Dubai Judges Rule Employment Termination is Force Majeure in Rent Dispute

March 21, 2021

Amongst the flurry of expectations and predictions on the application of force majeure arguments in light of the employment terminations currently occurring globally, whether related or unrelated to COVID-19, a panel of judges in the Primary Circuit of the Rental Disputes Center of Dubai ruled that termination of employment fulfills the requirements of a force majeure event and can be relied on as grounds to terminate a lease agreement.

Case

A lessee failed to pay rent from 1 January 2019 till 23 October 2019.

The landlord issued the requisite formal notice for payment to the lessee on 19 February 2020.

Upon expiry of thirty days past the formal notice, the landlord commenced trial procedures.

In early 2020, the landlord filed a case before the Primary Circuit of the Rental Disputes Center requesting; eviction, payment of outstanding rents, payment of maintenance charges, penalties, amongst other reliefs.

The lessee filed a counterclaim on the basis that they had been terminated from their employment and hence a force majeure event had manifested preventing them from complying with their obligations of paying rent and requested; return of the rent deposit, termination of the lease agreement, and

costs.

In arguing force majeure in the counterclaim, the lessee relied on two real estate rulings of the Dubai Courts:

No. 238/2012: “Force majeure is understood to render compliance with obligations impossible pursuant to Article 273(1) of the Civil Procedures Law…”

No. 415/2011: “Hardship and force majeure events must be respected in ending or limiting the performance of an obligation…if the underlying event is in a general sense exceptional and unusual, and was not foreseen at the time of entering into the agreement…”

The lessee argued that the force majeure event was that they had been terminated from their employment on 29 December 2019.

The landlord did not counter the force majeure argument with any defenses on the non-application of a force majeure event.

Notwithstanding the fact that termination of employment had occurred after the debt had accrued, the panel of judges accepted the argument that termination of employment is an unexpected event fulfilling the conditions of a force majeure event and that the continuance of the obligations under the lease agreement would cause hardship to a level of the impossibility of performance and ordered the termination of the lease agreement as of the date of the final ruling.

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Hostile LLC takeovers under the new 100% UAE ownership laws

March 21, 2021

An announcement took place on 23 November 2020 that foreign investors can have complete ownership of Emirati companies that are governed by the Federal Commercial Companies Law ("CCL") otherwise known as "on-shore" companies.

The concession is limited to limited liability companies and private joint stock companies, including those owned by a single shareholder.

The most common form of corporate formulation is generally a limited liability company, with 49% of the shares of the company owned by a foreign investor (or investors), and 51% owned by a national shareholder (or shareholders).

It goes without saying that this development grants substantial flexibility to new foreign investors.

But here we consider certain implications for currently existing companies.

Minority shareholders who currently own 49% or less of a business will look to expand their ownership.

Amicable negotiations to buy-out the shares of the majority shareholder may not succeed for various reasons, such as the majority shareholder leveraging their position to sell their shares at exorbitant valuations.

And majority shareholders who currently own 51% or more of a

business will look to protect their ownership.

What ensues from these machinations will be attempts at hostile takeovers.

What is a hostile takeover?

In a general sense, a hostile takeover is in reference to forcible buyouts of a publicly listed company when the board of the public company is rejecting the sale.

Different strategies are employed such as “bear hugs” where the acquirer would issue a tender offer to the public stockholders to buy the publicly traded shares at a value higher than the publicly traded value.

Or “dawn raids” where the acquirer would purchase all the publicly traded shares as soon as the stock exchange is open for business.

Or a “proxy fight” which is basically an attempt to reform the board of the public company for a new board to approve the acquisition.

Notwithstanding, hostile takeovers are in essence an attempt by a person/company to forcefully – and with hostile tactics – acquire all or controlling interest in a business.

In this article, we detail hostile takeovers in the manner between a minority and a majority shareholder of a limited liability company (“LLC”) – where the minority shareholder (the “predator”) may attempt to forcibly takeover all of the target shares of the majority shareholder in the LLC, or enough shares to grant the predator controlling interest.

Although there are many strategies, here we discuss examples of five offense strategies that a predator may employ, and five defense strategies that a majority shareholder could trigger, in a hostile takeover attempt.

Offense strategy: interlocking takeover

An interlocking takeover would occur where there are more than two shareholders, and the predator and another shareholder (the "interlocking shareholder") jointly own over 50% of the share capital and use their combined controlling interest to remove the third shareholder target and obtain its target shares.

Article 677 of the Federal Civil Transactions Law ("CTL") grants the shareholding majority the right to apply to the court for removal of any shareholder if the request is based on sound grounds.

Sound grounds could include where a shareholder is engaged in competing business or is convicted of a felony (such as money laundering), and so on, but this would ultimately be up to the judge's discretion.

As to continuity in the business, a lawsuit aimed at removing a shareholder would not generally prejudice the continuing operations of the LLC.

"That when the decision is made to remove a shareholder from the company, the company continues among the rest of the shareholders, and the separated shareholder in this case deserves his share and this share is estimated according to its value on the date of filing the lawsuit." (Federal Supreme Court Judgment No. 933/2019)

The interlocking shareholder may subsequently sell its shares to the predator, granting the predator complete share ownership of the LLC.

Offense strategy: grey knight takeover

A grey knight takeover is where the predator engages another person/company (known as a "grey knight") to acquire the target shares of the majority shareholder which would result

in the predator and the grey knight jointly owning simple majority (over 50%) or a supermajority (75% and above) of the LLC's share capital.

A grey knight is generally an offeror who purchases shares without expressing any hostility and represents itself as a neutral share purchaser.

If the share ownership of the predator and the grey knight jointly grants a supermajority of 75% that would fulfil the quorum for convening a general assembly (Article 96 of the CCL), and voting on matters that require extraordinary general assembly consent such as amendment of the articles of association of the LLC (101 of the CCL).

The predator and the grey knight could also trigger Article 677 of the CTL to obtain the target shares.

Offense strategy: creeping parent takeover

A creeping parent takeover occurs where the majority shareholder is a company rather than a natural person, and the predator gradually and interceptively acquires controlling interest of the majority shareholder company.

At times, the majority shareholder parent company is a non-active, invaluable entity and any offers to purchase shares of the majority shareholding company at above-market values would be too attractive to refuse.

Article 77 of the CCL establishes the principle of non-divisibility of shares owned by a company. This means that the target shares would be owned indivisibly by that company (not divisibly by its parent level shareholders), hence once the predator has controlling interest at the parent level of the majority shareholder, the predator may *de facto* control the target shares, and ultimately the LLC.

The predator may also engage a grey knight for takeover of the

controlling interest of the majority shareholder parent company.

Formulation:

Company A (the predator) owns 49% of Company X.

Company B owns 51% of Company X (the target shares).

Company X is the valuable entity.

Company A (or the grey knight) offers to purchase minor or all shares of Company B at a premium price.

Company A eventually owns controlling interest of Company B.

Offense strategy: toehold takeover

A toehold takeover is the acquisition by the predator of minimal additional shareholding (usually 5% or less) to gain a toehold into majority shareholding as precursor to a hostile takeover action.

For example, if the predator owns only 49%, they may purchase 1.1% at minimal to own a total of 50.1% of the share capital of the LLC.

Subsequently, the predator may trigger Article 677 of the CTL as described above.

Offense strategy: black knight takeover

A black knight takeover occurs where the majority shareholder is in debt to a third-party creditor, and the creditor triggers Article 20 of the CCL to enforce its debt against the target shares of the majority shareholder.

The shares would then be sold at court auction, granting the predator the opportunity to purchase the shares at the auction.

The black knight may also be the predator itself, if the predator has proven debt against the majority shareholder.

Defense strategy: safe harbor

A safe harbor defense would occur where the majority shareholder, facing a hostile takeover, would add a commercial activity to the LLC which falls outside Cabinet Resolution No. 16 of 2020 (Concerning the Determination of the Positive List of Economic Sectors and Activities Eligible for Foreign Direct Investment and Percentage of their Ownership).

By adding an activity that falls outside Cabinet Resolution No. 16 of 2020, the predator would no longer be able to comply with the complete foreign ownership requirements and be prevented from owning more than 49% of the LLC by the regulators.

Defense strategy: backward integration

A backward integration defense involves the majority shareholder acquiring the source of the LLC's business; such as the producer of raw materials that the LLC uses for its commercial activities, or the ancillaries which are necessary to the LLC.

By controlling the source of the LLCs commercial activity, the majority shareholder would have leverage to prevent hostile takeover action by the predator.

Defense strategy: golden parachute

A golden parachute defense occurs when the majority shareholder has, or obtains, a managerial role in the LLC with extensive benefits and end of service gratuity that would render the removal of the majority shareholder financially detrimental to the LLC that the predator is dissuaded from a hostile takeover action.

Defense strategy: show-stopper

A show-stopper defense essentially involves the majority shareholder commencing trial proceedings to prevent hostile takeover action.

Defense strategy: forward integration

A forward integration defense mirrors a backward integration defense except the majority shareholder would purchase the businesses that make use of the LLC's services or products to control the market of the LLC.

Using deal counsel as raiders or killer bees

Predators looking to engage in hostile takeover action would engage a raider as a takeover artist to lead the hostile takeover action. This is generally the law firm / counsel in charge of the hostile takeover.

Majority shareholders looking to defend against hostile takeover action would engage a killer bee to fend off the action. A killer bee would generally be the law firm / counsel in charge of defending against a hostile takeover.

Both predators and majority shareholders need to consider whether their deal counsel (i.e. their law firm / counsel that assisted in establishing the relationship / the LLC) should also act as their raider or killer bee, respectively, in hostile takeovers.

An initial thought may be that the deal counsel who had assisted in advising on the deal and setting up the LLC should also be the raider or killer bee because they are already familiar with the corporate structure and nuances that took place during the incorporation process.

But before this initial thought is acted upon, a predator should ask whether the deal counsel had advised on including provisions in the articles of association of the LLC that require the majority shareholder to sell to the minority

shareholder where there is a change of law.

If not, then the deal counsel may face “confirmation bias” which reflects a strong view favoring a position during the deal, which may be difficult to alter for the deal counsel to act as the raider.

Another concern is that deal counsel may be subject to discovery proceedings if trial takes place.

For example, if an expert is appointed during trial proceedings pursuant to Federal Law 10/1992 on Evidence in Civil and Commercial Transactions, the expert may be granted powers to investigate correspondences, documents, or any other potential evidence that took place at the time of the deal/corporate establishment, including those prepared by the deal counsel.

Hence, trial proceedings may be negatively affected if the raider or killer bee is the same as the deal counsel.

Another conflict of interest may occur if the deal counsel had been jointly engaged by all the shareholders to conclude the deal / establishment process, rendering the deal counsel incapable of being engaged by the predator or the majority shareholder, as a raider or killer bee, due to direct conflict of interest.

Ultimately, it may be appealing to revert to deal counsel to act as the raider or the killer bee, but the risks may outweigh the presumed benefit, which results in favoring new counsel to effectively manage the hostile takeover.

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Demystifying Disputes in Country-by-Country Reporting Compliance

March 21, 2021

Country-by-Country Reporting (CbCR) compliance obligations for multinational entity groups (MNCs or multinational companies) were introduced in the UAE in mid-2019 via Cabinet Resolution No. 32 of 2019, where the first notification and reporting deadline was set for 31 December 2019.

There is no shortage of industry experts in the UAE to have assisted MNCs with the technical elements of the submissions with respect to contents of the report, identification of constituent entities, tax residency parameters, and so.

In this article, we look at the penalties that could be imposed on an MNC for violation the CbCR compliance obligations, and how to dispute those penalties before the competent authorities.

Penalties

The Ministry of Finance, which oversees CbCR compliance, has the authority to implement penalties of various proportions on the reporting entity (e.g. the MNC);

- Failure to retain CbCR compliance documents/data for a minimum period of five years after the date of reporting to the Ministry of Finance: AED 100,000;
- Failure to provide the Ministry of Finance with any information requested: AED 100,000;

- Failure to report information in a complete and accurate manner: AED 50,000 to AED 500,000; and
- Failure to submit on the reporting date or failing to notify the Ministry of Finance on or before the reporting date of the intention to file for a certain accounting period: AED 1,000,000 and AED 10,000 daily until the failure is resolved, or the daily amount reaches ED 250,000.

The Ministry of Finance must notify the reporting entity in writing if the reporting entity violates any CbCR compliance requirements and should provide a grace period of fourteen business days for the reporting entity to rectify the contravention.

If the reporting entity fails to rectify, the penalties would apply, and the reporting entity must be notified of the penalties within six months of the date the penalty liability arises, or the violation comes to the attention of the Ministry of Finance.

Insufficiency of funds or lack of access to information are not cause for excuse against the imposition of a penalty.

Any penalty applied must be settled by the reporting entity within 30 business days from the notification date of the penalty, or the date of which a grievance against the penalty has been denied.

Grievance

If the reporting entity may submit a grievance if it has grounds to believe that; (i) it did not commit a violation that warrants the imposition of a penalty; or (ii) disagrees with the amount of the penalty imposed on it.

The grievance must be submitted to the Ministry of Finance within 30 business days from the date of notification of the

penalty.

The Ministry of Finance must notify the reporting entity of its decision within 60 business days. If no decision is provided to the reporting entity within 60 business days, then the grievance is deemed accepted, and the penalty imposed shall be canceled.

Litigation

Cabinet Resolution No. 32 of 2019 on the CbCR compliance regulations is silent on what occurs if the Ministry of Finance decides to reject the grievance.

In this case, the reporting entity may turn to the Civil Procedures Law which provides the reporting entity with an avenue to apply for the annulment of the Ministry of Finance's rejection of the grievance in its nature as an administrative decision.

The appeal would be lodged before the administrative circuit of the federal courts and must be lodged with 60 calendar days from the date the reporting entity is notified of the Ministry of Finance's rejection of the grievance, or the date on which the reporting entity is otherwise proved to have admittedly been informed of the rejection.

Grounds for Appeal

As a general matter, Emirati jurisprudence provides that administrative decisions by government bodies (or civil servants) may be appealed on five grounds;

- if a decision is outside the administrative powers of the government body;
- procedural issues in that the government body does not issue its decision pursuant to the steps and procedures provided for by law (e.g. Supreme Court Case No. 146/1985);

- lack of jurisdiction whereby the government body is not the competent body to issue the decision in dispute (e.g. Supreme Court Case No. 258/1993);
- lack of reasoning whereby the decision issued does not provide the legal or factual grounds to support its action (e.g. Supreme Court Case No. 772/2004); and
- abuse of power in cases where an administrative decision is issued in an arbitrary manner, or in a manner that deviates from public benefit (e.g. Supreme Court Case No. 89/2001).

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UAE Tax Judges: Textualism or Original Intent? (and private clarification disputes)

March 21, 2021

In comparison with general dispute practices, tax disputes are subject to a limited number of judges; three judges at the tax dispute resolution committees (TDRCs), one judge at the Tax Disputes Circuit of the Federal Primary Court, one judge at the Tax Disputes Circuit of the Federal Appeals Court, and the Chief Justice at the Federal Supreme Court.

The three judges at the TDRCs are appointed pursuant to Ministerial Decrees and serve a term of one to three years,

that may be extended.

Each TDRC has an alternate judge that adjudicates disputes in place of the primary judge in case the latter is unavailable.

Each of the tax disputes circuits of the Federal Primary and Appeals Courts is headed by a judge appointed pursuant to Ministerial Decree – the first appointment having had occurred pursuant to Decisions No. 237 and 238 of 2019.

Finally, tax disputes that reach the Federal Supreme Court would be adjudicated by a panel of five judges; the Chief Justice and four judges.

What does this mean?

Other disputes in the UAE, such as construction, banking and finance, personal affairs, criminal matters, and so on may be adjudicated over by one of a plethora of judges, depending on the Emirate or court system that has jurisdiction over the dispute, the respective circuit, stages of litigation, amongst other variables.

With such a significant number and variety of judges reasoning and issuing rational over interpretations of the same provisions of law, it is relatively difficult to hone in on a particular stance that the judiciary is taking with respect to a particular law or provision.

On the other hand, because tax disputes have only begun in 2018, and due to tax disputes being heard by a limited number of judges, a tax dispute litigant (or their counsel) can develop better foresight to the persuasions of each of the TDRCs or Federal Court tax dispute circuits.

Textualism or original intent?

Tax judges have taken differing positions on readings of certain tax law provisions. The difference in rationale generally boils down to whether the interpretative approach is

an explicit application of the text, or whether the judge expands the reading of the law to grant more weight to the intent of the legislator* at the time the law/provision was drafted and ratified.

*The ‘legislator’ essentially means their Highnesses the seven Rulers of each Emirate who approve Federal law, supported of course by the Ministry of Justice and the technical and legislative lawmaking committees.

A practical example for this discussion would be disputes over decisions by the Federal Tax Authority that do not have an immediate monetary value; such as a dispute over a private or public clarification as opposed to a dispute over an incorrect tax return or a voluntary disclosure.

There is a level of procedural ambiguity with respect to disputes over private or public clarifications. The Tax Procedures Law and the Cabinet Decision forming the TDRCs requires that a tax dispute litigant settle any taxes and/or penalties in dispute prior to objecting before the competent TDRC. The question becomes; what if a clarification dispute does not have an immediate monetary value (i.e. tax or penalty liability) as is generally the case?

We have seen so far different judicial interpretations amongst judges on this particular issue as to whether a dispute that has no immediate monetary value (such as a private or public clarification dispute) can be adjudicated upon.

Of the various methods of judicial interpretation; two common approaches are textualism and original intent. A textualist would look at the structure and text of the law and apply the explicit reading of a provision. Original intent applies where the judicial interpretation of a law or provision broadens the analysis into what the authors of the text intended to achieve.

Of course, the spectrum of whether an interpretation falls

within either approach is extensive, but the example provided with respect to tax disputes that carry no monetary value provides a useful empiricist view within the following cases.

In one private clarification dispute in 2019, a textualist judicial interpretation resulted in a tax judge finding that no immediate monetary value in dispute renders non-fulfillment of the requirement of settling the taxes and penalties prior to objecting and serves as grounds for rejection of a private clarification dispute on a procedural basis.

In another private clarification dispute also in 2019, an original intent judicial interpretation resulted in the finding that dispute procedures in tax laws were intended to grant avenue for adjudication of disputes vis-a-vis the Federal Tax Authority notwithstanding the lack of an immediate tax or penalty liability, also as the subject matter in dispute may ultimately manifest a tax or penalty liability in the future or in retrospect based on the tax treatment in dispute.

The difference in the method of judicial interpretation applied in these two cases draws a very practical example of how different judicial interpretation approaches could bear significantly different results, and how tax dispute litigants would benefit from understanding the nuances of tax dispute procedures and prior interpretive approaches taken by the UAE tax judiciary.

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UAE Supreme Court rules on priority of ‘hidden’ agreements over fictitious contracts

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During the Summer of 2020, the Supreme Court ruled on the validity and priority of ‘hidden’ agreements over fictitious (sham) contracts.

A similar case was brought to the Supreme Court earlier in 2015 but was not addressed on merits and was rejected procedurally.

The Dubai Cassation Court looked at similar cases in relation to the constitutional contracts of commercial companies in the past but found that constitutional contracts of companies cannot be rendered fictitious but only void.

Now the Supreme Court has taken a definitive position on ‘hidden’ agreements granting them priority over fictitious contracts.

Case

The facts of the case revolved around two siblings conducting a sale agreement and a gift contract otherwise known as “Heba” under Shariah law – for the transfer of the property owned by their father who was at the time mentally impaired due to an accident.

As per the submissions of the litigants and in the *obiter dicta* of the judgment, the gift contract was put together to

avoid the Dubai Land Department registration fees.

One of the siblings sued before the Federal Primary Court requesting the Court to rescind the gift contract, and to order the Dubai Land Department to re-register the land in the name of the father, on the basis that their father was taken advantage of due to his mental impairment to sign-off on the gift contract, and on which basis the property had been transacted without the father's knowledge.

The Primary Court appointed a real estate expert and a forensic doctor as expert trial witnesses, and the forensic doctor confirmed that the father suffered from mental dementia and disability, and impaired memory, and would have been easily influenced and unaware of his actions. The forensic doctor concluded that the father could not be held responsible for his actions from a medical perspective.

The Primary Court ordered rescindment of the gift contract and addressed the Dubai Land Department to re-register the property in the name of the father. The defendant appealed this ruling.

In January 2020, the Appeals Court rejected the appeal, which was challenged before the Federal Supreme Court on the grounds that the transaction was in fact subject to a sales contract and not the gift contract that had been rescinded, and that the gift contract was a fictitious contract drawn up in order to avoid the real estate registration fees.

In deciding the matter, the Federal Supreme Court applied the provisions of Articles 394 and 395 of the Civil Transactions Law which state as follows:

Article 394

1-If a fictitious contract has been concluded, creditors of the contracting parties and particular successors in title may, if they are in good faith, avail themselves of the hidden

contract and prove, by any means, the fictitious of the contract by which they were prejudiced.

2-In the case of a conflict of interest between the interested parties, some of whom rely upon the fictitious / apparent contract and others on the hidden contract, the former shall have preference.

Article 395

When the contracting parties hide a genuine contract behind a fictitious contract, the genuine contract will bind the contracting parties and their universal successors in title.

The Supreme Court also referenced the provisions of Sharia law in stating that:

"…if the contracting parties conceal a real contract with a fictitious contract, then the contract in force between the contracting parties and any concerned parties is the real (concealed) contract."

The finding of the Supreme Court was ultimately:

"…the fictitious contract has no effect between the contracting parties, given that the contracting parties intend to refute the fictitious contract and adhere to the concealed contract."

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Now that you paid a tax penalty – have you looked at your tax indemnification agreements for recourse?

March 21, 2021

Scene

You are a services or goods provider registered as a taxpayer with the Federal Tax Authority.

You are facing liquidity and cash flow difficulties.

You have customers; you have issued tax invoices, but your invoices are unpaid.

In consequence, due to liquidity issues, you are late in paying your due taxes.

A few weeks or months pass since the end of your tax period until invoices are paid.

You now have the liquidity to pay your taxes, but shortly after, the Federal Tax Authority issues an administrative penalty assessment against you for late payment of taxes.

Late tax payment penalties of 2% immediately, 4% after the first week, and 1% per day, of the value of the unpaid taxes are applied.

Did you draft a comprehensive and enforceable tax penalty indemnification agreement against the late-paying customers to indemnify you against any tax penalties you incurred?

What are tax indemnification agreements against tax penalties?

A tax indemnification agreement against tax penalties (whether standalone or as part of a contract) may grant the taxpayer protection Dirham-for-Dirham for unexpected tax penalties that arise due to a customer's late or non-payment, without necessarily the need for the taxpayer to evidence loss.

The incorporation of a tax indemnification agreement into your standard contracts provides a claim by contract, with proven values, allowing for speedier recovery and enforcement against the customer.

Contracts – in the UAE or otherwise – may generally include a tax respective provision along the lines of the following:

"The First Party agrees to bear any current or future tax or increase to any current or future tax."

The language of such provision could be in various forms, length, or complexity, but the crux of it usually obligates one of the parties to bear the tax liabilities that arise out of a transaction. However, as a general matter, such provisions do not obligate a party to reimburse another party against tax penalties levied by the Federal Tax Authority.

Administrative tax penalties applied by the Federal Tax Authority against a taxpayer are issued in a 'Notification of Administrative Penalty Assessment' pursuant to Article 21 of the Executive Regulations to the Tax Procedures Law.

In an administrative penalty assessment issued by the Federal Tax Authority, the penalties are applied in an itemized list corresponding to the applicable tax return periods (monthly or quarterly) with details on the formulas used pursuant to Cabinet Resolution No. 40/2017 to calculate the penalties; highlighting the values which have formulated as late penalties.

A statement of account provided by the Federal Tax Authority also itemizes the taxes due and penalties in detailed

chronology.

These details allow the taxpayer to correlate the tax penalties to the tax invoices issued in a respective time period, and subsequently, be able to allocate the late payment penalties to the unpaid tax invoices and the respective clients with the outstanding debts.

Are indemnification payments against tax penalties taxable?

In its public clarification VATPO01, the Federal Tax Authority states that predetermined amounts that contractual parties designate during the formation of the agreement for an injured party to collect as compensation upon a specific breach are not considered consideration for a provision of any goods or services but to compensate a party for loss.

Consequentially, tax indemnification payments against tax penalties levied by the Federal Tax Authority would arguably fall outside the scope of VAT.

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Two tax dispute resolution committees formed for Dubai (Decree No. 691/2020)

March 21, 2021

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

Objections that have been filed since then with the Dubai tax dispute resolution committee had not been decided on.

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 Decree was recently published in the Official Gazette and orders the formation of two tax dispute resolution committees for the Emirate of Dubai.

The Ministerial Decree is significant because formerly, under Ministerial Decrees No. 109/2019 and 456/2020, the Emirate of Dubai had only one tax dispute resolution committee to hear objections against reconsideration decisions of the Federal Tax Authority.

Since 2018, all taxpayers registered in the Emirate of Dubai would submit their objections to only one committee and the statistics over the past three years reflect a substantial increase of objections that seem to have necessitated expanding the capacities to hear objections:

- 10 objections filed in 2018 (approximately).
- 30 objections filed in 2019 (approximately).
- 160 objections filed in 2020 (approximately).

The two new committees will be assigned objections to decide on based on whether the first numeric of the docket registration number is an odd or even number.

The Ministerial Decree names new chairs (judges) and members (experts), and new general secretaries for the two newly formed tax dispute resolution committees.

Has this happened before and what to expect?

The first tax dispute resolution committee objections were filed on 29 August 2018 with the Ministry of Justice and were a total of five objections addressed to the Dubai tax dispute resolution committee (TDRC).

However, the objections were officially registered upon the formation of the Dubai TDRC on 31 March 2019, and the decisions were issued on 8 April 2019.

In hindsight, one can see that even where objections were filed before the formation of the TDRC, the TDRC formally registered and decided on the objections when it was formed.

However, this is not the only potential outcome for the current objections filed with the Dubai TDRC since September 2020.

In mid-2020, the Federal Courts ruled that if a reconsideration decision is not issued by the FTA within the procedural time-bar, it must be considered an implied rejection triggering the time-bar to challenge the implied rejection (twenty weekdays).

An implied rejection pursuant to Article 84(bis) of the Civil Procedures Law is the general rule that a grievance to an administrative body (in this case the FTA or TDRC) that is not decided upon within the procedural time-bar is to be considered an implied rejection.

This is also supported by Article 33(2)(b) of the Tax Procedures Law which states that challenges against objections that are not decided on may be filed with the Federal Primary Court in case of non-issuance of a decision by the tax dispute resolution committee.

As was the case in 2018 and 2019, the newly formed Dubai tax dispute resolution committees may issue decisions on the backlog of objections that had been registered since September 2020.

On the other hand, the newly formed Dubai tax dispute resolution committees and the Federal Courts may take the position that Article 33(2)(b) of the Tax Procedures Law should have been triggered by those who filed objections and the disputes should have been directed to the Federal Primary Court.

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Coronavirus (COVID-19): Emirati and Sharia law on pandemics and hardship events

March 21, 2021

With the disruption to global business and trade due to the Coronavirus pandemic, parties may look to argue hardship events under the law to alleviate extraneous obligations (such as an extraneous increase of cost in concluding the obligation).

Hardship events are occurrences that result in changing the equilibrium of a contract creating an extreme burden on one of the parties to the contract.

Contracts may provide for provisions that address hardship events, and therein include pandemics as an example of a hardship event – but if parties have entered into a contract that lacks a hardship event provision, can they rely on UAE

legislation to argue that the Coronavirus pandemic makes their obligation extraneous and seek remedy from the Courts (or an arbitration tribunal)?

Hardship events are addressed under Article 249 of the UAE Federal Law No. 5/1985 on Civil Transactions.

Notably; pandemics are also addressed in one provision under Emirati law; that is Article 587 of the Civil Transactions Law. Article 587 explicitly addresses pandemics that affect fruit sales, and the obligations on the buyer and seller when the fruits sold are affected by a pandemic.

What is relevant in Article 587 is the Sharia jurisprudence that leads to its drafting before coming into promulgation in 1985, and how that jurisprudence can apply in disputes that occur between parties over hardship events that have occurred or will manifest due to the Coronavirus pandemic.

Article 249 on Hardship Events

Article 249 of the UAE Civil Transactions Law allows that when as a result of general exceptional and unpredictable events, the performance of a contractual obligation, without being impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, a judge may reduce the obligation that has become excessive to reasonable limits.

In light of no particular event being referenced or given as an example to qualify as a hardship event in Article 249, or in Article 893 which indirectly addresses force majeure events, it is necessary to rely on other provisions in the law to confirm whether pandemics qualify as hardship events and the strength of such arguments before the judiciary.

Sharia Origin of Article 587 on Pandemics

In the implementation of the directives of the late Sheikh Zayed bin Sultan Al Nahyan (may God have mercy upon him), the

founding father of the United Arab Emirates, to apply the provisions of Islamic Sharia in the UAE, the Council of Ministers issued decision No. 50/26 in 1978 to form a supreme committee for Islamic legislation and delegated His Excellency the Minister of Justice to form two subcommittees, one for criminal laws and the other for civil, commercial, maritime and civil procedure laws, in order for these committees to prepare and review laws in accordance with the provisions of Islamic Sharia.

The supreme committee reviewed civil transaction laws, and – for example – theories of individual will as a source of commitment, contracts of adhesion and their origin in Sharia as 'contracts of trust', and other theories and principles that became codified in UAE law.

Amongst the matters addressed by the supreme committee, and most relevant to the Coronavirus pandemic, was the theory of hardship events and their origin in Shariah law as 'pandemic theory'.

The rule of 'pandemic theory' finds its basis in Islamic jurisprudence in the principle of 'excuses' in the Hanafi jurisprudence and 'pandemic' in Maliki and Hanbali jurisprudence with a difference in the provisions and in the fairness between the two parties to the contract and justice in general.

Not only is the codification of hardship events derived from 'pandemic theory' in Sharia law, but scholarly jurisprudence has found that in light of the principle of pandemic theory applying to contractual relations in relation to fruit trade, the same principle can arguably be applied to other contractual transactions such as industry, construction, and general trade contracts where a pandemic causes a hardship event.

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The Business of Influencing in the UAE

March 21, 2021

The ability to influence has been a topic of dialectics for centuries – how the influence was obtained, how it was used, how much of it was at stake. When the topic of influence comes up, we may refer to great writers, composers, or philosophers. But these days the discussion of influence brings about names like Kylie Jenner, Selena Gomez, and The Rock. Influence is more powerful and puissant than ever before and that is solely due to the insurmountable ascent of social media. The social media marketing wave is truly remarkable; a conservative estimate of the new industry falls at around USD 1.28 billion, with brands estimated to spend USD 15.1 billion on influencer campaigns by 2022.

Nonetheless, some influencers fail to do the sole job that they claim to be proficient in – influencing. In 2018, Luka Sabbat, a self-proclaimed "Creative Entrepreneur exploring all the world has to offer. Stylist, Creative Director, Design Director, Actor, Model, etc" with 2.3 million followers on Instagram, was sued by Snap, Inc. for his failure to 'influence'. Sabbat had been contracted by Snap, Inc. to promote their line of eyewear by posting three Instagram stories and one Instagram feed post during fashion week in New York, Paris or Milan, along with being photographed wearing

the product during Paris or Milan fashion week. Sabbat was sued on the basis that he did not post all of the required material and was not photographed wearing the product. In 2019, Sabbat was sued once more by Konus, a streetwear brand, for failure to participate in a photo shoot for the brand's look book and failure to share two permanent posts on Instagram with specified tags.

If you are a virtual purveyor, you need to be diligent in how you approach the landscape of influencing. So here the question lies, how is the business of influencers operated and what are the legal ramifications that could be in store for an influencers failure to influence.

In the UAE, there is a procedure for becoming an influencer that is a little bit more complicated than merely posting a photo with some flashy filters. Since 2019, the UAE has established licensing procedures in order to be a professional influencer. Social media influencers have become regulated requiring Federal level licensing with the National Media Counsel (NMC) and domestic licensing in the influencer's respective Emirate.

For example, the Ras Al Khaimah Economic Zone grants a Social Media Influencer Permit is for influencers or bloggers residing in the UAE. Other economic zones across the UAE that provide social media influencer permits include Dubai Media City, Dubai Studio City, Dubai Production City, or Abu Dhabi's twofour54.

Depending on the number of followers and the rate of engagement that an influencer has, they will be approached with different business proposals. There are generally two categories that apply to influencers: reach and niche. Reach refers to influencers with large followings, while niche refers to influencers with smaller, more specialized and engaged communities.

A key consideration when it comes to a business engaging with an influencer is the appreciation that the industry is at a very early stage of development, so there will be varying expectations and varying degrees of professionalism. In this context, it is recommended that arrangements with between both parties are clearly set out in a suitable agreement, specifying the scope of work, the key performance indicators, nuanced matters such as restrictions and expectations of hashtags, and compliance with NMC guidelines.

For example, the NMC prohibits publishing any advertisements about medications or pharmaceutical products without a special permit from the Ministry of Health and Prevention. In case the influencer is needed to advertise medication or pharmaceutical products; who would be responsible for obtaining said permit? This is particularly relevant with a significant number of influencers in the UAE promoting self-care products (beauty-care, skin-care, etc.).

On the other hand, a key consideration for influencers is taking into account that agreements entered into in their personal capacity may lead to personal liability against them – in other words, failure to comply to their influencer obligations may lead to loss of their personal assets as compensation.

An alternative model that influencers adapt is creating a company that limits liability, of which the influencer may operate through. Although the influencer licensing requirements by NMC remain necessary, influencers would bode well limiting personal liability by engaging their clients through a limited liability company. This structure is often used by actors and other talent and is referred to as a ‘loan out company’. The business established by the social media influencer ‘loans out’ the influencer themself to the client.

The influencer would then separate their personal wealth from that of the ‘loan out company’; holding separate bank

accounts, contract liabilities, and so on.

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UAE Sports Arbitration Centre Kicks Off Operations

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The Court of Arbitration for Sport ("CAS") is based in Switzerland and is considered the elite international dispute resolution forum for legal disputes relating to sports, including commercial disputes (i.e., issues arising from sponsorship agreements or player contracts) and discipline (i.e., doping, non-compliance with codes of conduct). CAS also acts as an appeals court for decisions made by the arbitration systems of sports organizations or dispute resolution mechanisms, including global associations with disciplinary arms such as FIFA and the International Olympic Committee.

In May 2012, Abu Dhabi hosted the first seat for the Court of Arbitration for Sport outside Switzerland. Now, Abu Dhabi is home to its own arbitration centre, dubbed the UAE Sports Arbitration Centre ("UAE SAC") which has been established under the Federal Law No 16 for 2016 issued by His Highness Sheikh Khalifa bin Zayed Al Nahyan.

UAE SAC partly began operations in 2016, but as of June 2020, it has commenced full operations. The UAE SAC is equipped with

every facility, which is available for anyone seeking to resolve their disputes related to sports through mediation or arbitration. This significant milestone is a positive development in sport, aiming at spreading a culture of sports mediation or arbitration in the United Arab Emirates.

According to a recent study, Dubai's burgeoning sports industry now exceeds USD 1.7 billion annually; this accounts for 0.8% of Dubai's GDP. Of the USD 1.763 billion, USD 670 million originates from overseas markets, which indicates Dubai's growing importance as a world sporting destination.

The UAE is renowned as a prime emerging sports market and continues to grow and offer a landscape for development. This aptitude across the nation brings vast opportunities and challenges and will most certainly act as a catalyst for sustainable development; with such development requiring a parallel expansion in the legal infrastructure of the sports market.

The UAE SAC will seek to be the answer to the legal challenges in play and assist in the sustainable development of the market. Although the UAE SAC has yet to unveil its rules of arbitration, they will most likely be revealed to the public in the coming weeks. However, looking at the CAS – which the UAE SAC is closely modeled after – we can arguably presume that the standard clause to be inserted into contracts for resolution by the UAE SAC will look like this:

"Any dispute arising from or related to the present contract will be submitted exclusively to the Sports Arbitration Centre in Abu Dhabi, United Arab Emirates, and resolved definitively in accordance with the [UAE SAC Rules]."

Optional explanatory phrases:

"The Panel will consist of one [or three] arbitrator(s)."

"The language of the arbitration will be…"

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