Dubai Cassation Court rules FIDIC arbitration clause not enforceable

March 23, 2021

In a recent judgment, the highest Court in Dubai, the Dubai Cassation Court ruled that incorporating a FIDIC contract (general conditions) by reference into a transaction does not necessarily bind the parties to the arbitration clause therein that FIDIC contract (general conditions).

In this judgment, the Dubai Cassation Court also sheds light on the judicial approach with respect to Article 7(2)(b) of the Federal Arbitration Law which permits incorporating arbitration clauses by reference to any model contract, international agreement, or any other document containing an arbitration clause.

The dispute involved matters related to variation, site discharge, termination for convenience, and other issues related to the construction of a villa. The dispute quantum was around AED 20,000,000.

The employer sued the contractor before the Dubai Primary Court, which found that the Dubai Courts have jurisdiction over the dispute, and ruled in favor of the employer.

The contractor appealed and the Dubai Appeals Court ruled that the Dubai Courts do not have jurisdiction over the dispute due to the existence of the arbitration clause that is incorporated by reference between the parties.

The parties had indeed agreed that the 1987 FIDIC Red Book

General Conditions of Contract shall govern the transaction.

Clause 67 of the 1987 FIDIC Red Book General Conditions contains a multi-tiered dispute resolution clause which requires that all disputes are to be referred to the engineer in the first instance for a decision and subsequently to arbitration under ICC rules.

The Dubai Appeals Court found that incorporating by general reference the entirety of the 1987 FIDIC Red Book General Conditions is sufficient to bind the parties to the arbitration clause contained therein the General Conditions.

The employer challenged the Dubai Appeals Court judgment before the Dubai Cassation Court.

The Dubai Cassation Court overturned the Appeals Court judgment and found that the arbitration clause was not enforceable and that the Dubai Courts had jurisdiction to adjudicate the dispute.

Referring to statute; the Cassation Court relied on Article 7 of the Federal Arbitration Law which requires arbitration agreements to be in writing. Although the judgment references the entirety of Article 7, the judgment continues to implicitly highlight the provisions of Article 7(2)(b) by elaborating on the permissibility of incorporating an arbitration clause by reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause if the reference is such as to make that arbitration clause part of the contract.

The parties did indeed agree that the 1987 FIDIC Red Book General Conditions shall govern the transaction, however, the Cassation Court found that because there was no explicit reference to the arbitration clause of the General Conditions, it cannot be construed that the parties had explicitly agreed to the arbitration clause therein.

The Dubai Cassation Court upheld the Dubai Primary Court's reasoning, which provided a more in-depth analysis, as follows:

"An agreement to arbitration is considered when it is a referral contained in the original contract to the document that includes the arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is only achieved if it includes an indication to the arbitration clause included in the document referring to it, yet if the referral to the aforementioned document is merely a referral in general for the texts of this document without specifying the aforementioned arbitration clause in particular that establishes the parties' knowledge of its existence in the document, the referral does not extend to such arbitration clause, and the arbitration is not deemed agreed upon between the parties to the contract, and it is also decided that if there are appendices or schedules to the contract, it is not required that the parties sign them if the parties stipulate in the contract that these appendices or schedules are considered an integral part of the contract, considering that these appendices or schedules are nothing more than a detailed statement of what the parties have agreed in substantive issues, except that if these appendices or schedules include an exceptional condition such as the arbitration clause, which does not apply to the parties, unless signed by the parties…the contract concluded between the plaintiff and the defendant which governs the relationship that is the subject of the lawsuit does not evidence the will of the parties to bring into effect the arbitration clause to settle the disputes arising from the implementation of the contract."

A special webinar has been prepared to discuss this judgment in collaboration with the Chartered Institute of Builders, which will take place on 19 April 2021. For more details and registration click here.

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New Dubai Tax Dispute Resolution Committees now deciding on 2020 and 2021 objections

March 23, 2021

Brief

Since around September 2020, the tax dispute resolution committee of the Emirate of Dubai has been inoperable (under reformation).

On 25 November 2020, the UAE Minister of Justice issued Ministerial Decree No. 691/2020 on the Formation of Tax Dispute Resolution Committees for the Emirate of Dubai.

The Emirate of Dubai previously had only one tax dispute resolution committee to hear objections against reconsideration decisions of the Federal Tax Authority. However, the Decree formed two tax dispute resolution committees for the Emirate of Dubai (Dubai TDRCs).

The two new Dubai TDRCs began practically operating on 16 February 2021 and had docketed all tax objections lodged in 2021 for review and issuance of a decision.

Decisions for objections filed in 2021 have begun being issued as of mid-March 2021.

As of the fourth week of March 2021, objections filed in 2020 are also being considered by the Dubai TDRCs.

However, taxpayers could be required to communicate with the Ministry of Justice and confirm the validity of the objections and continued request by the taxpayer/objector for the Dubai TDRC to decide on the objection.

The Ministry of Justice may request confirmation as to whether the objector had proceeded to file an appeal before the Federal Primary Court pursuant to Article 33(2)(b) of the Tax Procedures Law which grants objectors the opportunity to challenge the non-issuance of a decision by a tax dispute resolution committee.

(The Tax Disputes Circuit of the Federal Primary Court is responsible to hear challenges against rulings of a TDRC. Both the taxpayer and the FTA may challenge a ruling of the TDRC before the Federal Primary Court, Federal Appeals Court, and finally the Federal Supreme Court.)

Timelines

If a person (domiciled in Dubai for tax purposes) disagrees with a decision by the FTA and commences the reconsideration process but does not obtain a favorable outcome, the subsequent procedure would be to object before the Dubai TDRCs.

The objection is lodged with the tax dispute resolution department of the Ministry of Justice that is responsible for lodging the objection with the Dubai TDRCs within two weekdays as of the date of the filing.

Once the Dubai TDRCs receive the objection, a decision must be rendered within a maximum of forty weekdays which comprises of

an initial twenty-weekday period and an additional twenty-weekday extension period. The extension can be granted based on the request of the objector or the Federal Tax Authority, or if the Dubai TDRC deems it necessary.

After the procedure before the Dubai TDRC is concluded, either the objector or the Federal Tax Authority can challenge the committee's decision before the Federal Primary Court.

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Courts Mandate Valuation of Claims by Litigants

March 23, 2021

On 28 October 2019, the Abu Dhabi Judicial Department (ADJD) ordered the departments of the Abu Dhabi Courts to inspect claims and counterclaims at all levels of the Court to ensure that litigants have quantified their claims/requests in their submissions at the time of filing.

Abu Dhabi Law No. 13/2017 provides that for lawsuits of unknown value, a fixed fee applies of AED 1,500 for summary matters, and AED 4,000 for plenary matters, with the remainder of the fees to be paid once the final judgment is pronounced.

Notwithstanding, the ADJD stated that parties – both plaintiffs and defendants in their claims and counterclaims

respectively – may avoid including quantum of their claims in an attempt to avoid court fees.

Hence, litigants with claims that are *prima facie* quantifiable must include the value therein to avoid the risk of claims being rejected by the Abu Dhabi Courts. (See below for types of cases and valuation methods.)

The ADJD also noted that the same requirements apply to claims before the Appeal and Cassation Courts.

Departments that are required to inspect claim values are the Abu Dhabi Court Case Management Office, the outsource services centers (such as Tasheel), the Heads of the Court registration departments, and Heads of Court case preparation departments.

Abu Dhabi Law No. 13/2017 grants the Abu Dhabi Courts authority to dismiss the case in case it is found during the proceedings that the fees paid were not commensurate with the claims or not duly collected.

The Civil Procedures Law No. 11 of 1992 as amended by Cabinet Decision No. 57 of 2018 that came into effect in early 2019 requires the value of the lawsuit to be assessed on the day of its filing and in all cases to be based on the litigants' latest demands. The value of the lawsuit shall include any interests, indemnities, revenues, expenses and other appurtenances of which value is estimated, due on the day of its filing.

With respect to non-cash claims that require valuation per the Civil Procedures Law (as amended), the valuation methods are:

- Where the currency of the claim is other than Emirati Dirhams, a conversion to Emirati Dirhams would take place.
- Real estate ownership matters where valuation would be based on the real estate's value. If the value of the property is not assessed, it shall be considered to

exceed one million dirhams.

- Requests for validity, nullification, or rescission of a contract shall be based on the value of the subject matter contract.
- Actions relating to the dissolution or liquidation of a company are valuated based on the capital of the company at the time of filing the suit.
- Eviction suits are valuated based on the annual rental value.
- Suits between creditors and debtors regarding the seizure or an auxiliary real right are valuated based on the debt's value or value of the property/real right seized, whichever is less.

The provided list is non-exhaustive but provides litigants with an idea of the factors in valuating court fees.

The Abu Dhabi Court fees are 5% of the value of civil lawsuits with a minimum of AED 100 and a maximum of AED 40,000. This is applicable to the Primary and Appeal Courts. The Cassation Court fees are a fixed fee of AED 2,000 for every appeal in cassation, with an AED 3,000 deposit with the court treasury as a guarantee that is refunded if the judgment is in favor of the appellant.

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(COVID-19) 1981 Government

opinion on force majeure salary deductions

March 23, 2021

In 1981, the Department of *Fatwa* (Legal Advice) and Legislation, the Department at the UAE Ministry of Justice responsible for advising government agencies on legal issues, issued an opinion on whether an employee who had been out of the country on a work-related trip and could not return due to a force majeure event, was eligible to continue receiving their salary.

The Department established two principles in its opinion:

- The intent of the employee: The provisions on vacation leave do not apply to the case of an employee on a formal work trip abroad when the employee is late in returning to their work for reasons beyond the employee's control because the employee did not consider the delegation of the task entrusted to him as being a vacation but rather as a work mandate.
- Application of force majeure events: If the employee is on a formal work trip abroad, not to consider their failure to return to the United Arab Emirates (or any other designated work location) due to a force majeure event as a break from work that may be deducted from their salary.

The opinion of the Department was laid out as follows:

If an employee is on an official work trip, they are not considered to be on vacation but rather at work, and if force majeure conditions prevent the employee from returning following the end of their mandate, such cannot be considered a break from work which may be deducted from their vacation

days, but rather takes the rule of force majeure that prevents the employee from carrying out their work.

If a force majeure event precludes the possibility of the employee's return following the end of their work mandate, such as the absence of a means of transportation or other reasons that cannot be limited that lead to impeding the return of the employee sent abroad from the workplace, in such a case, this cannot be considered a break from work, which may be deducted from the employee's vacation days, but rather takes the rule of force majeure that prevented the start of work.

What if the employee is in the UAE and not traveling?

In the current state of affairs, a considerable number of employees in the UAE cannot attend their workplace due to the restrictions placed to prevent the spread of COVID-19, whether due to restrictions on accessing the workplace (closure of malls, etc.), or the employee themselves choosing to stay home in adherence with Government instructions, in particular *Cabinet Resolution No. 17/2020 on the Limiting the Spread of the Coronavirus*, and *Federal Public Prosecutor Resolution No. 38/2020 on the Regulations of Cabinet Resolution No. 17/2020*.

The opinion of the Department is significant in that it addresses an employee's inability to return to the place of work but is nonetheless addressive of a situation where the employee was on a work trip outside the country, as opposed to not being able to return whilst they are within the UAE.

However, employees and employers should account for the first principle established by the Department's opinion; that is the intent of the employee and employer on whether the days affected by the force majeure event were to be vacation days or workdays.

If the restrictions caused by COVID-19 had occurred during

days which both the employee and employer had intended on being workdays, but (in reference to the second principle noted above) a force majeure event restricted the employee from attending their place of work, it is precautionary for both employer and employee to refer to and consider the extent to which principles set forth by the Department of *Fatwa* (Legal Advice) and Legislation in its opinion in 1981 would apply in today's circumstances amidst the Coronavirus pandemic.

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As the Dubai tax dispute committee possibly reforms – does it affect your right to object to tax penalties?

March 23, 2021

Brief

The tax dispute resolution committees were formed pursuant to the Tax Procedures Law, its Executive Regulations, and specifically Cabinet Decision No. 23/2018.

The Dubai tax dispute resolution committee ("Dubai TDRC") was formed pursuant to Ministerial Decision No. 109/2019 which named the primary judge, the two experts, and the alternate

judge as the committee members.

The Dubai TDRC has jurisdiction to accept and rule on objections by persons domiciled in, or with a tax registration address, in the Emirate of Dubai.

There are two other committees in the Emirate of Abu Dhabi and the Emirate of Sharjah, but this article focuses on the potential reform of the Dubai TDRC.

Currently, it is believed that the Dubai TDRC may be undergoing reform which could ultimately affect objections that are currently filed or will be filed in the near future until new committee members are appointed by Ministerial Decree.

What happens to objections if the committee is inoperable?

If a person (domiciled in Dubai for tax purposes) disagrees with a decision by the Federal Tax Authority and commences the reconsideration process but does not obtain a favorable outcome, the subsequent procedure would be to object before the Dubai TDRC.

The objection is lodged with the tax dispute resolution department of the Ministry of Justice that is responsible for lodging the objection with the Dubai TDRC within two weekdays as of the date of the filing.

Once the Dubai TDRC receives the objection, a decision must be rendered within a maximum of forty weekdays which comprises of an initial twenty weekday period, and an additional twenty weekday extension period. The extension can be granted based on the request of the objector or the Federal Tax Authority, or if the Dubai TDRC deems it necessary.

After the procedure before the Dubai TDRC is concluded, either the objector or the Federal Tax Authority can challenge the committee’s decision before the Federal Primary Court.

Here the question becomes; what if a committee is undergoing reform and does not issue a decision?

Does the objector have to wait, or can they continue their dispute before the Federal Primary Court?

To briefly address these questions, we draw reference to a case where a similar committee was yet to be formed, and the litigant proceeded to file their claim before the Courts directly, which was found to be a valid procedure by the Federal Supreme Court.

Federal Supreme Court case where an administrative committee was not formed

In 2001, conciliation and arbitration committees ("CAC") were established within the Federal Courts to decide on certain disputes before those disputes were to be filed before the Federal Primary Court.

By 2008, one of the Federal Courts had not yet set up a CAC, and a litigant bypassed the CAC and filed their case directly before the Federal Primary Court on the basis that the CAC was not formed.

The Federal Primary and Federal Appeals Court rejected the claim based on the grounds that the litigant had not registered their dispute before the CAC prior to filing the claim with the Federal Primary Court, and that such procedure was mandated by law.

However, the Federal Supreme Court overturned the lower courts' judgments and ordered that if the Minister of Justice does not issue a decree forming the CAC for it to be competently operable, litigants may plead their case before the Federal Primary Court directly.

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How the New FTA Public Clarifications Guide Affects Tax Disputes

March 23, 2021

In October – November 2019, the Federal Tax Authority issued an updated Clarifications User Guide (USEG001) replacing its predecessor version from June 2018.

Item '6′, pg. 10, of the previous version of the Clarification stated that:

"Once a response is issued by the FTA, you may decide whether to follow the Clarification provided by the FTA or not at your own risk".

In the updated version of the Clarification that was issued recently, this provision has been omitted, subsequently creating more mandatory application of public clarifications on taxpayers in the UAE.

How does this affect litigation procedures and the judicial interpretation of public clarifications?

As far as the black letter of the law goes; Federal Decree-Law No. 13/2016 On the Establishment of the Federal Tax Authority does not grant the FTA powers to issue laws – only to propose them in coordination with the Ministry of Finance.

As a general matter, Federal legislation may only be issued by the 'Legislator', i.e. the consensus of the seven Rulers of the seven respective Emirates. This was the issue with the DIFC Law in the past and is currently a matter of discussion on the Bylaws to the Civil Procedures Law.

Public clarifications – as far as matters stand today – are administrative decisions that may be challenged as any other administrative decision is, originally pursuant to Article 84 of the Civil Procedures Law on actions for canceling administrative decisions; taking into consideration the special provisions of the Tax Procedures Law.

In March 2019, Minister of Justice Decisions Nos. 237 and 238 of 2019 established Tax Dispute Circuits in the Federal Courts. Prior to the Tax Dispute Circuits, tax cases were referred to the Administrative Circuits of the Federal Courts, i.e. the Circuits that hear disputes where one (or all) of the parties are public / government entities.

This reinforces the stance that a public clarification is an administrative decision. Consequently, meaning that if a taxpayer was existing in the State when the clarification was issued, they should challenge the clarification itself as an administrative decision within the time limit of its issuance, or otherwise be deemed to have conceded to it.

The complexity arises if the taxpayer is established in the UAE after that time limit on challenging a public clarification has passed, in which case the taxpayer may request the Tax Dispute Resolution Committees or Federal Courts to adjudicate on the contents of the clarification if there are substantive, arguable grounds to do so.

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UAE Tax Courts Anniversary: 41 cases, 6 favoring taxpayers (so far)

March 23, 2021

The Tax Disputes Circuits of the Federal Primary Court and Federal Appeals Court were signed into law on 18 March 2019 pursuant to Minister of Justice Decisions No. 237 of 2019 and No. 238 of 2019, respectively.

The Tax Disputes Circuit of the Federal Primary Court is responsible to hear challenges against rulings of a Tax Disputes Resolution Committee ("TDRC"). Both the taxpayer and the Federal Tax Authority ("FTA") may challenge a ruling of the TDRC before the Federal Primary Court, Federal Appeals Court, and finally the Federal Supreme Court.

As the Tax Disputes Circuits pass their first anniversaries, we look at how many cases have been lodged since March 2019 till *circa* April 2020, and how many have been in favor of the taxpayers. Taking into consideration that many cases are still pending and that there have not been any final and binding judgments by the Federal Supreme Court so far.

Cases filed at the Federal Primary Court:

- 13 cases have been filed by the FTA challenging TDRC rulings that were in favor of the taxpayer.
- 15 cases have been filed by taxpayers challenging TDRC rulings that were in favor of the FTA.

The Federal Primary Court has so far ruled in favor of

taxpayers in 5 cases, reversing penalties applied by the FTA in 4 cases. Other cases have either been in favor of the FTA or are pending.

Wasel & Wasel is counsel to various taxpayers in cases before the Federal Primary Court. In early 2020, Wasel & Wasel obtained two judgments at the Federal Primary Court reversing penalties applied by the FTA, in addition to various other rulings obtained by Wasel & Wasel at the TDRC stage reversing penalties.

Cases filed at the Federal Appeals Court:

- 4 cases filed by the Federal Tax Authority appealing a Federal Primary Court judgment in favor of the taxpayer.
- 5 cases filed by taxpayers appealing a Federal Primary Court judgment in favor of the FTA.

Cases filed at the Federal Supreme Court challenging a judgment of the Federal Appeals Court:

- 1 case filed by the Federal Tax Authority appealing a Federal Appeals Court judgment in favor of the taxpayer.
- 2 cases filed by the taxpayers appealing a Federal Appeals Court judgment in favor of the FTA.
- 1 case filed at the Constitutional Circuit of the Federal Supreme Court challenging the ‘pay now, argue later’ rule.

The Execution Circuit of the Federal Primary Court is responsible for enforcing payment against taxpayers. So far, there have been 9 execution applications against taxpayers.

The industries of taxpayers involved in litigation before the Federal Courts have included tobacco, construction, manufacturing, e-commerce, banking and insurance, exhibitions, education, and trading.

The values in dispute before the Federal Courts have ranged from six-figures to nine-figures. Rulings by the TDRCs under six-figures (i.e. AED 100,000) are final and cannot be challenged before the Federal Primary Court.

A substantial number of the cases that were ruled in favor of the FTA by the Federal Courts were due to the taxpayers having failed to adhere to procedural requirements; such as failing to pay the taxes and penalties in dispute prior to objecting before the TDRCS, or objecting before the TDRCs after twenty working days of receiving the FTA's decision on a reconsideration request.

Statistics are approximate figures as of mid-April 2020.

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UAE Federal Court Restricts Time Limit on Tax Reconsideration Requests

March 23, 2021

Brief

One of the most common questions asked regarding tax reconsideration requests is the consequence of not receiving a response from the Federal Tax Authority ("FTA") within the

statutory timeframe of twenty-five weekdays.

The UAE Federal Courts have recently addressed this issue in opining that – if no decision is taken on the reconsideration request – the time limit to object before the tax dispute resolution committees commences at the expiry of the twenty-five weekdays.

This essentially means that once a person submits a reconsideration request, if no decision is received within twenty-five weekdays, the twenty-weekday time limit to object before the tax dispute resolution committee commences at that point.

Recap on Time Limits

Briefly recapping the tax dispute resolution procedure; if a person disagrees with a decision made by the FTA, the first step to trigger the dispute resolution procedure is to submit a reconsideration request to the FTA against that decision.

Subsequent to the reconsideration procedure, there are four stages that the dispute would be subject to; the tax dispute resolution committees, the tax dispute circuits of the Federal Primary Court and the Federal Appeals Court, and finally the Federal Supreme Court.

There are time limits between each stage and non-compliance with the time limits results in rejection of the dispute on a procedural basis.

The time limit to submit a reconsideration request is twenty weekdays as of the date of the decision subject of the reconsideration.

Upon submission of the reconsideration request, the FTA has twenty weekdays to decide and five days thereafter to communicate the decision to the requestor; twenty-five weekdays in total.

If the requestor does not agree with the reconsideration decision, they must object before the competent tax dispute resolution committee within twenty weekdays as of the date of the reconsideration decision.

The Federal Courts have now clarified that if no decision is received from the FTA on the reconsideration request within twenty-five weekdays, the time limit of twenty weekdays to object before the tax dispute resolution committee commences.

Was this expected?

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

The general rule for decisions on government grievances is legislated under Article 84 of the Civil Procedures Law which 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."

The general rule, such as that under the Civil Procedures Law, can notwithstanding be altered by subject matter legislation.

For example, the Country-by-Country Reporting 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 weekdays "…then the appeal will be deemed to have been successful and any penalty imposed shall be canceled."

So, we see the original position under the Civil Procedures Law is that a non-response is deemed a rejection, whilst in the CbCR subject matter legislation a non-response is deemed an acceptance.

The Tax Procedures Law, on the other hand, is silent on whether no response from the FTA on reconsideration requests is to be deemed a rejection or acceptance of the application.

Where a subject matter legislation, such as the Tax Procedures Law, does not provide for an explicit variation to the original rule – then the original rule applies.

Moreover, the Tax Procedures Law and the Cabinet Decision forming the tax dispute resolution committees grants the committees jurisdiction to decide on reconsideration requests that were submitted to the FTA to which the FTA has not decided upon.

The Federal Courts have now confirmed this and have taken the position that if a person wishes to object against a reconsideration request that has not been decided upon, they must do so within twenty weekdays as of the expiry of twenty-five weekdays since the submission of the reconsideration request.

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Supreme Court Ruling: Agreeing to Arbitration by E-mail and Instant Messaging?

March 23, 2021

In the last quarter of 2019, the United Arab Emirates Federal Supreme Court issued a judgment stating that agreeing to arbitration between parties could occur by electronic means and digital messaging. The judgment confirms Article 7(2)(a)

of the Federal Arbitration Law which states that an arbitration agreement is deemed to be in writing if it is in the form of an electronic message.

This is an unprecedented development as the general consensus had been that an arbitration agreement must be signed in manuscript (by hand) by the parties to the agreement.

Moreover, the Federal Supreme Court added that the agreement to arbitration could occur before the respective subject matter contract is concluded, during its lifetime, post its termination or nullity, or even during litigation procedures at which point a court hearing the dispute would be mandated to stay proceedings for the parties to commence arbitration.

Case Facts

In 2017, an arbitration award was issued by Tahkeem (the Sharjah International Commercial Arbitration Centre) in relation to a real estate dispute. The arbitration agreement between the parties had been entered into as a separate agreement after the conclusion of the subject matter contract.

In 2018, after the issuance of the 2018 Federal Arbitration Law, the net winner of the arbitration submitted the award for confirmation before the Primary Court. The Primary Court deferred the matter to the Appeals Court as the competent court for confirmation pursuant to the Federal Arbitration Law. The Appeals Court rejected confirmation of the award reasoning that a separate arbitration agreement is void and should instead had been a provision within the subject matter agreement itself.

The net winner of the arbitration challenged the judgment of the Appeals Court before the Federal Supreme Court, requesting that the Appeals Court judgment be overturned, and requesting confirmation of the validity of the arbitration agreement and the arbitration award.

Judgement

The Federal Supreme Court ruled that a separate arbitration agreement is valid and upheld the validity of the arbitration award; ordering the Appeals Court to confirm the award.

The Federal Supreme Court ruled that an arbitration agreement that is subject to the laws of the United Arab Emirates is valid even if the subject matter agreement is terminated or found void, or if the subject matter agreement is being litigated before the courts.

The Federal Supreme Court also confirmed the requirement for the arbitration agreement to be in writing, however, it also explicitly found that such agreement can be done through written electronic communication or through instant messaging, so long as such are compliant with the statutory requirements of electronic transactions.

Electronic Signing of an Arbitration Agreement

The Federal Electronic Transactions Law governs agreements between parties concluded through electronic devices and permits agreements (in whole or in part) to be conducted via electronic means, and the Federal Law on Evidence in Civil and Commercial Transactions governs the admissibility of digital/electronic evidence before the courts.

The Dubai Cassation Court has ruled in (in separate trials) that the rules on evidence do not prevent the admission of a data message or electronic signature as evidence to substantiate a litigant’s arguments.

A widespread point of concern in arbitration proceedings in the United Arab Emirates is the requirement of persons with specific authority to bind the parties to an arbitration agreement pursuant to Article 4(1) of the Federal Arbitration Law and Article 203(4) of the Federal Civil Procedures Law.

However, the Dubai Cassation Court has also ruled that authority may be express, implicit or apparent, particularly if the signatory is the registered manager (authorized representative) of the party. The exception to the manager's authority would generally be if the Articles of Association of the company explicitly restrict the manager from agreeing to an arbitration agreement.

The Electronic Transactions Law permits electronic signatures even if the law requires the existence of a specific form of a signature on a document; such as the specific authority to bind a party to an arbitration agreement.

To determine whether it is possible for a person to rely on an electronic signature, the party relying on the electronic signature must, amongst other elements, adopt appropriate steps to verify that the electronic signature is enhanced by an electronic authentication certificate, and if relying on an electronic signature is impossible, the party relying on the electronic signature shall be responsible for all the risks resulting from the non-validity of that signature unless otherwise established.

E-mails have a variety of tools that can create secure authentication of e-mail messages creating secured digital signatures to comply with the Electronic Transactions Law. Generally, reliance on e-mails as evidence would be conditional on the parties' ability to evidence the authenticity or lack thereof of the e-mail exchange.

It is also prudent to address instant messaging technologies considering the Federal Supreme Court ruling in this article. The most popular instant messaging means of which in today's modern commercial landscape is the use of WhatsApp as a platform for agreements to be negotiated and concluded (at times mere heads of agreement, sometimes addendums, or even severable provisions).

In 2019, the Dubai Cassation Court ruled – in respect of a gold trade deal dispute – that an agreement concluded between parties via WhatsApp (and partly via e-mail) is binding.

Moreover, WhatsApp Inc. (the developer of the WhatsApp service) does not provide expert testimony but holds that WhatsApp records are self-authenticating pursuant to law and do not necessarily require the testimony of a records custodian.

In essence, and in reading the relevant UAE laws and reliance on UAE higher court rulings, those authorized on behalf of the parties can conclude an arbitration agreement via WhatsApp if the WhatsApp message exchanges between the parties have evidence of receipt (often indicated by the 'blue ticks') before or during the lifetime of the respective subject matter agreement, or post its termination or nullity, or even during a court trial on a dispute regarding the subject matter agreement.

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UAE Remote Notarization / Attestation amidst COVID-19

March 23, 2021

The COVID-19 pandemic has left many businesses unable to go about performing their normal day-to-day operations. With people stuck at home, offices locked down, and restrictions on

global travel in place, many have found difficulties in ensuring that their work makes it through the pandemic.

Notarization is necessary for any business in order to avoid fraud and to ensure proper execution. The UAE continues to thrive in maintaining an ascendant economic ecosystem by doing all that it can to ensure that businesses do not face the challenges that come about with situations such as these.

In April 2020, the Dubai Courts announced that public notary services would be available to be conducted remotely, as to abide by the health and safety measures put in place due to the pandemic, whilst also ensuring that business operations remain steadfast. The circular states that the following Notary Services can be conducted remotely:

i) Power of Attorney notarization;

ii) Notarization of legal notices;

iii) Acknowledgments;

iv) Notarization of Local Service Agent Agreements;

v) Notarization of Memorandums/Articles of Association and addendums thereto with respect to civil companies (i.e. companies not subject to the Commercial Companies Law).

Companies that are subject to the Commercial Companies Law that wish to incorporate or amend constitutional documents must do so with the Dubai Economic Department.

This remote notary service requires a subscription to BOTIM, a video/voice calling application that can be found on the App Store for Apple users and the Play Store for Samsung users. The process entails the Dubai Courts' notary office contacting the attestor to the document through this video connection to establish the identity of the principal and full knowledge of the contents of the document.

This document must be sent to the dedicated email address in PDF format with an approved declaration to the remote signing on the bottom of each page.

When sending the email, it must contain all the information and documentation that is relevant, including (1) applicant's name, mobile number, address, Emirates ID or passport and confirmation of capacity; (2) documentation proving the applicant's authority to appoint powers; and (3) the company's commercial registration details (e.g. trade license), if applicable.

For these remotely notarized documents to be permissible under this service, they must include the following language:

"I, the undersigned, declare with my full capacity, and through video communication, using BOTIM, my consent on all that is stated in this application and I sign accordingly."

After the Dubai Public Notary has reviewed the documents, the applicant will be contacted via BOTIM either for: (a) further documents to be presented, (b) amendments to be made, or (c) to confirm approval of the notarization request and verify the relevant details with the applicant.

The applicant will then receive an SMS and an email containing the amount due and the link for payment. Once the payment has been made online, the original document will be sent to the applicant's address. The fees for this procedure will be payable by credit card and the courier will deliver the document at a cost of AED 21 to your address.

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