

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

March 21, 2021

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 through the Remote Communication Technology.”

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TikTok ban and what it means for influencers in the UAE (and elsewhere)?

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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

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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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UAE employment disputes amidst COVID-19: force majeure, class actions, unionization, and procedures

March 21, 2021

As the Coronavirus pandemic takes its toll on businesses, many employment relationships are facing disruption, and employers are taking action on a mass-scale, with issues relating to unpaid leave, undue termination, or other actions that may be seen as a breach of contractual or lawful employment rights.

Comparatively, employees who deem themselves victimized in the current circumstances look to avenues to protect their interests individually or collectively.

In this article, we look at updates to unionization and class action lawsuits in the United Arab Emirates, the risks of employers arguing force majeure circumstances, and procedures for a collective claim by employees.

Example of past cases on collective employment disputes

In 1991, the Federal Supreme Court ruled in favor of the employees in a collective employment claim lodged by three employees (and referred to the Federal courts by the deputy minister at the time).

In 2002, the Federal Supreme Court rejected a claim by 18 employees on the basis that it was a joinder of 18 independent claims and did not fulfill the requirements under Article 154 of the UAE Labor Law (Employment Law) governing collective employment disputes.

In 2006, the Federal Supreme Court rejected defense by an employer that the claim should have been lodged as a collective employment dispute and ruled in favor of the employee.

2018 updates; thresholds, class actions, and unionization

In 2018, the regulatory procedures for collective employment disputes were amended by the Minister of Human Resources and Emiratization. Amongst which three crucial amendments were introduced.

The first of the crucial amendments made in 2018 was establishing a minimum threshold of one-hundred employees to fulfill the conditions of a collective employment dispute.

Secondly, the employees making the claim do not necessarily have to be employed by the same employing entity. Even if the employees are employed by different entities, but share a common denominator, they may form a class on the condition that all their employers share the same owner.

Finally, the employees must be represented by three to five employees designated by the collective employees; essentially a mechanism akin to unionization in other jurisdictions.

Force majeure and the dangers of making the argument

Employers looking to legitimize actions against employees based on an argument of a force majeure event occurring may face inquiry (by the conciliation committee, the supreme arbitration committee for employment disputes, a court, or opposing counsel) as to whether the employer's financial condition justified such action against the employees.

A critical example would be large enterprises (such as banks, airlines, or real estate developers) who publicly announce annual revenues in billions of Dirhams, in which case an overseeing conciliator, arbitrator or judge would question

whether adequate human resource provisions were made against potential business disruption in light of the magnitude of revenues generated.

Provisioning for human resource liabilities is of particular importance as Emirati law requires that employment debts are prioritized in the payment of debts during liquidation or bankruptcy, and are also prioritized over government or third-party debts, which essentially reflects the significance the Emirati legislator has given in terms of preferring employment debts against any others.

Moreover, limited liability companies (and other forms of commercial companies) must maintain a certain cash reserve. Administration and liabilities of corporate cash reserves are complex and vary, but as a general matter, the reserve must amount to half of the paid-up share capital amount. For example, a corporate with a paid-up share capital of AED 100,000,000 must maintain a statutory reserve of AED 50,000,000.

Read collectively, companies must provision funds out of annual profits into cash reserves and employment debts arguably have priority over government or third-party debts. The formulation of these two elements dilutes an argument of force majeure as the employer is – by law – required to establish a cash reserve to cover unexpected expenses of which employees are prioritized over third parties (such as suppliers, landlords, etc.).

Even in the odd circumstance that an employer has an insignificant shareholding capital, such as AED 10,000 for example which would require a reserve of only AED 5,000 – but the employer operates with annual figures amounting to millions or more, an employee may argue factual contradiction to the requirements of the commercial companies law which necessitates that a company must have sufficient capital to achieve the purpose of its incorporation.

Importantly; employers face creating a liability over the personal assets of the shareholders and managers if arguing that the Coronavirus is a force majeure event that hindered the employer from paying salaries (or any other employee debt).

The risks arise if the employer is found to have not maintain the required cash reserves (which are meant to cover unexpected circumstances) due to excess distribution of profits to shareholders, in which case the owners and managers of the employer may become liable in their personal capacity (i.e. with their personal assets) for breach of the commercial companies law.

Procedure for collective employment disputes

Commencing collective employment dispute procedures (whether as employees of the same employer, or a class of employees of different employers who share the same owner) requires the employees to notify the employer in writing of any collective dispute to commence a preconditional amicable settlement period.

The employees and the employer must also notify the Customer Happiness Center of Ministry of Human Resources and Emiratization located in the Emirate that has jurisdiction over the dispute, on the day the dispute occurs, or directly on the following business day, that a collective employment dispute has commenced.

The employees must continue to adhere to their employment obligations, and the employer must keep the entity valid and operational until the dispute has been resolved.

If direct negotiations do not resolve the dispute within seven business days, either of the employer or employees may request the Center to mediate the dispute.

If mediation efforts by the Center are not accepted by the

parties within ten days from the date the Center is notified of the request to mediate, the Center must then refer the dispute to the respective conciliation committee.

The conciliation committee has the authority to set hearings and obtain evidence to adjudicate the dispute, and question any of the employees or persons concerned with the dispute, as it deems fit.

The conciliation committee must issue its ruling within two weeks of the dispute being referred to it or otherwise refer the matter to the supreme arbitration committee for employment disputes.

If the conciliation committee issues its ruling, and either of the parties disagrees with the ruling, they may object before the supreme arbitration committee for employment disputes.

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National Media Council Issues Circular Regarding Social Media Advertising

March 21, 2021

On 9 September 2020, the National Media Council issued a circular regarding social media advertisements which will impact companies, brands, influencers, and anyone who carries out social media advertising activities on a commercial basis;

emphasizing the need to obtain prior approval from the Media Licensing Department.

As the influencer wave maintains its consistent growth, the circular addresses this by putting an emphasis on the manner in which products are to be advertised via social media. A recent study found that 84% of influencers in the UAE do not disclose paid partnerships on their social media posts and this has led to a mass confusion amongst their followers, as people are failing to grasp the authenticity of the influencer's posts – the circular aims to rid this issue. The circular states:

“The advertisement must conform to conditions of advertisement, must be authentic and not exaggerated, must not lead to confusion with other names, products or activities, and must not include or contain any false or misleading claims and anything involving fraud and deceit.”

Furthermore, the circular goes on to state:

“The identity of the advertisement must be clearly defined and must incorporate the use of a clear and non-confusing language that is distinct from the other materials posted on the account. The advertisement must appear distinctive and independent from other materials, with time intervals in cases of broadcast.”

The advertising material that is used on the social media post must be referred to and referenced in the following fashion:

- The use of a phrase or hashtag “advertising material”, “advertisement” or “paid advertisement” clearly, without other hashtags that make it challenging for the advertisement to stand out;
 - The use of “thanks to... [advertising entity]” or “in collaboration with...” has been deemed, by the National Media Council, not sufficient enough to disclose whether the advertisement is commercial

or not.

- The use of a clear and legible font and the avoidance of the small and illegible font or a font with a color similar to the advertisement background;
- The disclosure (the advertisement) must be placed where it is clearly visible to readers;
 - Generally, the disclosure has to be placed at the beginning of the content or description.
 - The disclosure cannot be placed where users are required to move to another page or content in order to see it.
- If the content is a video, the disclosure must be stated orally (in addition to being placed in the writing);
 - If the advertising is used in a Snapchat/Instagram/Facebook story or video posted on the account, the disclosure must be featured in the first or second story/video or at the beginning of a live broadcast.

The circular reiterates the much-needed restrictions on the advertising of health-related products, drugs, and other pharmaceuticals with prior approval for advertising required by the Ministry of Health.

Influencers should be diligent in the manner in which they advertise and ensure that they obtain their license immediately. For example, paid influencers who are advertising without a license could potentially face a AED 5,000 fine from the National Media Council.

With the perpetual rise of social media marketing that has redefined how businesses can engage in the public's day-to-day life, the UAE is taking steps to ensure that this form of marketing is nurtured and moderated.

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PRECEDENT: UAE Supreme Court pierces the corporate veil and finds foreign company liable for its UAE subsidiary in USD 1.2 billion energy dispute

March 21, 2021

Summary

The UAE Supreme Court ruled that foreign companies engaging in commercial activities in the UAE are liable for the actions of their UAE subsidiaries even where the UAE subsidiary is the party to the contract in dispute and not the foreign company.

The Supreme Court considered the following arguments:

- The ownership percentage of the UAE subsidiary by the foreign parent company.
- The degree of benefit and responsibility of the foreign parent company in the transaction entered into by its UAE subsidiary in dispute.

- The extent to which the foreign parent company engages in pre-contract activities (such as negotiation) and post-contract activities (such as implementation).
- The extent to which the UAE subsidiary is acting on behalf or for the foreign parent company.

Facts

In 2005, two parties entered into a gas supply agreement for the manufacture of ammonia on the basis that the gas supply would commence on 31 December 2006 (the "Agreement").

One party to the Agreement was to develop the manufacturing capacities (the "Manufacturer"), and the second party to the Agreement was the UAE subsidiary ("UAE Subsidiary") of the foreign company (the "Foreign Supplier").

The Manufacturer completed the development of the facilities, but the UAE Subsidiary did not comply with the supply of the gas by 31 December 2006.

Claim

In 2012, the Manufacturer sued the UAE Subsidiary, the Foreign Supplier and six of the Foreign Supplier's foreign subsidiaries for the following:

- Almost USD 740,000,000 in lost profits.
- Almost USD 100,000,000 in future lost profits.
- Almost USD 280,000,000 in depreciation of assets.
- Almost USD 40,000,000 in financing costs.
- And other heads of claim regarding leasing and insurance costs, and moral damages.

The Foreign Supplier and its six foreign subsidiaries had no corporate registration in the UAE.

The UAE Subsidiary filed a counterclaim requesting the non-entry into force of the Agreement, and in alternate for the

rescindment of the Agreement, and almost USD 30,000,000 in compensation on the basis that:

- the Agreement was subject to a condition precedent for the Manufacturer to secure buyers for the manufactured goods by September 2005 – which the Manufacturer had allegedly failed to conclude.

Primary and Appeals Judgments

The Primary Court rejected the counterclaim by the UAE Subsidiary and ordered compensation by the UAE Subsidiary of almost USD 260,000,000 in favor of the Manufacturer.

The Primary Court did not find the Foreign Supplier or its six foreign subsidiaries liable on the basis that they were not signatories to the Agreement and were not licensed to operate in the UAE.

The Appeals Court upheld the Primary Court ruling and increased the compensation quantum in favor of the Manufacturer to almost USD 290,000,000.

Supreme Court Appeal

The Manufacturer challenged the Appeals judgment before the Supreme Court in its part in finding the UAE Subsidiary solely liable – and not finding the Foreign Supplier and its six subsidiaries liable.

The Manufacturer argued that the Foreign Supplier should be held liable for the following reasons:

- the Foreign Supplier is the 100% owner of the UAE Subsidiary;
- the Foreign Supplier is the owner of the gas intended for supply;
- notwithstanding that the UAE Subsidiary was signatory to the Agreement, the Foreign Supplier was the party responsible for negotiating the Agreement; and

- the UAE Subsidiary signed the Agreement on instruction of the Foreign Supplier.

The Manufacturer also argued that the six foreign subsidiaries should be found liable on the basis that:

- the six foreign subsidiaries assisted in the negotiation and conclusion of the Agreement, and hence are jointly liable for any liabilities on the UAE Subsidiary.

Supreme Court Judgment

The Supreme Court overturned the Appeals Court judgment (and in turn the Primary Court judgment) and found that the Foreign Company and its six foreign subsidiaries are to be held jointly and personally liable alongside the UAE Subsidiary for the ordered compensation of USD 290,000,000.

In its reasoning, the Supreme Court applied Articles 313, 314, 315, and 316 of the UAE Commercial Companies Law of 1984 as the governing law at the time of the transaction (“Old CCL”) – as opposed to the new UAE Commercial Companies Law of 2015.

The Supreme Court ruled that Articles 313 to 316 of the Old CCL:

“...indicate that the foreign company incorporated abroad may not practice its activity inside the United Arab Emirates unless it obtains a license to do so from the Ministry of Economy after the approval of the competent authority in the Emirate in which it carries out this activity, provided that it is proclaimed by being registered in the commercial register.

If the foreign company or the office or branch to which these procedures are affiliated do not fulfill such requirements before carrying out any activity within the UAE, then they shall not be considered as an independent personality separated from the liabilities of the registered subsidiary,

and all that is done in terms of actions by, or arrangements for the account of, the foreign company before the completion of the registration procedures results in personal liability on the foreign company, and joint liability with the persons who performed the act or the disposition on the foreign company's behalf."

The Supreme Court found that the Primary and Appeals Courts' judgments were deficient in excluding the Foreign Supplier from the liabilities of a foreign company active in the UAE.

The Primary and Appeals Courts' judgments relied on Article 2(3) of the Old CCL which excludes the provisions of the Old CCL to petroleum companies working in the field of prospection, extraction, marketing, and transport; companies producing electricity, gas, water desalination and related activities such as transport, and distribution, as well as companies that are exempt by a Cabinet of Ministers decision.

The Supreme Court ordered that Article 2(3) of the Old CCL applies and exempts oil and gas, and electricity and water companies that are registered in the UAE. However, it does not apply to foreign energy companies that do not have any form of registration in the UAE.

Significance

The Supreme Court judgment creates a substantially novel landscape for creditors in the UAE by providing precedent to pursue foreign parent companies for the debts of their UAE subsidiaries – even where the party to the contract in dispute is the UAE subsidiary of the foreign parent company, and not the foreign parent company.

For foreign parent companies, this novelty manifests the need to consider the extent to which a foreign parent company will negotiate and engage in a contract prior to the signing of the contract by its UAE subsidiary, the ownership structure that the foreign parent company will have over its UAE subsidiary,

and the level of managerial control the foreign parent company will apply to its UAE subsidiary.

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