submitted to the FTA to which the FTA has not decided upon. This is also confirmed by the powers granted to the TDRCs in the Cabinet Decision forming the TDRCS.

The necessity to pay the tax and administrative penalty liabilities in dispute prior to resorting to a TDRC has discouraged taxpayers from submitting an objection if no response on a reconsideration application is obtained from the FTA within the timeframe.

In 2020, however, more taxpayers may develop tax refundable positions with credit held by the FTA that could be debited against tax and administrative penalty liabilities, or refunded to the taxpayer – which could possibly result in a higher rate of objections against unresponded to reconsideration applications as taxpayers pursue closure on outstanding liabilities or stabilization of their liquidity and balance sheets.

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Landmark Ruling Cancels Tax Audit Penalties

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In a recent landmark ruling issued by one of the three Tax Dispute Resolution Committees ("TDRC"), the TDRC ordered the cancellation of not only the late payment penalties – but also the tax audit penalties resulting from a tax audit.

Generally, the penalties arising from a tax audit are 50% of the tax liability, and there is usually a late payment penalty of up to 300% of the tax liability.

Wasel & Wasel counseled a taxpayer before the TDRC who had been subject to a tax audit and the TDRC ruling obtained ordered the cancellation of nearly all penalties including both the late payment penalties and, additionally, the tax audit penalties.

Although in the past the TDRCs and Federal Courts have ruled on cancellation of late payment penalties (of which Wasel & Wasel counseled on), this recent ruling by the TDRC cancelling the tax audit penalties was the result of significant efforts in arguing that the lawful elements that give rise to the tax audit penalties were not completely fulfilled.

Audit Penalties Process

Once a taxpayer is audited, the taxpayer generally receives (i) notification of the audit results; (ii) notification of the tax assessment; and (iii) notification of the tax penalties levied.

The tax penalties levied as a result of a tax audit are generally based on §10 or §11 of Cabinet Decision 40/2017 which applies penalties as follows:

- Fixed penalty of AED 3,000 or AED 5,000 depending on whether a violation is a first-time or repeat violation.
- Percentage based penalty of the amount unpaid to the FTA due to the error and resulting in a tax benefit as follows:
- o 50% if the taxpayer / registrant does not make a voluntary disclosure or a voluntary disclosure is made after being notified of the tax audit and the FTA has started the tax audit process, or after being asked for information relating to the tax audit, whichever takes place first.
- 30% if the taxpayer / registrant makes the voluntary disclosure after being notified of the tax audit and before the FTA starts the tax audit.
- 5% if the taxpayer / registrant makes a voluntary disclosure before being notified of the tax audit by the FTA.

The second penalty generally applied from tax audits is pursuant to §9 of Cabinet Decision 40/2017 which is the late payment penalty calculated as follows:

- 2% immediately of the unpaid tax.
- 4% after the seventh day following the deadline for payment.
- 1% daily penalty charged on any amount that is still

unpaid one calendar month following the deadline for payment with a maximum of 300%.

Wasel & Wasel has counseled taxpayers before the TDRCs and the Federal Courts (up to the Federal Appeals Court) where late payment penalties and other penalties (such as audit penalties) were canceled.

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First UAE Supreme Court COVID-19 Judgement (Trade Secrets)

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In late 2020, the UAE Federal Supreme Court ruled on the first COVID-19 related dispute which involved trade secrets. For employers and employees, this case provides a long-awaited answer as to the importance of how and when to treat COVID-19 issues with secrecy in the workplace.

Facts

The case in question revolved around a police officer who was to guard a house containing individuals that had contracted COVID-19. The officer was tasked with ensuring none of the infected residents leave the house, nor for anyone to enter.

Whilst guarding the house, the officer took a video of himself – with the house in the background – and sent the video via WhatsApp to his family group chat, warning them to stay away from the house/area to avoid contracting the virus.

The Public Prosecution filed a criminal case against the officer, claiming he had breached trade secrecy by sharing the video with his family.

Issues

The Public Prosecution brought the claim against the officer in the Federal Primary Court, pursuant to Article 379 of the UAE Penal Code which stipulates:

"Shall be subject to a jail sentence for a minimum period of one year and/or to a minimum fine of twenty thousand Dirhams, whoever by virtue of his profession, craft, position or art is entrusted with a secret and divulge it in cases other than those allowed by law or if used for his own personal interest or for the interest of another person, unless authorized by the confiding person to disclose or use it.

The penalty shall be imprisonment for a term not exceeding five years in case the perpetrator is a public servant or a person in charge of a public service who was confided the secret because or on the occasion of discharging his duties or performing his service."

There are two elements that are required to satisfy Article 379 of the UAE Penal Code:

(1) obtainment of the confidential information/secret through one's profession, craft, or possession, and;

(2) divulging such information for their own personal interest or the interest of others.

Rule

The Federal Primary Court ruled in favor of the officer and acquitted him of the accusation brought against him. The officer presented his argument to the Federal Primary Court detailing the two degrees of the accusation: (1) the information of the house containing individuals that had contracted the virus was not characterized by secrecy, and (2) the purpose of him sharing a video was not to divulge a secret. As a result, the Public Prosecution appealed the ruling before the Federal Court of Appeals, seeking to overturn the acquittal and requesting a sentence of three months' imprisonment as punishment for the officer.

The Federal Court of Appeals determined that the officer sending a video of the house he was guarding to his family, was a breach of the confidentiality of the information defined within Article 379 of the UAE Penal Code. The Federal Court of Appeals found that although the purpose of the officer sharing such information had no criminal intent as he was merely alerting his family to be wary of the house in order to avoid contracting the virus, he had divulged such information for the benefit of others – as described within the Article.

Furthermore, in accordance with Article 379 of the UAE Penal Code, for the crime stipulated in the Article to exist, the accused must "*by virtue of his profession, craft, position […] is entrusted with a secret and divulge it […] for his own personal interest or for the interest of another person*".

The Federal Court of Appeals determined that the officer had obtained the confidential information of the house containing the individuals that had contracted the virus from his Captain, and that such information would not have been made available to him unless it were for his profession.

The ruling of the Federal Court of Appeals was challenged by the officer before the Federal Supreme Court.

The Federal Supreme Court found that the first element of

Article 379 of the UAE Penal Code was not satisfied, even though the information was confidential, there was no criminal intent behind the actions of the officer. Additionally, the Federal Supreme Court found – similarly to the Federal Primary Court – that the purpose of the officer sharing the information with his family was no more than a warning and was not an act of divulging a secret. Therefore, the elements of Article 379 of the UAE Penal Code had not been satisfied.

Decision

The Federal Supreme Court overturned the judgment of the Federal Court of Appeals and acquitted the officer of the accusations, ruling that he was not guilty of criminal activity in his actions.

Why This Case Matters?

This is the first case that involved COVID-19 to be adjudicated by the Federal Supreme Court and in concurrence the first dispute involving breach of secrecy regarding COVID-19.

For employers and employees, this case provides a long-awaited answer as to the importance of how and when to treat COVID-19 issues with secrecy in the workplace and provides a judicial test that could be applied in employment policies and procedures.

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Enforcing Against Horses & Camels in the UAE

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Enforcement is an issue that frequently arises with plaintiffs in the United Arab Emirates. The difficulties are multi-fold; lack of follow-up by counsel; aggressive asset transfer and concealment by the defendant (i.e. such as real estate transfer to a spouse); queuing behind prior creditors whom have already issued attachment orders on assets; but one crucial factor is knowing where to look for assets.

Horses and camels in the United Arab Emirates can have values in the millions of US dollars and, for example, during the annual Abu Dhabi International Hunting and Equestrian Exhibition, transactions can be in the hundreds of thousands for young camels or horses.

When a favorable judgment is obtained and at the time of enforcement, it may be found that the defendant would have cleared bank accounts and transferred ownership of vehicles and real estate to other parties.

What a defendant may overlook is concealing was their livestock, which is an asset that can be enforced against.

Below we provide a general overview of the enforcement procedures, and a clearer insight into how enforcement procedures against horses or camels would play out, bearing in mind that other livestock such as falcons or sheep can be valuable assets to consider.

General Enforcement Steps

Enforcement orders are administered by the Enforcement Judge (alternatively translated as the ‘Execution Judge’). A request is submitted via the online system where the request must include *inter alia* the respective judgment and itemized details of the debt (including items such as costs, etc.), requiring the Judge to notify the debtor and hold a hearing within fifteen working days. The online system is available in Abu Dhabi, Dubai, and Ras Al-Khaimah. The Federal Courts, on the other hand, require over-the-counter applications and follow-up.

Once the Judge is comfortable that notification has concluded successfully, through all the required methods, by courier, digitally, and so on, but the debtor has not attended a hearing, the Judge would liaise with the UAE Identification Authority to confirm whether the debtor is within or outside the UAE. Finally, it is preferable that the creditor requests the Judge to issue a public notification via a daily Arabic newspaper.

With all the above steps concluded, the creditor can begin to apply for enforcement of assets. This process requires the creditor to request the Judge to issue a writ to one or various entities for the disclosure of assets that the debtor may own as registered in the databases of such entities. The Abu Dhabi Courts, for example, have a predefined list of entities that can disclose such information.

The list, however, is not comprehensive and it is up to the creditor (or more so, the creditor’s counsel) to explore other valuable assets and their respective overseeing authorities.

When it comes to livestock, a bespoke request must be made, even if electronically.

Horses

Horses generally have title deeds that are registered with a particular authority such as the Emirates Equestrian Federation, the Emirates Arabian Horse Society, or the UAE Equestrian and Racing Federation.

A writ of inquiry issued to the above entities would result in the disclosure of any registration data of horses owned by the debtor. The details would also include the stables at which a horse is being housed.

Subsequently, a request is made to the Judge to issue a writ of enforcement addressed to the stable to seize the horse(s).

Once the writ is communicated to the stable, the stable will maintain the horse until it is auctioned off through court.

During the period of when the horse is seized and until it is auctioned off, the horse remains maintained and looked after for, and all costs associated with the horse’s maintenance are added to the cost order against the debtor.

Camels

As opposed to horse trade, camel trade in the UAE is not as systematic and occurs in a more customary manner.

The reason being is that camels may be prize/breeder camels or race camels, as horses may be prize horses/breeder or racehorses, but a significant portion of camels in the UAE are generally kept on farms as cattle.

Trade of camels occurs on a more customary basis with owners transferring camels without contractual arrangements, and camels being cared for by other private farm owners, as opposed to commercial stables.

These customary transactions make asset tracing of cattle camels somewhat more difficult than for horses, but entities such as the Dubai Camel Racing Club or the Camel Racing Association would hold data with respect to race/prize camels for a creditor to enforce against.

The lack of systemization of camel trade also makes it difficult to quantify the costs associated with maintaining the camel. However, the courts can accept reasonable valuations submitted by parties.

For example, in Federal Supreme Court case no. 320 of 1995, the following ruling was issued:

The facts, as evidenced by the contested judgment and all other documents, indicate that the plaintiff filed the case no. 108 of 1994 before the Federal Court of First Instance in Al Ain to 1) oblige them to pay him an amount of AED 367,500 as the value of the camel, the amounts incurred in feeding and care in addition to the amount of 400 dirhams value of water per month, and the amount of 1,000 dirhams per month as wages of the worker who supervised the camel until the dismissal of the case…3) writing to the Office of the Ruler's Representative in the Eastern Region to commission the "Camel Commission" to inspect the camel and to give an opinion as to whether it is a pure breed race camel…

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Preparing for e-litigation in the UAE amidst Coronavirus (COVID-19) hindrances

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As travel is hindered, staff work from home and general work routines (domestic and global) are disrupted, parties to litigation should consider options for managing trials via e-litigation strategies and technologies pursuant to recent developments in Emirati legislation.

On 27 March 2019, Minister of Justice Decisions Nos. 260 and 259 of 2019 were issued to regulate e-litigation procedures.

Decision No. 260 of 2019 regulates electronic proceedings in civil procedures, whilst Decision No. 259 of 2019 does so for criminal procedures.

The Decisions regulate the following:

- Requests for application of e-litigation procedures instead of standard brick-and-mortar litigation.
- Electronic filing and electronic signing of pleadings and applications.
- Liaising with the case management office electronically.
- Electronic summons and notifications of parties.
- Virtual attendance of litigants, their representatives, witnesses, and experts.
- Virtual hearings and electronic minutes of the hearings.
- Confirmation of agreements and consents during virtual hearings.
- Submission of evidence and validation of evidence in virtual hearings.
- Appointment and reliance on translators for litigants for e-litigation procedures.
- Electronic filing of petition order requests, and petition order e-issuance.
- Electronic issuance of writs of execution (enforcement orders).
- Digital judgments (with digital signature by the presiding judge or Head of the respective circuit).

Prior to the Decisions regulating the process, e-litigation in the UAE was first introduced on 18 September 2017 with the issuance of Federal Decree No. 10 of 2017 (the “e-Trial Law”).

The e-Trial Law made amendments to the Civil Procedures Law issued by Federal Law No. 11 of 1992.

The e-Trial Law introduced in Title 6 in Book 3 of the Law under the name of ‘Use of Remote Communication Technology in Civil Procedures’ Articles 332 to 343 addressing the new e-Trial system.

Article 332 of the e-Trial Law defines the use of Remote Communication Technology in the Civil Procedures as “the use of audiovisual communication means between two parties or more for the purpose of achieving remote appearance and exchange of documents, including the lawsuit registry, procedures of declaration, trial and execution carried out through this technology”.

Article 334 of the e-Trial Law, regarding Appearance and Trial Procedures, states that “all the provisions concerning the collection of fees, registry, declaration, submission of documents, appearance, publicity, pleading, hearing of witnesses, questioning, deliberation, issuance of judgments, submission of appeals and execution through the procedures thereof set forth under the present Law and its amendments shall be deemed valid if carried out totally or partially trough the Remote Communication Technology.”

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TikTok ban and what it means

for influencers in the UAE (and elsewhere)?

March 21, 2021

On 6 August 2020, President Trump signed an Executive Order to stop the “*spread in the United States of mobile applications developed and owned by companies in the People’s Republic of China (China) [which] continues to threaten the national security, foreign policy, and economy of the United States*” by imposing restriction against the application ‘TikTok’ as of 20 September 2020.

The US is the second country to legislate against TikTok in recent months. India banned the app, along with over 50 other Chinese-made apps and games, in June. The ban cost the app an estimated 15 million new users.

TikTok, a video-sharing mobile application owned by the Chinese company ByteDance Ltd. (a company valued at approximately USD 100 billion), has reportedly been downloaded over 175 million times in the United States (20% of TikTok’s revenue stems from the US) and over one billion times globally.

With the Executive Order in place and the newest form of influencers attempting to deal with the impending circumstances, the question lies, what can we learn from the wording of the Executive Order and what will this mean for TikTok influencers across the globe?

The Wording of the Order

Section 1(a) of the Executive Order states:

“The following actions shall be prohibited beginning 45 days after the date of this order, to the extent permitted under

applicable law: any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest."

This means that the Executive Order notably bars transactions with ByteDance, not 'TikTok' as a branded application. This presumably opens up the possibility of TikTok continuing to operate under a US company such as Microsoft, which has been in talks about buying some or all of TikTok. However, until the ownership of TikTok is transferred from ByteDance, the ban will remain.

The Executive Order goes on to stipulate, *inter alia,* that transactions are prohibited between ByteDance (subsequently, TikTok) and any person or any property which is subject to the jurisdiction of the United States.

With the Executive Order in place, no person or company in the United States is permitted to perform transactions or deals with any person who is under the banner of TikTok; as a result, TikTok influencers in the UAE and across the globe are put in a difficult limbo.

'Person'

The wording of the Order stipulates that "*any transaction by any person… subject to the jurisdiction of the United States*" is prohibited.

Pursuant to Title 31, Subtitle B, Chapter 5, Section 315.329 of the US Code of Federal Regulations:

"The terms person subject to the jurisdiction of the United States and person subject to U.S. jurisdiction include:

(a) Any individual, wherever located, who is a citizen or resident of the United States;

(b) Any person within the United States as defined in § 515.330;

(c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and

(d) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section."

Pursuant to Title 31, Subtitle B, Chapter 5, Section 515.330 of the US Code of Federal Regulations:

"(a) The term person within the United States, includes:

(1) Any person, wheresoever located, who is a resident of the United States;

(2) Any person actually within the United States;

(3) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and

(4) Any corporation, partnership, association, or other organization, wherever organized or doing business, which is owned or controlled by any person or persons specified in paragraphs (a)(1) or (a)(3) of this section."

Arguably, the Order engulfs US citizens, foreign branches of US companies, and foreign companies owned or controlled by any person who is a resident of the United States, or US company, who are outside of the US – restricting them from transacting with ByteDance (TikTok).

'Property'

Furthermore, the Order also prohibits "*any transaction… with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd.*".

As per Title 31, Subtitle B, Chapter 5, Section 315.313 of the US Code of Federal Regulations:

"(a) The phrase property subject to the jurisdiction of the United States includes, without limitation, securities, whether registered or bearer, issued by:

(1) The United States or any State, district, territory, possession, county, municipality, or any other subdivision or agency or instrumentality of any thereof; or

(2) Any person with the United States whether the certificate which evidences such property or interest is physically located within or outside the United States.

(b) The phrase property subject to the jurisdiction of the United States also includes, without limitation, securities, whether registered or bearer, by whomsoever issued, if the instrument evidencing such property or interest is physically located within the United States."

Arguably, if a company outside of the US has a shareholder who is a US citizen notwithstanding the gravity of control over the company by the person, that company will also not be permitted to do business or perform transactions with ByteDance and TikTok.

The coverage of property is quite excessive as it includes money, deposits and financial instruments, evidences of title or ownership, powers of attorney, movables, intellectual property, licenses, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

The wording of the law creates a significant extra-jurisdictional coverage on the TikTok ban.

Looking at the What this means for TikTok influencers in the UAE (and elsewhere)

With 20 September 2020 closing in quick, it is important for creative agencies, marketing firms, and social media influencers (amongst others) involved in the industry to start reviewing their contracts.

In influencer contracts, there are multiple stakeholders in the relationship, but dominantly: (1) the influencer, (2) the management company that manages the influencer, and (3) the party paying for and receiving the promotion from the TikTok influencer.

Usually, an influencer enters into a contract with the management group so that the management group can seek profitable opportunities for the influencer in return for a cut of the profits. At which point, the brand would contract the influencer via the management group seeking exposure in exchange for a payment to the influencer.

With the ban in place, it is advisable that these transactions and their respective contracts are revised by all stakeholders.

If the contracts can no longer be complied with, parties will also have to review their force majeure provisions, lacking any thereof the parties must seek guidance on whether foreign change in law constitutes a force majeure event.

Companies must also run internal audits and due diligence on their contractual relationships and transactions to identify any high-risk areas that create exposure to the Executive Order.

There are 431 TikTok influencers in the UAE; these influencers have an average of 170,075 followers and 42,085 plays per video, and an average engagement rate of 12.8%. As the ban comes into effect, they will have to navigate the contracts they have in place (if any) in order to avoid the loss of following, profits, and exposure that they will potentially face.

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UAE Cassation Court finds arbitration agreement waived if parties engage in court proceedings

March 21, 2021

In a recent judgment by the Abu Dhabi Cassation Court, the Cassation Court found that the engagement of parties in the court and expert procedures – even whilst challenging the jurisdiction of the courts due to an arbitration agreement – should be considered by the courts in determining whether the party challenging jurisdiction has waived their right to rely on the arbitration agreement.

Facts

A subcontractor sued the main contractor in a construction dispute for AED 75 million before the Abu Dhabi Primary Court in 2019.

The main contractor challenged the jurisdiction of the courts to hear the dispute from the initiation of the trial proceedings until reservation for judgment on the grounds that the contract was subject to an arbitration agreement between the parties.

The Primary Court ultimately found it had no jurisdiction over the dispute as the underlying contract contained an arbitration agreement, however, the Primary Court had appointed an expert to review the contract, powers of attorney, and other matters related to the merits of the dispute.

The subcontractor appealed the judgement before the Abu Dhabi Appeals Court in April of 2020.

In June of 2020, the Appeals Court dismissed the appeal and upheld the verdict of the Primary Court.

Thus, the subcontractor took the matter to the Abu Dhabi Cassation Court (the highest court in the Emirate of Abu Dhabi).

Issues

The Abu Dhabi Cassation Court determined that the courts had jurisdiction to hear the case for two reasons; the first being that the subcontractor's signatory to the contract did not have authority to bind the subcontractor to an arbitration agreement.

The second – and more significant – reasoning by the Cassation Court was that the engagement of the parties with the court and expert procedures must be considered in deciding whether the party challenging the jurisdiction of the court had waived their right to do so by engaging substantively in the merits of the dispute during proceedings.

In this, the Abu Dhabi Cassation Court stated that:

“In addition to that, the expert procedures took a prolonged period of time, during which the two parties reached joint consensus on many of the detailed matters of expertise and on the terms of entitlements for the appellant with the respondent, and that the respondent had been researching the subject matter of the lawsuit, which concluded that the respondent had waived its argument in respect of the arbitration agreement and non-jurisdiction of the courts, and the appellant insisted on this before the two trial courts [Primary and Appeals], but neither of the courts investigated and researched this issue, which is considered denial of the right of defense, and when the contested judgment ended with its reasons and verdict – in support of the first-degree ruling – contrary to what preceded, which indicates that the two courts have not properly applied the law and did not understand the facts of the case, and turned away from addressing the appellant’s defense on aspects that deserved a response, and that is what defects the appealed judgment and requires its revocation.”

(The appellant being the subcontractor and the respondent being the main contractor.)

Deductively and arguably, the Cassation Court put forth a three-prong test to determine whether a litigant would be deemed to have waived their jurisdictional arguments that are reliant on an arbitration agreement.

The three prongs may be considered as follows:

1. The extent that the party challenging jurisdiction becomes engaged in the merits of the dispute during court proceedings notwithstanding any primary jurisdictional challenge.

2. The extent that the party challenging jurisdiction becomes

engaged in the court expert procedures.

3. Whether any consensus was made by the party contesting jurisdiction with the counter litigants as part of the court or expert proceedings.

Also notable is Cassation Court’s finding that the parties engaged in the court expert proceedings for a “prolonged period of time” even though the trial before the Primary Court took about one year which is a relatively average length of time for a complex construction dispute at the first level of court.

Significance

This judgment by the Abu Dhabi Cassation Court presents a novel but substantial consideration when challenging jurisdiction of the courts in the UAE on the grounds that an arbitration agreement governs the dispute between the parties.

And likewise, the judgment presents a critical question; to what degree can a party challenging jurisdiction engaged in the merits of a dispute before the courts?

Litigants that challenge the jurisdiction of the courts – on grounds that an arbitration agreement exists – must make significant choices in how and when to argue the merits of the dispute as opposed to choosing to only challenge jurisdiction without arguing on merits.

Engagement with the court expert procedures must also be carefully conducted as any verbal or written disclosure, comment, or decision may be construed to be consenting to court or expert procedure related matters that would be deemed waiver of the jurisdictional challenge.

And parties must also be diligent in how they (or their counsel) review and critique any case management session minutes, expert hearing transcripts and reports, and hearing minutes for trial sessions before the court, to ensure that no explicit or implied jurisdictional waiver is made.

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Bid Bonds and Evaluation Methods under the 2019 Tender Regulations in Qatar

March 21, 2021

On 20 June 2019, the Qatar Cabinet issued Decision No. 16/2019 On the issuance of the Implementing Regulation to the Tenders and Bids Law (the "Regulations").

Long-awaited, the new Regulations govern the tendering process as have been established by Law No. 24/2015 Regulating Tenders and Bids, providing detailed provisions regarding the step-by-step procedures that take place.

Below are the important takeaways for tenderers looking to bid for projects in the State of Qatar with respect to bid bonds and evaluation methods:

Bond Forms

For both bid bonds and performance bonds, the Regulations permit either submission of a cashier's cheque, or of a bank guarantee letter issued by a local or a bank accredited by decision of the Prime Minister after obtaining the approval of the Qatar Central Bank, whether such bank is located inside or outside the State of Qatar (“Accredited Bank”).

Cheques that are drawn on foreign banks shall be accepted if they are annotated with the acceptance of a local or an Accredited Bank that the local or the Accredited Bank undertakes to pay the amount equal to the required bond and that it is bound to pay it in full upon first request to do so.

Bank guarantees for both bid bonds and performance bonds must be unconditional, unrestricted, fully payable and irrevocable.

Bid Bonds

Every bid shall be submitted with a bid bond within the conditions of the announcement or the invitation. The maximum amount that may be requested would not exceed five percent (5%) of the estimated value. The bidder who fails to submit the required bid bond shall be excluded.

Exemption from the bid bond requirement shall be possible in the following:

1. In tenders related to consultancy services.
2. In tenders related to technical, research, media, sponsorship and marketing services.
3. In tenders whose value is less than 500,000 Qatari Riyals.

In supply tenders which may be split, the amount of the bid bond may be set at not more than five per cent (5%) of the estimated value of each item separately, in which case the bidder shall submit the required bid bond for the items he wishes to bid for.

If the tenderer submits a bank guarantee as opposed to a cashier’s cheque, the guarantee must be valid for no less than one hundred twenty (120) days from the date set for the submission of the bids.

The bid bonds shall be returned to the unsuccessful bidders within a period not exceeding seven working days from the date of issuance of the decision rejecting their bids, or from the expiration of the bond without its renewal. The bid bond shall be returned to the successful bidder within a period not exceeding seven working days from the date of collecting the performance bond.

Performance Bond

The announced tender conditions shall determine the amount of the performance bond at not less than ten percent (10%) of the contract value. The full performance bond shall be kept until the final execution of the contract, including the warranty or maintenance period pursuant to the tender conditions.

Exemption from submitting the performance bond in full or in part shall be possible in tenders, bids Mumarasa* and direct agreements related to the following:

1. Consultancy services.
2. Technical, research, media, sponsorship and marketing services.
3. If the value of the process is less than 500,000 riyals.
4. Warranty and maintenance services.

*Mumarasa contracts are those that are executed for procurement, works, or services which are requested in urgent cases, or that were tendered but for which no bids were submitted, or for which bids were submitted with unacceptable prices but urgent requirements to the end that they cannot be put out to tender again.

Language of Documents

The documents of the tenders, bids and contracts shall be drafted in Arabic, but English documents may be accepted if accompanied with an Arabic summary. However, the bidding shall be in Arabic except in certain cases where the Tenders and Bids Committee approves submissions in another language so long as they are accompanied by a summary translated into Arabic.

Evaluation by Points

In the cases where the tender requires the evaluation of bids using a points system, the tender conditions shall include the elements and the basis for evaluation as well as the details and basis for scoring points. They shall likewise specify the evaluation points and the minimum limit for the technical acceptance of the following elements:

1. The length of experience in the required field of execution.
2. The permanent technical and administrative cadres working for the bidder.
3. The projects that were successfully executed, and the value of the project executed at the highest cost.
4. The permits for exercising the technical works of specialized nature.
5. The financial capacity of the bidder shown by an audited budget.
6. The equipment, machines and devices available with the bidder, which are necessary for the completion of the requested work.
7. Any data or information that is deemed necessary.

The tender shall be awarded to the lowest bidder whose bid meets the requirements of minimum technical acceptance. The evaluation by points may be based on the calculation of the common points for joint technical and financial acceptance, in which case the contract shall be awarded to the bidder whose bid has scored the highest points in the joint evaluation provided that the price he has submitted is within the limits of the estimated value or the limit accepted.

Tender Documents and Approvals

Tender documents shall sufficiently be delivered to whoever requests them, after the payment of the financial consideration prescribed in the announcement. The documents shall include the following:

1. The form of announcement of the tender.
2. The form of the tender (the bid).
3. The instructions and general conditions of the tender, which refer to the legal provisions to be complied with by the bidders when submitting their bids.
4. The special conditions of the tender, which refer to the technical matters that are specific to each tender according to its type.
5. The forms of the bid bond and the performance bond.
6. The accurate and detailed bills of quantities showing the particulars of the items.
7. The full detailed drawings and specifications.
8. The form of the contract.
9. The elements and basis for evaluation and the details and basis for scoring points.
10. The general conditions of contracting set by the Government Authority, after notifying the Department.
11. Any other relevant documents which the Department decides to add in coordination with the Competent Department

Samples

The Regulations require that where a tender requires the provision of samples; the weight, size or volume of the samples shall be stipulated. For items which need to be supplied inside boxes; the type, capacity, and specifications of these boxes shall be indicated. A bid that is not accompanied by said samples shall not be accepted, and samples at the showrooms of the bidders may be inspected on-location in the cases that so require. The samples shall be returned to the unsuccessful bidders within seven working days from the date of rejecting their bids. The samples submitted by the contracted party shall be kept throughout the validity period of the contract.

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Ruling Sets Precedent on Applicable Penalties for Voluntary Tax Disclosures (UAE)

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In the extremity; when faced with errors in tax filings, taxable persons may be subject to fines amounting to the equivalent of up to 350% of any unpaid taxes.

Comparatively, with appropriate record-keeping and diligent filing of a voluntary disclosure(s), the penalty that could apply to errors would only be 5%, as supported by a recent ruling of one of the three Tax Dispute Resolution Committees (TDRC) in the United Arab Emirates.

Taxable persons wishing to notify the Federal Tax Authority

(FTA) of an error or omission in their tax return, tax assessment, or tax refund application may submit a voluntary disclosure pursuant to Article 8 of the Executive Regulations to the Tax Procedures Law.

There have been cases of voluntary disclosures that have resulted in penalties specific to voluntary disclosures being applied to the taxable person amounting to 50%, 30%, or 5% of the unpaid tax.

There have also been cases where voluntary disclosures have resulted in the taxpayer being subjected to retroactive penalties that would amount to a maximum of 300% of the unpaid tax in addition to the 50%/30%/5% voluntary disclosure penalties.

A recent landmark ruling by the Tax Dispute Resolution Committee (TDRC) clarified that where the taxpayer can clearly evidence that they have acted in good faith and made the voluntary disclosure within the timeframe of twenty business days as of the date their awareness of the error, only the voluntary disclosure penalties apply – and not the retroactive penalties that could amount to an additional penalty of 300% of the unpaid tax.

As opposed to merely stating the necessity to remedy a mistake without noting the taxable person's consciousness of the error; both the Executive Regulations and the Tax Procedures Law emphasize the element of a taxable person's awareness of a mistake when making a voluntary disclosure filing:

- Article 8 of the Executive Regulations: "*…the taxable person shall make a voluntary disclosure to the Authority within twenty business days from the date when the taxable person became aware of the error.*"
- Article 10 of the Tax Procedures Law in each of the four sub-articles: "*If a taxable person becomes aware…*"

The TDRC’s ruling is in line with UAE court precedent such as the Federal Supreme Court’s rulings in appeals 555/2012 and 1/1991 where the Court clearly indicated that unintentional error is not punishable especially if the subject person acted in good faith [when becoming aware of a mistake] within the parameters of the law.

The significant takeaway of this ruling for taxable persons is that evidence of how the error and/or omission came about, and how the taxable person became aware should be clearly recorded and transmitted to the FTA when a voluntary disclosure is made. That evidence should indicate that the taxpayer had discovered the error (and made the voluntary disclosure) within the twenty-business day period.

When reconsideration requests to the FTA are made, challenges before the TDRC are submitted, or an appeal is raised before the Federal Courts on voluntary disclosure, it is paramount that the taxable person can clearly evidence how it is they came about becoming aware of the error that required a voluntary disclosure.

Such evidence can be in the form of internal communication between personnel, private clarifications (a response to a clarification request issued to the FTA), issuance of an FTA guide or public clarifications, adjustment of systems and processes (especially in light of the novelty of the tax reforms in the UAE), deployment to production systems, internal audits, and so on.

The Penalties in Detail

Cabinet Resolution No. 40/2017 on Administrative Penalties for Violations of Tax Laws in the UAE explicitly provides for the application of two penalties in cases of voluntary disclosure by the taxable person. The first is a fixed penalty of AED 3,000 for the first occurrence of voluntary disclosure and an AED 5,000 penalty in case of repetition.

If the taxable person makes a voluntary disclosure after being notified of the tax audit and the FTA starts the tax audit, or after being asked for information relating to the tax audit, whichever takes place first, a 50% penalty of the unpaid tax shall apply.

If the taxable person makes the voluntary disclosure after being notified of the tax audit but before the start of the tax audit, a 30% penalty of the unpaid tax shall apply.

If the taxable person makes a voluntary disclosure before being notified of the tax audit by the FTA, a 5% penalty of the unpaid tax shall apply.

Nonetheless, there are also additional penalties that have been imposed on taxable person retroactively when voluntary disclosures are submitted to the FTA. These penalties have been those that fall under the category of failure to settle the tax within the timeframe (i.e. late payment penalties). These penalties are:

- 2% of the unpaid tax is due immediately once the payment of payable tax is late.
- 4% is due on the seventh day following the deadline for payment, on the amount of tax which is still unpaid.
- 1% daily penalty charged on any amount that is still unpaid one calendar month following the deadline for payment with a maximum of 300%.

The calculation of the above late penalty percentages commences as of the date of when the disclosure should have been made initially (i.e. when the error occurred).

Knowledge of Tax Legislation

In a short period of time, the UAE witnessed several federal legislations (laws, legislative decrees, cabinet decisions, ministerial decrees, all of which comprise new tax legislation). This legislation is new to the community and the

Emirati judiciary and came in succession rapidly. Moreover, there have been more than 20 guidelines and 10 public clarifications issued by the FTA.

Albeit the general principle is that ignorance of the law is not an excuse; it is in UAE jurisprudence that it is necessary for those subject to the law to understand the content and application of the law as an additional condition after its publication and entry into force. This is pursuant to the principles of justice that a person is required to respect legislation only after he or she has become aware of its requirements.

This axiom is significant for taxable persons who see a voluntary disclosure triggered due to new guidelines or public clarifications issued by the FTA, private clarifications provided, or errors that stem from the organizational compliance efforts that a taxable person puts in place to comply with the tax reforms.

In 2008, the Federal Supreme Court ruled that the general constitutional requirements and the legal system are based on the principle that laws and the like are not enforced once they are enacted, but must be sufficiently communicated to all and brought to their knowledge. Otherwise, the adverse would be contrary to the principles of justice and the obligation to protect acquired rights, and the stability required by the public interest in the transactions of individuals and maintenance of public confidence.

The Federal Supreme Court ruled in the same manner in 2002 that in accordance with the principles of the Shari’a law, the general constitutional principles and the foundations of the legal system, it decided laws and the like (regulations, etc.) shall not be effective once issued, but shall be communicated to all and brought to their knowledge in order for those subject to the law to conform to.

The principles of knowledge of the law – particularly in tax legislation – have also been grounded by the Egyptian Court of Cassation in a recent ruling in 2016 where the Court found that late payment penalties due to the introduction of new tax legislation should be reconsidered by the respective authorities, and in certain cases, not be applied due to the time period necessary for a taxable person to become aware of the new tax requirements.

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